

# JUSTICE FOR SURVIVORS OF INTIMATE PARTNER VIOLENCE CONFERENCE REPORT

## EXECUTIVE SUMMARY

Domestic violence survivors seeking justice and safety in New York State's family and supreme courts often encounter a deeply flawed, poorly functioning system that exposes them and their children to further harm.<sup>1</sup> On October 13 and 14, 2022, a coalition of leading nonprofit agencies that serve and advocate for survivors<sup>2</sup> convened a conference in New York City to address these systemic inequities and identify meaningful solutions.<sup>3</sup> During the conference, *Justice for Survivors of Intimate Partner Violence: Transforming an Inequitable Family Law System*, attorneys, scholars, survivor leaders, members of the judiciary, social service professionals, psychologists and advocates identified key

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<sup>1</sup> This Report was prepared by members of the Family Law Roundtable (see *infra* note 3), including Jennifer Friedman, Senior Program Director, Bronx, Manhattan and Queens Family Law Project & Policy at Sanctuary for Families, and Jennifer Barry, Legal Volunteer, Sanctuary for Families, with support from Simpson, Thatcher & Bartlett LLP, including Susan Cordero, Deputy Pro Bono Counsel and Nora Hood, J. Carr Gamble, and Kelly Johnson, Associates, and Proskauer Rose LLP (Proskauer), including William C. Silverman, Partner, and Lauren Altus, Alisha Bruce, Celeste Kim, and Makenzie Way, Associates.

<sup>2</sup> The conference was presented by the nonprofit organizations Sanctuary for Families (Sanctuary), Her Justice, the New York Legal Assistance Group (NYLAG), and Safe Horizon, with support from the law firms Gibson Dunn and Proskauer. It was co-sponsored by the New York State Coalition Against Domestic Violence (NYSCADV), the Urban Justice Center Domestic Violence Project, Pace Women's Justice Center, The Legal Aid Society - Civil, Day One, the Lawyers Committee Against Domestic Violence (LCADV), Empire Justice Center, Legal Services NYC, and the Bronx Women's Bar Association.

<sup>3</sup> The Conference followed a Family Law Roundtable which met virtually for ten sessions between March 2021 and December 2021, and included the leaders who organized the Conference. Roundtable members include: Shani Adess, Vice President, New York Legal Assistance Group (NYLAG); Jennifer Barry, Legal Volunteer, Policy, Sanctuary for Families (Sanctuary); Rachel Braunstein, Director, Policy, Her Justice; Anna Maria Diamanti, Director Family and Matrimonial Practice; Her Justice; Jennifer Friedman, Senior Program Director, Bronx, Queens, and Manhattan Family Law Project & Policy, Sanctuary; Karla George, Associate Program Director, Family Law Project, Sanctuary; Maya Grosz, Director of Training, NYLAG; Barbra Krysko, Senior Program Director, Brooklyn and Staten Island Family Law Project, Sanctuary; Christine Perumal, Former Director, Domestic Violence Project, Safe Horizon; William C. Silverman, Partner and Head of Pro Bono, Proskauer Rose LLP, and Chair, The Fund for Modern Courts; Lisa Vara, Director, Matrimonial and Economic Justice Project, Sanctuary. The sessions were divided into three phases: identifying the obstacles to obtaining justice for domestic violence survivors in Family Court; knowledge-building about domestic violence, discrimination, and bias relevant to New York family law systems; and articulating solutions that would improve the experience of domestic violence survivors in family law systems and result in outcomes that protect their safety and that of their children. To this end, the Roundtable developed the Conference to share its analysis, discussion, and conclusions more broadly with the legal community.

obstacles facing survivors and recommended needed reforms to New York State's family law system.<sup>4</sup>

Specifically, the conference focused on widespread inequities in custody, visitation, and family offense cases, which proceed in both the family and supreme courts, and the devastating impact they have on survivors.<sup>5</sup> Throughout the two days, panelists confronted the ways in which these courts fail to provide an effective and equitable system for domestic violence survivors seeking safety and protection for themselves and their families, and identified the most significant challenges they face. In family law proceedings, the stakes could not be higher for survivors and their children, as this inadequate and inequitable system of justice has led to tragic consequences, including death or injury at the hands of abusers, loss of child custody and/or visitation rights, and further trauma inflicted by the litigation itself. Panelists also addressed the egregious under-funding and poor functioning of the Family Courts and the endemic bias woven into these institutions.

The Conference included ten keynote and panel presentations addressing significant systemic challenges and potential solutions for survivors of intimate partner violence in the family law system.<sup>6</sup> The Conference featured first-hand accounts by survivors and practitioners, original research presented by renowned experts, and insights provided by prominent sitting and retired judges. Conference panelists drew from materials regarding the intersection of racism, misogyny, and other forms of oppression and its impact on systems,<sup>7</sup> including groundbreaking reports on gender and racial bias in the court system. In addition, each panel provided relevant materials, including scholarly research, reports, studies, articles, statutes and proposed legislation, all of which remain available on the Conference website at <https://www.familylaw2022.com/>.

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<sup>4</sup> There is a Family Court in each county across New York State. The Family Court possesses original jurisdiction over disputes involving minors, as well as over family offense proceedings. Issues related to custody and visitation are also heard in the New York State Supreme Court, in connection with divorce proceedings. This Report uses the term "family law system" to encompass matters adjudicated by both courts, in which survivors of domestic violence proceed in disputes over child custody, visitation, and orders of protection.

<sup>5</sup> The proceedings are available for viewing at <https://www.familylaw2022.com/>.

<sup>6</sup> A complete list of the Conference panelists follows as Appendix A to this Report.

<sup>7</sup> Columbia Law School and UCLA School of Law Professor Kimberlé Crenshaw developed the conceptual framework for and coined the term "intersectionality," which addresses how intersectional parts of identities such as race, gender, sexual orientation, class, immigration status, and others combine to produce specific experiences of discrimination and oppression. Rich Russo, *Professor Kimberlé Crenshaw Defines Intersectionality*, YOUTUBE (Sept. 14, 2018) [<https://perma.cc/593U-JQ49>].

The conference identified the following obstacles to justice and key reform recommendations to address these systemic challenges.

### **I. Obstacles to Justice and Safety for Survivors of Domestic Violence in New York’s Family Law System**

Justice and equal protection under the law are often denied in New York State’s family law system due to:

1. Bias against survivors and counsel on the basis of intersecting identities, including race, gender, ethnicity, religion, sexual orientation, immigration status, gender identity, and poverty;
2. Lack of understanding of trauma, coercive control, lethality factors, and femicide resulting in substantial safety risks to survivors and children;
3. Failure to prioritize the safety of survivors and children and their allegations of domestic violence and child safety risks over the other party’s demands for custody and visitation and claims of “parental alienation”;
4. Under-resourced and poorly-functioning family courts, including insufficient numbers of judges to handle overwhelming case dockets, which undermine the equitable and timely administration of justice for survivors and families;
5. Lack of administrative oversight of judges, uniform court rules, transparent mechanisms to report misconduct by judges and court staff, and a viable appellate mechanism for improper interim decisions; and
6. Insufficient training of judges, court personnel, and other stakeholders in family law, domestic violence, and trauma.

### **II. Key Reform Recommendations**

The family law system is failing New York’s most vulnerable families. These reforms are necessary to create an equitable family law system.

#### **A. Enhance Training, Assignment, and Accountability of Judges, Court Personnel, and other Stakeholders**

1. Require enhanced training for court personnel including judges, court officers, forensic evaluators, and court-appointed attorneys;

- a. Require ongoing and immersive training on bias, cultural sensitivity, substantive family law, and domestic violence, including trauma, vicarious trauma, lethality factors, coercive control, and litigation abuse; and
2. Require the same level of training for all judges hearing family law cases, regardless of duration of assignment. Increase the number of qualified family law judges and the diversity of the bench;
3. End rotation of judges through the family court on temporary assignments;
4. Enhance accountability of family law judges.
  - a. Develop effective case management strategies and procedures for family law judges, mandate training, and implement oversight process to ensure compliance;
  - b. Enhance administrative oversight of judges;
  - c. Establish uniform procedural rules for family court, including for virtual proceedings, handling of evidence/exhibits, and other court procedures;
  - d. Improve complaint process for reporting and tracking incidents of bias and other misconduct in the courts, make widely available to court users, and ensure transparency and accountability for violations; and
  - e. Implement transparent fatality review process for both child and adult fatalities.

## **B. Reform Family Law**

1. Reform Custody Law to Protect Children and Families;
  - a. Require judges to conduct a preliminary safety assessment that prioritizes the safety of children and considers lethality factors before issuing temporary custody and visitation orders;
  - b. Implement an interim appellate process for temporary custody and visitation orders in family court;
  - c. Prohibit the courts from considering allegations of parental alienation or “unfriendly parent” in domestic violence cases;
  - d. Introduce best interest factors that discourage disrupting primary caretaking relationship and prioritize protecting the safety of the child; and
  - e. Ban use of “reunification therapy” and “reunification camps.”
2. Recognize coercive control in New York State law.

- a. Amend the social services law definition of domestic violence to include coercive control; and
- b. Include coercive control in the family offenses enumerated in the Family Court Act.

### **C. Implement Court Reforms**

1. Institute court unification and simplification; and
2. Increase resources for and modernize the court system;
  - a. Increase funding for adequate staffing of court attorneys, clerks, and other necessary staff;
  - b. Modernize the Office of Court Administration website;
  - c. Repair and upgrade dilapidated courthouse facilities;
  - d. Improve accessibility of virtual proceedings;
  - e. Institute New York State Courts Electronic Filing system in the family court and expand access to the Unified Case Management System;
  - f. Ensure all courthouses provide childcare services;
  - g. Improve availability of interpreters; and
  - h. Allocate resources to increasing compensation for court appointed attorneys.

### **D. Institute Collaboration Among Stakeholders**

1. Institute coordinated community response task force to meaningfully engage stakeholders, including law enforcement, judges, domestic violence advocates and others.

## **CONFERENCE FINDINGS: OBSTACLES TO PROTECTION AND JUSTICE IN THE FAMILY LAW SYSTEM**

The objective of this Report is to highlight the primary issues raised by conference participants that continue to perpetuate an inequitable and under-resourced family law system for survivors, and the recommendations and advocacy plans proposed by the panels in order to promote justice and safety.

### **I. Bias against survivors and counsel on the basis of intersecting identities, including race, gender, ethnicity, religion, sexual orientation, immigration status, gender identity, and poverty**

Survivors and the practitioners who represent them experience negative case outcomes and denigrating experiences due to biased treatment in New York State's family law system. Rather than impartial decisions that reflect the facts of a case and the applicable law, counsel and litigants face bias due to their intersectional identities, including race, class, gender, ethnicity, religion, sexual orientation, immigration status, and gender identity. In a court system that serves diverse communities, and primarily those in poverty, bias remains a foundational problem, and subverts equal protection under the law and the proper administration of justice for the most vulnerable. In order to confront systemic intersectional bias, conference keynote panelists discussed how litigants and practitioners experience bias, how bias influences evaluations and decision-making by judges and key court personnel, and the role bias plays in perpetuating an under-resourced court system.

### A. Race and Gender Bias in the Courts Yesterday and Today

First, during a keynote panel entitled *Addressing Inequity and Injustice in the Family Law System*, the Hon. Betty Weinberg Ellerin (Chair, New York State Judicial Committee on Women in the Courts), Hon. Judy Harris Kluger (Executive Director, Sanctuary for Families), and Hon. Troy K. Webber (Associate Justice, New York Supreme Court Appellate Division First Judicial Department and Co-Chair, Franklin H. Williams Judicial Commission) discussed the extent to which gender and race biases have been found to exist in the New York court system.

Both Justice Ellerin and Justice Webber elucidated the history of bias in the court system and ongoing bias within the courts by explaining the findings from four groundbreaking reports:

1. The 1986 *Report of the New York Task Force on Women in the Courts* ("1986 Report");
2. the 1991 *Report of the New York State Judicial Commission on Minorities*, by the Franklin H. Williams Judicial Commission of the New York State Courts;
3. the *Gender Survey 2020* ("2020 Gender Survey")<sup>8</sup> by the New York State Judicial Committee on Women in the Courts; and

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<sup>8</sup> In order to compile responses from a broad spectrum of practitioners, the Gender Survey was distributed online and utilized the New York State Attorney Registration database. From the database pool, 5,340 attorneys responded and had their answers recorded. N.Y. STATE JUD. COMM. ON WOMEN IN THE CTS., GENDER SURVEY (2020), <https://www.nycourts.gov/LegacyPDFS/IP/womeninthecourts/Gender-Survey-2020.pdf> [<https://perma.cc/3K6K-W7NH>]. This Survey followed the 1986 *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. REV. 11 (1987). Both are discussed in detail herein.

4. the *Report from the Special Adviser on Equal Justice in the New York State Courts 2020*,<sup>9</sup> produced by former U.S. Secretary of Homeland Security Jeh Johnson (“Johnson Report”).

One of the most disturbing takeaways of their discussion was that many of the recent report findings and current survivor and practitioner experiences repeats much of the gender and race bias that was identified in the earlier reports close to forty years ago. In fact, Justice Webber memorably exclaimed, the findings of Secretary Johnson were “a mirror image of what Franklin Williams found in his report in 1991,” to an extent that “you could have just taken the page from the Franklin Williams report and put it on [the Johnson Report], and say ‘hey!’ or, ‘here’s the report!’”

In the context of gender bias, the 2020 Gender Survey found that female lawyers, litigants, and witnesses continue to experience higher levels of inappropriate and inequitable behaviors, stemming from gender bias, than their male counterparts despite any advancements that may have been made.<sup>10</sup> In addition, in the 1986 Report, and as panelists indicated remains true today, “[p]erhaps the most insidious manifestation of gender bias against women – one that pervades every issue respecting the status of women litigants – is the tendency of some judges and attorneys to accord less credibility to the claims and testimony of women because they are women.”<sup>11</sup>

Another disturbing finding of the 1986 Report that has remained a constant is that judges often perceive the testimony and allegations of women to be unpersuasive in cases involving allegations of abuse. As explained by Justice Ellerin at the Conference, the lack of credibility afforded to women in domestic violence cases often requires these litigants to, in effect, “double prove” their case, because their testimony and evidence are given less weight than their male counterparts. Ultimately, the 2020 Gender Survey concluded that “there is all too often an atmosphere of inappropriate behavior experienced by female

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<sup>9</sup> JEH JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS (Oct. 1, 2020), <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> [<https://perma.cc/7MEU-HB2H>] (“Johnson Report”). The Johnson Report found that the New York State court system faces a lack of resources, an overabundance of cases, and many instances of implicit and explicit racial bias from people working in the court system. To confront these concerns and create a more equitable justice system, the report proposed changes to the court’s existing policies and the introduction of new programs. The report was based on 96 interviews, during which 289 individuals shared their opinions. These interviewees consisted of those who work within and outside of the official court system.

<sup>10</sup> GENDER SURVEY (2020), *supra* note 8, at 10.

<sup>11</sup> *Report of the New York Task Force on Women in the Courts*, *supra* note 8, at 113-14.

lawyers, litigants, and witnesses that continues to infect our courthouses and legal proceedings to varying degrees requiring significant remedial efforts.”<sup>12</sup>

With regard to racial bias, the Johnson Report chronicled the extent to which litigants, counsel, and court personnel reported personal experiences and observations of racial bias within the New York State court system, including instances of “dehumanizing language” being directed at litigants of color by court personnel.<sup>13</sup> Appallingly, the Johnson Report noted what had been found by the Minorities Commission in 1991, and remains true today, “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.”<sup>14</sup> Justice Webber further expounded on the second-class status of the family courts by detailing facts such as the unacceptable deterioration of the Bronx Family Court’s physical building, which leaks during heavy rain. It is even the conventional sentiment among judges that they are punished for infractions by being assigned to that court, and it is known that judges cannot be promoted to the appellate divisions directly from serving in the family court. Moreover, because judges are “human, too,” and “not above the reach of the implicit racial biases that pervade our society,” efforts to expose and confront bias and to undo its systemic and implicit roots have proved difficult in New York’s under-resourced court system.<sup>15</sup>

Importantly, while each of these groundbreaking reports addressed race and gender bias separately, Judge Kluger pointed out that the survivors accessing family court in New York City are predominantly low-income women of color, and many are immigrants, and that an intersectional analysis must be applied to fully understand the compounded experiences of bias that they experience.

## B. Manifestations of Bias

The second keynote panel, entitled *How Bias Manifests in New York State’s Family Law System*, as well as the keynote address delivered by Stephanie McGraw, provided vivid examples of the systemic bias that has led to tragic outcomes, including the death of women and children. Ms. McGraw, a survivor

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<sup>12</sup> GENDER SURVEY (2020), *supra* note 8, at 10.

<sup>13</sup> Johnson Report, *supra* note 9, at 4.

<sup>14</sup> Johnson Report, *supra* note 9, at 3, 27 (citing REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES VOL. 1, at 1 (1991), available at [https://ww2.nycourts.gov/sites/default/files/document/files/2018-11/Judicial%20commission%20%20vol%201\\_0.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2018-11/Judicial%20commission%20%20vol%201_0.pdf) [<https://perma.cc/X7RA-JVHS>]).

<sup>15</sup> Johnson Report, *supra* note 9, at 81. *See also* Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAMILY CT. REV. 213 (2017).



of child abuse and intimate partner violence, and founder and CEO of the nonprofit organization W.A.R.M. (We All Really Matter), holds vigils for victims of intimate partner homicides, provides support services for those left behind in these tragedies, and assists survivors and their children who need to flee for their safety. She critiqued the lack of services made available to low-income Black and Brown communities, noting that W.A.R.M. sheds light on implicit bias in systems, because “what happens to women and children and Black and Brown women when it comes to family court – when it is ‘just us,’ it is not ‘justice’ for all.”

The psychological origins of implicit bias were described by Conference panelist Dr. Carolyn Springer, an applied social psychologist and Associate Professor in the Gordon F. Derner School of Psychology at Adelphi University. She explained that humans develop associations of characteristics with certain social groups in order to build mental maps—or “schemas”—that are needed to help process information. Through this process, presumptions are made about certain groups or populations pre-reflexively, inadvertently leading to prejudices and stereotypes that are linked to particular demographics.<sup>16</sup> Unfortunately, refusing to acknowledge the presence of these biases can cause people to unknowingly constrict and distort information they receive and consider, which leads to impaired thinking and decision making. Dr. Springer noted that implicit bias is universal; it exists within nearly everyone, including attorneys, litigants, and court personnel. In the context of family law proceedings, bias, implicit or otherwise, is particularly detrimental because judges are afforded wide discretion and determinations of survivor credibility are crucial. In addition, the lack of safeguards in the family law system, including a thorough understanding of bias, domestic violence and trauma, uniform rules and protocols, proper oversight and accountability, ample resources and support services, exacerbate the impact of bias on survivors. Thus, to the extent that research, supported by the evidence collected in the Johnson Report, suggests that judges and court personnel tend to hold many of the same implicit associations on race, gender, sexual orientation, and gender identity as most adults, a judge’s position of influence means that their biases have real-life consequences for litigants.

Conference panelists discussed specific examples of tragic consequences that have resulted from biased decision making. One conference panelist, Jacqueline Franchetti, spoke of the devastating failure of the Nassau Family

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<sup>16</sup> Bias can either be explicit or implicit. Explicit bias is a conscious preference, whether positive or negative, for a particular social category. Implicit bias is a preference that operates outside of social awareness. A host of factors contribute to our implicit biases, including societal and media influences and portrayals of different groups and stereotypes. Dr. Springer explained the natural reluctance to recognize or admit to implicit bias, especially when such biases go against what we believe to be our values or ethics.

Court judge, forensic evaluator, and attorney for the child to believe or accept her presentation of evidence establishing the danger posed by her child's father. Tragically, he went on to murder their two-year-old daughter during a court-ordered visit that was ordered over Ms. Franchetti's vehement objection.<sup>17</sup>

Indeed, in 2020, then Governor Cuomo convened a commission of experts "charged with providing recommendations to the Governor regarding if and/or how forensic custody evaluations should be used by New York courts...after hearing from parents, attorneys, and other court actors who reported negative experiences with forensic custody evaluators."<sup>18</sup> The Commission was adopted by Governor Hochul, and ultimately, the Governor's Blue Ribbon Commission on Forensic Custody Evaluations independently reviewed the use of such evaluations throughout the state and concluded, in a vote of 9-11, that forensic evaluations are so rife with bias that they should be eliminated entirely. These Commission members argue:

"these reports are biased and harmful to children and lack scientific or legal value. At worst, evaluations can be dangerous, particularly in situations of domestic violence or child abuse – there have been several cases of children in New York who were murdered by a parent who received custody following an evaluation. These members reached the conclusion that the practice is beyond reform and that no amount of training for courts, forensic evaluators and/or other court personnel will successfully fix the bias, inequity and conflict of interest issues that exist within the system."

Another example of implicit bias in the New York court system is the consideration and reliance on stereotypes in judicial decision making. Specifically, cultural stereotypes of women's roles in marriage and parenting unduly influence custody determinations. For instance, women's behavior and life choices are frequently held to a higher and/or different standard than that of men. Conference panelist Linda Lopez, Sanctuary for Family's Deputy Legal Director, echoed Justice Ellerin's observation on credibility and lamented that her clients often experience a double standard regarding parenting. While judges expect mothers' behavior and decisions to be perfect, they accept far less from fathers. Moreover, in her experience, women are seen as "hysterical, mentally

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<sup>17</sup> See *infra* pp. 76. Details of this case and the murder of 2-year-old Kyra are discussed in the section of this Report addressing the law's failure to incorporate lethality factor assessments in custody and visitation proceedings.

<sup>18</sup> REPORT OF THE BLUE-RIBBON COMMISSION ON FORENSIC CUSTODY EVALUATIONS, Delivered to New York Governor Kathy Hochul December 2021. <https://ocfs.ny.gov/main/news/for-release.php?idx=14041> [<https://perma.cc/Y27U-2FGT>].

unstable, master-manipulators and frauds,” and are treated as such by the court system. Immigrant clients are also too often accused of committing immigration fraud by raising allegations of domestic violence in order to obtain immigration relief, even where there are documented instances of abuse.

Moreover, parenting is most often assessed “in accordance with dominant, predominantly white middle-class norms,” leaving low-income and/or women of color at risk of losing custody when their personal circumstances fall outside that inherently biased standard.<sup>19</sup> Panelist Shain Flicher, Executive Director, LGBT Bar Association & Foundation of New York, explained that the Family Court system was “not designed for” LGBTQ families and that courts question the credibility and experiences of parents who are outside the heterosexual “norm.”

The impact of bias can be compounded when judges are guided by other participants in the family court system, such as forensic evaluators, case workers, and visitation supervisors, who fall prey to the same biases.<sup>20</sup> Such bias can cause litigants to abandon their cases with decidedly unjust results. Ms. Lopez shared that one of her clients in a custody case was forced to testify on the first day of trial in detail about the severe physical abuse perpetrated by her children’s father. Even as the client shared testimony about her abuser repeatedly banging her head against a wall, the judge admonished her repeatedly, even yelling at her for answering a question before the judge could rule on an objection. The client was so distraught after this experience that she relinquished custody instead of enduring further berating by the judge. Nothing Ms. Lopez said could change her mind.

Unfortunately, female attorneys have also been subjected to bias and gender stereotypes by judges, court personnel and male attorneys. Ms. Lopez recounted an incident when she advocated strenuously for appropriate legal remedies when her client’s abuser violated an order, and the judge responded that she was “personalizing” the case. The Reports of the Task Force on Women in the Courts have also noted instances in which male attorneys speak disparagingly to female attorneys, and jurists often do not correct or reprimand this appalling behavior.

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<sup>19</sup> See Maldonado, *supra* note 15, for a detailed discussion of the extent to which custody evaluators, lawyers, and judges are influenced by racial, ethnic, and cultural backgrounds of the parents and the child in custody disputes, and how implicit biases may influence testimony and outcomes.

<sup>20</sup> *Id.* at 214, 242.

At the Conference, New York State Court Deputy Chief Administrative Judge Edwina Mendelson highlighted the Office for Court Administration's (OCA) recognition of systemic bias and efforts to address it. Judge Mendelson noted that (then) Chief Judge Janet DiFiore commissioned Secretary Johnson to take an unflinching look at the court system after the murder of George Floyd coincided with public exposure of overtly racist social media posts made by court officers. OCA has embraced the findings and recommendations of the Johnson Report and the 2020 Gender Survey, and tasked Judge Mendelson with implementing them in her capacity as Deputy Chief Administrative Judge for Justice Initiatives and leader of OCA's Equal Justice in Courts Initiative.<sup>21</sup> It is incumbent upon advocates to demand accountability from OCA in implementing reforms within its purview, while continuing to push for changes that require support from external actors, such as the need to increase funds allocated to the court system to remediate dilapidated buildings.

### C. Training and Accountability

Conference panelists agreed that training of judges and all court personnel is necessary to combat bias. Robust anti-bias training that is immersive, as opposed to simply lecture-style, would be interactive, enable participants to broaden their perspective, and assist in curtailing implicit biases. This form of training would support judges as they work to comply with the revisions to the New York State Administrative Rules on Judicial Conduct, which now explicitly direct that a judge "shall perform judicial duties without bias or prejudice," including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status, or socioeconomic status.<sup>22</sup> As noted by the Hon. Tamra Walker, the ultimate goal of these training efforts is to ensure that "when the parties, the families, the people that we serve walk into the courthouse...everyone that they come across has to know how to treat others with dignity and respect and avoid any bias because that's not the court system that we want to promote."

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<sup>21</sup> HON. EDWINA G. MENDELSON, OFFICE FOR JUSTICE INITIATIVES, EQUAL JUSTICE IN THE COURTS <https://www.nycourts.gov/legacyPDFS/IP/NYA2J/Equal-Justice-in-the-Courts.pdf> [https://perma.cc/6MQL-AHK5].

<sup>22</sup> The rules stipulate that "A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct." 22 N.Y.C.R.R. § 100.3(B)(4).

Increased accountability was also raised as an important remediation of bias. As Linda Lopez strongly stated, “oppression, discrimination, racism, and sexism” in the Family Courts lead to women, and especially women of color, being viewed unfavorably merely because of who they are—a dynamic which can only be changed with a culture-shift within the system that is spurred by “accountability.”

#### **D. Culture Change in the Family Law System**

In order to eliminate the second-class system of justice, there must be recognition that the family law system serves an important role. In order for this to be accomplished, attitudes towards survivors and their intersectional identities must change.

In order to mitigate this harm, judges must reduce the role of stereotypes in their decision making. This requires less reliance on intuition, “gut-checks,” and hurried rulings. Wherever possible, judges should instead use checklists and objective criteria to promote more structured legal analysis. Additionally, judges should seek feedback where possible and be amenable to motions for reconsideration. This will allow them to reexamine whether bias may have played a role in their decision making.

Judges should also promote diversity in chambers and within the court as a whole. Being exposed to different groups helps eliminate stereotypical thinking. And, in exposing judges to the unique lived experiences of their colleagues, clerks, and assistants, they can also gain a deeper understanding of the litigants they serve.

#### **E. Key Recommendations to Address Bias in the Family Law System**

##### **1. Conduct Immersive Training for Judicial and Other Court Personnel:**

Effective training is crucial. Prior to taking a position with the Family Court, and on an annual basis, all court personnel, including judges, clerks, and court officers, should be required to participate in immersive bias, cultural sensitivity, and trauma-informed training to:

- a. Address implicit bias related to race, gender, ethnicity, religion, immigration status, gender identity, poverty

and LGBTQI+ identity as it impacts litigants and those who appear in court, including counsel;

- b. Address the intersection of these attributes;
- c. Become culturally sensitive to litigants' lives, including their cultural backgrounds, poverty and immigration status;
- d. Become more informed about domestic violence, child abuse and associated trauma; and
- e. Immersive training designed to expand a participant's understanding of a litigant's life, for instance, as a low-income domestic violence survivor and immigrant woman of color, would provide judges and court personnel with invaluable insight about how a trauma survivor experiences the court process and provide context and perspective when making credibility determinations. All training should be conducted by experts in the field and tracked to ensure court personnel participation.

**2. Increase diversity of the bench.**

**3. Monitor implementation of recent legislation to require forensic evaluators in custody or visitation proceedings to receive training on the dynamics of domestic violence and child abuse.**

**4. Hold the Office for Court Administration accountable for implementing recommendations of the Gender Survey 2020 and the Johnson Report, with transparent information available to the public annually on the progress made.**

**II. Lack of understanding of trauma, coercive control, lethality factors, and femicide resulting in substantial safety risks to survivors and children**

In the last several decades, the domestic violence field has evolved to include a deeper and more nuanced understanding of the trauma experienced by survivors, the dynamics of coercive control, and how to better assess the level of

danger a survivor may be in. The ability of the court system to adequately protect and serve the families that come before it for relief is hindered by the failure of the family law system to keep pace with these advancements. The fact that courts often do not engage with cases in a trauma-informed manner, examine instances of coercive control, or use lethality assessment tools, has led to tragic consequences, including the murder of children. Conference panelists raised numerous examples of ignored warnings that led to instances of femicide or continued abuse, for individuals who were involved in family law proceedings at the time. Conference panelists shared their own experiences and those of their clients with these shocking and tragic outcomes, in order to expose the gaps in the law and in the training of judges and evaluators that could prevent the reoccurrence of such tragedies.

### A. Trauma and “Trauma-Informed” Practices

Courts frequently fail to understand that survivors often experience trauma<sup>23</sup> as a result of domestic violence, and that repetitive or severe trauma is likely to have detrimental and chronic effects on the survivor.<sup>24</sup> Post-traumatic stress disorder (PTSD) is a frequent reaction to experiencing domestic violence, and is characterized by intrusion (emotional reactions, flashbacks, images, nightmares), avoidance (dissociation, minimizing, numbing, denial), and arousal (anger, difficulty concentrating, insomnia).<sup>25</sup> Additional responses to traumatic stress may include a sense of helplessness, becoming aggressive, nervousness, withdrawal, and substance abuse or addiction.<sup>26</sup> Domestic violence can be even more traumatic to survivors than, for example, natural disasters, because it shatters their “fundamental sense of trust and attachment.”<sup>27</sup> Any one or

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<sup>23</sup> The symptoms of psychological trauma can range from depression, often accompanied by listlessness or flattened affect, to panic attacks and extreme emotionality. See Dorchen A. Leidholdt, *Interviewing and Assisting Trafficking Survivors: Barriers to Interviewing and Assisting Survivors*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING PURSUING JUSTICE FOR VICTIMS* 169, 170 (Jill Laurie Goodman and Dorchen A. Leidholdt ed., 2013).

<sup>24</sup> See *Trauma FAQs*, INTERNATIONAL SOCIETY FOR THE STUDY OF TRAUMA AND DISASSOCIATION, <https://www.isst-d.org/resources/trauma-faqs/> [<https://perma.cc/2BTW-X5ZF>].

<sup>25</sup> Leidholdt, *supra* note 23, at 170.

<sup>26</sup> See NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, *FACTS ABOUT DOMESTIC VIOLENCE AND PSYCHOLOGICAL ABUSE* [https://assets.speakcdn.com/assets/2497/domestic\\_violence\\_and\\_psychological\\_abuse\\_ncadv.pdf](https://assets.speakcdn.com/assets/2497/domestic_violence_and_psychological_abuse_ncadv.pdf) [<https://perma.cc/KJJ3-RJA2>] (citing M.J. BREIDING, J. CHEN & M.C. BLACK, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, CDC, *INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 2010* (2014)).

<sup>27</sup> See *Trauma FAQs*, *supra* note 24 (citing Naomi Breslau, *The epidemiology of posttraumatic stress disorder: What is the extent of the problem?* 62 *J. CLINICAL PSYCHIATRY* 16 (2001), Jean-Michel Darves-Bornoz, et. al. *Predictive factors of chronic post-traumatic stress disorder in rape*

combination of these responses may impact a litigant's demeanor and/or presentation and can be negatively misconstrued by judges and other court personnel who lack understanding of or disregard the manifestations of trauma. Moreover, engaging with an abuser through the litigation process itself can be traumatic for survivors.

There have been significant advancements in the study and understanding of trauma in the context of domestic violence, including the physiology of the traumatic response, how it impacts brain functioning, and how survivors are often re-traumatized or “triggered.”<sup>28</sup> Like coercive control and lethality factors, the courts have failed to keep pace with this research, and their lack of understanding is evident in their interactions with litigants. For example, courts frequently fail to assess and understand the extent to which experiences of trauma may impact a litigant's demeanor and/or presentation, or how being forced to engage with an abuser through the litigation itself can be triggering. Unfortunately, several of the most common trauma-related reactions are those that may otherwise be viewed negatively in a courtroom setting. For example, a survivor may engage in “minimization” (where a litigant might downplay the importance and intensity of their experiences to avoid their emotional impact) or “disassociation” (where traumatic events are compartmentalized and not immediately “unlocked” for recollection or testimony).<sup>29</sup>

As a result, judges can misconstrue a survivor's actions or statements that stem from symptoms of trauma and instead make negative credibility assessments, chastise the survivor for how they react and behave, or deny reasonable requests, such as protective measures during visitation exchanges. This misinterpretation and the contentious nature of the court process itself can both trigger underlying trauma and expose survivors to further trauma.<sup>30</sup> Victims then become more reluctant to trust that the family courts will protect them or that judges understand the trauma they have suffered.

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*victims*, 13 EUROPEAN PSYCHIATRY 281 (1998); and Troy Holbrook, et. al., *Gender differences in long-term posttraumatic stress disorder outcomes after major trauma: Women are at higher risk of adverse outcomes than men*, 53 J. TRAUMA 882–888 (2002)).

<sup>28</sup> *Id.*

<sup>29</sup> See Leidholdt, *supra* note 23, at 170. See also PUBLIC INTEREST PRO BONO ASSOCIATION, WORKING WITH SURVIVORS OF ABUSE: A TRAUMA INFORMED APPROACH, at 2, <https://volsprobono.org/wp-content/uploads/2020/11/Trauma-informed-Lawyering-Tip-Sheet-PIPBA-2019.pdf> [<https://perma.cc/9PCF-X73L>].

<sup>30</sup> Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L.R. 359, 374 (2016).



To avoid such misinterpretation, Family Court can and should adopt a “trauma-informed approach” to the interactions it has with litigants during a proceeding and place the realities of an individual’s trauma at the forefront of how its systems are designed and interactions measured. Such an approach must include a required training component for judges and other court personnel, in order to assist courts in understanding the manifestations of trauma, guide courts in viewing certain reactions from a litigant as a product of trauma, and inform the court’s interactions with that person. This type of training can also help the court system identify actions and practices that appropriately avoid retriggering, such as speaking respectfully and calmly to litigants, attention to positioning of the litigant in relationship to exits, explaining note taking, and explaining the roles and responsibilities of the various personnel in a courtroom.<sup>31</sup> In addition to training, a comprehensive inventory of practices within the Family Court system to assess the effects of trauma on the people being served and practical modifications to acknowledge how trauma manifests in contentious litigation would benefit all of those who serve and appear in Family Court.

## B. Coercive Control

Moreover, the New York State family law system fails to recognize that many abusers use coercive control, defined as: an ongoing implementation of abuse tactics designed to limit a survivor’s decision-making ability by denying her liberty, autonomy, and equality in a context of chronic power imbalance that is created and/or exploited by an intimate partner.<sup>32</sup> This type of abusive behavior, described by Evan Stark in his groundbreaking book, *Coercive Control: The Entrapment of Women in Personal Life*,<sup>33</sup> can sometimes seem subtle, but instills overwhelming fear and harm to the survivor and is “[i]ncreasingly argued to constitute the core of an abusive relationship.”<sup>34</sup>

Conference panelist Chitra Raghavan, Ph.D., a clinical psychologist in New York City and a tenured professor at John Jay College of Criminal Justice, outlined a range of coercive tactics that are used to continuously exploit a power imbalance, including surveillance to an extent that a survivor feels constantly “watched,” isolation of the survivor, micro-regulation and demanding compliance with trivial unpredictable demands, and degradation.<sup>35</sup> Dr.

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<sup>31</sup> See PUBLIC INTEREST PRO BONO ASSOCIATION, *supra* note 29, at 3–4.

<sup>32</sup> Jenny E. Mitchell & Chitra Raghavan, *The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics*, 27 VIOLENCE AGAINST WOMEN 187, 187 (2021).

<sup>33</sup> EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (2009).

<sup>34</sup> Mitchell, *supra* note 32.

<sup>35</sup> *Id.* at 188.

Raghavan compared the power imbalance associated with coercive control to a constant electric current causing steady pain, where “every now and then the voltage goes up.” As Dr. Raghavan stated at the Conference, courts and practitioners often “misclassify” incidents of coercive control “as minor, but if we actually understood the context, we would know that . . . the cold look, the silence, the breaking of the teacup was not minor, but extremely severe, in the context.” Whereas in a healthy relationship, one would expect negotiation and compromise, in a relationship permeated by coercive control, resistance is met with “increased coercion and increased retaliation.” The end result is constant fear, which ultimately leads the survivor to submit to the abuser’s power.

A key feature of coercive control is that the control is so pervasive within the relationship that survivors may have trouble identifying what is happening to them, especially at first. Indeed, many insidious forms of technology-facilitated abuse constitute coercive control, including monitoring using GPS and stalker ware technology, cyber sexual abuse, image-based abuse,<sup>36</sup> hacking into a survivor’s devices and accounts, and using other evolving technologies to harass, intimidate, and threaten survivors. For survivors engaged in family law cases, “litigation abuse,” or “legal abuse” is another overlooked yet extremely detrimental aspect of coercive control. Delay tactics that adjourn cases repeatedly, filing unnecessary or additional cases or petitions that are time-consuming and often expensive to defend, and extensive negotiations over simple issues related to visitation orders are common examples of this form of abuse. This abuse further triggers survivors who are still recovering from the trauma inflicted by the abuser.<sup>37</sup>

Panelist Tanya Selvaratnam, herself a survivor of coercive control, discussed the abuse perpetrated by her ex-boyfriend, then-New York State Attorney General Eric Schneiderman. Ms. Selvaratnam read an excerpt from her book, *Assume Nothing*,<sup>38</sup> which chronicled the relationship and how she extracted herself from it, and detailed the destructive effect of threats of surveillance, isolation, and controlling behavior inflicted by Schneiderman. Ms. Selvaratnam discussed how this intense, controlling behavior included glaring at

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<sup>36</sup> This form of abuse is also commonly referred to as “revenge porn,” a term advocates find to be prejudicial to survivors, who are not engaging in pornography; rather, their images are being weaponized against them.

<sup>37</sup> Ellen Gutowski, *Coercive Control in the Courtroom: Legal Abuse and its Correlates* (2021) (Ph.D. dissertation, Boston College) (on file with the Boston College Libraries), <https://dlib.bc.edu/islandora/object/bc-ir:109251/datastream/PDF/view> [<https://perma.cc/8ZPU-NREA>].

<sup>38</sup> Tanya Selvaratnam, *Assume Nothing: A Story of Intimate Violence* (2021).

her when she spoke on the telephone, preventing her from eating foods she enjoyed, and critiquing her body. His threats that he could have her followed were especially credible and frightening given that he was the top law enforcement official in the state of New York.<sup>39</sup> Ms. Selvaratnam was broken down by these dynamics, in addition to Schneiderman's<sup>40</sup> slapping, spitting on, and choking her during sex, without her consent.<sup>41</sup> She was subjected to a year of this conduct before extricating herself from the relationship. When Ms. Selvaratnam learned there were other women abused by Schneiderman, she bravely chose to share her experience with the *New Yorker*. Schneiderman resigned only a few hours after the publication of an article detailing an eerily similar pattern of abuse of Ms. Selvaratnam and three other women.<sup>42</sup>

As Raghavan and Mitchell noted in their 2019 study, *The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics*, conventional questions posed by a court as to a history of domestic violence may not fully capture the traumatic environment which the survivor has endured, where compliance behaviors were repeatedly enforced.<sup>43</sup>

For a domestic violence survivor to obtain an order of protection in family court, she must first file a petition alleging that at least one of the family offenses enumerated in the Family Court Act was committed.<sup>44</sup> These family offenses are defined in New York State penal law, and include offenses such as harassment, assault, menacing, stalking, sexual offenses, strangulation, unlawful dissemination or publication of an intimate image, among others.<sup>45</sup> Then, the

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<sup>39</sup> Schneiderman's abuse of Ms. Selvaratnam and three other women was first revealed in an article by Jane Mayer and Ronan Farrow, published in *The New Yorker* on May 7, 2018. See Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, *NEW YORKER* (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> [<https://perma.cc/254A-PY8Z>]. Three hours after the publication of this story, Schneiderman resigned from his position. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> This experience aligns with the research of Professors Mitchell and Raghavan, who identified a direct relationship between instances of coercive control and sexual coercion, including an increased likelihood of coercive tactics to obtain unwanted sex. Jenny E. Mitchell & Chitra Raghavan, *The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics*, 27 *Violence Against Women* 187, 187–206 (2021).

<sup>42</sup> Mayer & Farrow, *supra* note 39.

<sup>43</sup> Raghavan & Mitchell, *supra* note 41, at 187.

<sup>44</sup> N.Y. Fam. Ct. Act § 812.

<sup>45</sup> The full list of family offenses is: Disorderly conduct; Unlawful dissemination or publication of an intimate image; Harassment; Aggravated harassment; Sexual misconduct; Forcible touching; Sexual abuse; Menacing; Reckless endangerment; Criminal obstruction of breathing or blood

case will either go to trial, at which the survivor must prove by a preponderance of the evidence that every element of at least one family offense occurred, or will settle with the respondent consenting to the issuance of an order of protection, usually with no admission of wrongdoing. Such an order can direct that an abusive party stay away from a survivor, her home, her job, her children, end any contact with the survivor, including electronic communication, or refrain from engaging in further similar acts, in order to protect both survivors and their children.<sup>46</sup>

Notably, coercive control is not among the enumerated family offenses in Article 8 of the Family Court Act, and therefore cannot be alleged in a petition for an order of protection. Certainly, a petitioner can allege behaviors that might constitute coercive control, and at the same time might also constitute another enumerated family offense. For example, threatening suicide, withholding food, or monitoring of a partner's emails or phone could potentially be found by a court to constitute the family offenses of harassment, disorderly conduct, or stalking.

In addition, whereas coercive control is an ongoing and pervasive pattern of behavior, New York State's legal architecture requires an incident-based analysis, asking the court to look specifically at each individual allegation. Because the family offenses derive from the penal code, the family court essentially adopts the criminal law's hierarchy of crimes, in which an offense is deemed more serious, or more deserving of the court's concern, depending on the severity of violence, or the presence of "aggravating circumstances,"<sup>47</sup> elements such as whether a weapon was used or whether physical injury resulted from the incident. The court's analysis of the domestic violence

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circulation; Strangulation; Assault or attempted assault; Stalking; Criminal mischief; Identity theft; Grand larceny; Coercion. *Id.*

<sup>46</sup> New York Family Court Act § 841 provides that upon a finding that one or more family offenses was committed, a court may, *inter alia*, place a respondent on probation for a period of up to one year, and require the respondent to participate in a batterer's education program, which may include referral to drug and alcohol counseling; direct payment of restitution; and/or make an order of protection in accordance with § 842 of the Family Court Act. In turn, § 842 provides that an order of protection "shall set forth reasonable conditions of behavior to be observed for a period not in excess of two years by the petitioner or respondent or for a period not in excess of five years upon a finding by the court on the record of the existence of aggravating circumstances." Such an order may, *inter alia*, direct a respondent to "stay away" from the home, school, business or place of employment of any other party, the other parent, or the child, or other specific location, or to refrain from committing a family offense. Moreover, a court may enter an order directing the respondent to abstain from communicating by any means, including but not limited to email or other electronic means, with the person against whom the family offense was committed. N.Y. Comp. Codes R. & Regs. Tit. 22 §205.74 (Uniform Rules for the Family Court).

<sup>47</sup> N.Y. Fam. Ct. Act § 842.

therefore often overlooks the subtle ways in which an aggressor can utilize the tactics of coercive control against a survivor. Indeed, research indicates that coercive control may more accurately signal danger to survivors than the presence of physical abuse.<sup>48</sup>

Many domestic violence advocates believe the damage and danger of isolating, degrading, and manipulative behavior should stand as independent grounds for seeking an order of protection. Otherwise, such conduct may go unreported or unacknowledged for years.<sup>49</sup> As panelist Anna Maria Diamanti, (Director of the Family and Matrimonial Practice, Her Justice) noted, advocates in New York are seeking to address the legal gap in defining coercive control as a form of intimate partner violence. One advance would be enabling survivors to obtain orders of protection as a result of coercive control by amending Article 8 of the Family Court Act to include it as a family offense. Another would be to introduce coercive control as a factor that is considered in custody, divorce, and/or child support matters.<sup>50</sup> These reforms would align with those achieved in the United Kingdom and several other states, including California, which enacted the type of “coercive control” legislation that has provided a non-limiting list of behaviors that may comprise acts of coercive control, and protects those whose lives are upended by such behavior.<sup>51</sup>

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<sup>48</sup> Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555 (2010).

<sup>49</sup> Richard A. Dollinger & Alan Feigenbaum, *Repeat After Me: Coercive Control is Domestic Violence*, N.Y.L.J. (2022).

<sup>50</sup> In New York, a bill also has been introduced to establish the crime of coercive control as a Class E Felony. State Assembly Bill A3147/Senate Bill S5650 provides that “[a] person is guilty of coercive control when he or she engages in a course of conduct against a member of his or her same family or household. . . without the victim's consent, which results in limiting or restricting, in full or in part, the victim's behavior, movement, associations or access to or use of his or her own finances or financial information.” A. 3157, 2021-22 Reg. Sess. (N.Y. 2021). The bill provides that “lack of consent results from forcible compulsion or from fear that refusal to consent will result in further actions limiting or restricting the victim's behavior, movement, associations or access to or use of his or her own finances or financial information.” However, there is consensus among the Family Law Roundtable participants that the family offense provisions of Article 8 in the Family Court Act should be decoupled from the Penal Law, such that coercive control would be included as a means of obtaining an order of protection and other relief in the Family Court, without criminalizing the underlying conduct.

<sup>51</sup> In California, Senate Bill 1141 was signed into law on September 29, 2020. The law amends Section 6320 of the California Family Code so that “disturbing the peace of the other party,” which is grounds for a domestic violence restraining order, includes coercive control. The law defines the term as a “pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty,” and the legislature recognized while making this law that such non-physical actions “destroy the mental or emotional calm” of victims. S.1141, 2019-20 Reg. Sess. (Ca. 2020). Coercive control is also recognized in the U.K., as well as in Hawaii. In Hawaii, H.B. 2425 was signed into law on September 15, 2020. The law revised statutes to

Conference panelist Paula Cohen, Senior Attorney at the Survivor and Family Justice Workgroup of the Legal Aid Foundation of Los Angeles (LAFLA), touted the benefits to her clients of California's coercive control law. She described one client in California whose husband had monitored every aspect of her life by camera and other forms of surveillance, keeping her a prisoner in her own house. The court in California was able to use the coercive control statute to identify the extreme harm caused by this isolation and control, and issue her a restraining order and other relief. Ms. Cohen also described a California case in which the court found that an Orthodox Jewish husband who refused to agree to a religious divorce had committed coercive control, and issued the survivor an order of protection.<sup>52</sup>

### C. Lethality Factors and Danger Assessment Tools

Lives are threatened or in some cases tragically ended when judges who are responsible for making determinations in child custody and visitation cases are not trained in, or do not have knowledge of, lethality factors. In fact, despite their wide use by domestic violence advocates and law enforcement partners to help determine the risk of danger of death or near fatal assault in a domestic violence situation, New York State's family law systems generally do not understand or utilize evidence-based lethality indicators, also known as danger assessment tools, first developed by researcher Dr. Jacquelyn Campbell.<sup>53</sup> These lethality factors, as defined by Dr. Campbell, are a set of factors that can help determine the increased likelihood that an abuser will murder a survivor of

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include coercive control as a form of domestic abuse, defining it as “a pattern of threatening, humiliating, or intimidating actions, which may include assaults or other abuse that is used to harm, punish, or frighten an individual...a pattern of behavior that seeks to take away the individual's liberty or freedom and strip away the individual's sense of self, including bodily integrity and human rights, whereby the ‘coercive control’ is designed to make an individual dependent by isolating them from support, exploiting them, depriving them of independence...” H.B. 2425, 30th Leg. (Haw. 2020).

<sup>52</sup> See *Michelle H. v. Yaron H.*, (Cal. Super. Ct., Cnty. of Los Angeles, Fam. Div. 2022).

<sup>53</sup> *Assessing Dangerousness: Domestic Violence Offenders and Child Abusers* (Jacquelyn C. Campbell & Jill Messing eds., 3d ed. 1995).

intimate partner violence.<sup>54</sup> Examining these factors can help assess any increased risk of danger to a survivor and/or a child.<sup>55</sup> The factors include:<sup>56</sup>

1. Increase in physical violence over the past year
2. Respondent/Defendant owns a gun
3. Use or threatened use of lethal weapon
4. Separation within the past year
5. Unemployment
6. Strangulation
7. Jealousy
8. Controlling behavior
9. Drug/Alcohol abuse
10. Abuse during pregnancy
11. Child abuse threats
12. Child that is not the biological child of the defendant/respondent
13. Stalking
14. Avoidance of arrest
15. Victim belief that defendant/respondent is capable of killing him/her.

While these factors are now used frequently by law enforcement, legal advocates, and case workers, there is no legal requirement nor common practice that a court consider or apply them in assessing risk in a family offense or custody/visitation proceeding. As a result, courts often focus more on the presumption in the law that a parent should be permitted as extensive contact with a child as possible, than on the consideration of the risk to the other parent or child where visits or custody transfers are ordered.

As discussed above, Jacqueline Franchetti shared the heartbreaking story of her own such experience in a New York State Family Court. In the case related to custody of Ms. Franchetti's two-year-old daughter, Kyra, a Nassau County Family Court judge permitted unsupervised overnight visits between Kyra and her father over Ms. Franchetti's vehement objection. Only a few days after the

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<sup>54</sup> *Lethality Indicators*, Special Topic Seminar for District Court Judges, Univ. of N.C. Sch. Of Gov't (July 2015), [https://www.sog.unc.edu/sites/default/files/course\\_materials/Lethality%20Indicators.pdf](https://www.sog.unc.edu/sites/default/files/course_materials/Lethality%20Indicators.pdf) [<https://perma.cc/VW63-27A7>].

<sup>55</sup> The New York State Office for the Prevention of Domestic Violence recognizes a lethality screen based on Campbell's Danger Assessment tool. *See* OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, NYS DOMESTIC VIOLENCE FATALITY REVIEW (June 2021), [https://opdv.ny.gov/system/files/documents/2021/07/nys-domestic-violence-fatality-review\\_0.pdf](https://opdv.ny.gov/system/files/documents/2021/07/nys-domestic-violence-fatality-review_0.pdf) [<https://perma.cc/VP5L-N7MN>].

<sup>56</sup> See *Lethality Indicators*, *supra* note 53.

court granted the father overnight visits with Kyra, he shot and killed the child while she slept, and then set his house on fire and killed himself in a murder-suicide. Kyra is now among the 23 children murdered by their own parent during a custody case, separation, or divorce in New York State in the past 6 years alone.<sup>57</sup>

In Kyra's case, Ms. Franchetti repeatedly warned the court and the forensic evaluator of prior conduct by Kyra's father that, under a lethality factor analysis, would have indicated that the father posed a grave risk to the child. This included Ms. Franchetti's testimony and that of third parties that the father had stalked, harassed, and threatened her, had expressed suicidal ideation and engaged in fits of rage, and that he had access to firearms. However, tragically, during those court proceedings, the judge presiding over the case viewed Ms. Franchetti's opposition to Kyra's father having visits as a sign of Ms. Franchetti's vindictiveness, rather than reflecting her real and credible fear because of his stalking and threats against her. The court admonished Ms. Franchetti that "just because he abused you, doesn't mean he will abuse the child." When she continued to express her fear for her daughter's safety, she was told that she needed to "grow up." Similarly, the attorney for the child who was assigned to represent Kyra in the Family Court and the forensic evaluator appointed in Kyra's case<sup>58</sup> both dismissed the documented evidence of the father's dangerous behavior and his recent purchase of firearms.

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<sup>57</sup> During the period from 2008 to 2016, 58 children around the country who were the subjects of Family Court proceedings were killed by custodial parents. Almost always (in 52 of the 58 cases), these fatalities occurred in instances where mothers had attempted to warn the court that their children's safety was in danger because of an abusive father. See Laurie Udesky, *Custody in Crisis: How Family Courts Nationwide Put Children in Danger*, 100 Reporters (December 1, 2016), <https://100r.org/2016/12/custody-2/> [<https://perma.cc/FRH6-WQQX>].

<sup>58</sup> Shortly after the Conference, New York State enacted legislation that specifies that when a court appoints a forensic evaluator to evaluate and investigate the parties and child in a custody or visitation proceeding, the evaluator must be a licensed psychologist, social worker, or psychiatrist who has received training on the dynamics of domestic violence and child abuse within the last two years. The Office for the Prevention of Domestic Violence (OPDV) is directed to contract with the New York State Coalition Against Domestic Violence (NYSCADV) to develop this training. This law takes effect on June 21, 2023, and amends Domestic Relations Law § 240(1) with a new paragraph (a-4). The new paragraph requires a child custody forensic evaluator to notify the court in which such individual requests to be considered for such court ordered evaluations; requires such individuals to notify the court should they fall out of compliance (regarding the biennial training requirement); and includes training documentation requirements. The legislation also amended Executive Law § 575(3) to add a new paragraph (n) that requires the Office for the Prevention of Domestic Violence to contract with the New York State Coalition Against Domestic Violence to develop a training program for psychiatrists, psychologists and social workers, so that such individuals may conduct court ordered forensic evaluations involving child custody and visitation. The new paragraph lists the topics that shall comprise such training, including but not limited to: relevant statutes, case law and psychological definitions of domestic violence, coercive control and child abuse; the dynamics and effects of domestic violence and child abuse; trauma, particularly as it relates to sexual abuse and the risks posed to children and



In the years since Kyra's murder, Ms. Franchetti has become an outspoken advocate and leader in efforts to reform the law to better address evidence of safety risks. As a result, "Kyra's Law" has been introduced in the New York Assembly and Senate.<sup>59</sup> Kyra's Law would, among other things: require judges in custody and visitation disputes to make the health and safety of the child the top priority and to conduct an early safety assessment that would include lethality factors and coercive control; update the best interest factors judges use in determining custody to prioritize the safe (non-abusive parent) receiving custody of the child; prohibit the court from considering claims of parental alienation in domestic violence cases; and require training for judges and hearing officers on domestic violence, including lethality factors.<sup>60</sup> Kyra's Law remains pending in the New York state legislature.

#### **D. Femicide**

Femicide, which is defined as the killing of women and girls on account of their gender, is tragically occurring every day and is a devastating form of gender violence. While the international feminist community has begun to name and confront femicide, this scourge is not directly being addressed or prioritized as a crisis in the United States. Conference panelists noted that murders of women are reported in local New York City newspapers with alarming frequency, but are described as individual crimes, not linked to a larger pattern of violence against women and girls. Indeed, each time a murder is reported, agencies like Sanctuary for Families check their client databases to confirm whether the victim was a client. Tragically, on many occasions they have been. The vicarious trauma impacting staff from these femicides is also a serious concern for nonprofit agencies and must be addressed.

Stephanie McGraw poignantly elucidated the profound impact of these devastating losses of life on families and communities. By holding vigils honoring femicide victims, she raises awareness that these murders are not simply isolated cases. Ms. McGraw called upon conference attendees to "raise your conscious level," "get a little uncomfortable," and "stay woke" to these

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the long-term dangers and impacts imposed by the presence of adverse childhood experiences; and the danger of basing child custody decisions on claims that a child's deficient or negative relationship with a parent is caused by the other parent.

<sup>59</sup> A.3346-A (Hevesi)/S.3170 (Skoufis), 2022–2023 Leg. Sess. (N.Y. 2023). For more information about Kyra's law, see Kyra's Champions, available at <https://www.kyraschampions.org/kyras-law> (last visited Mar. 20, 2023) [<https://perma.cc/N2R7-39QL>].

<sup>60</sup> *Id.*

atrocities.

In fact, the incidence of femicide in the United States is steadily rising. One study estimates that American female intimate gendered killings are happening at a rate of almost three women every day.<sup>61</sup> The New York City Domestic Violence Fatality Review Committee Annual Report for 2020 found that "communities of color are disproportionately affected, with Black females being particularly adversely impacted," and that communities of color in "low-income neighborhoods account for just over 20% of the City's population but 40% of NYC's intimate partner homicides."<sup>62</sup> Moreover, using National Center for Health Statistics, researchers in a 2021 report in the *Journal of Obstetrics & Gynecology* found the homicide rate was 16% higher for pregnant women than their peers of reproductive age and noted that "homicide during pregnancy or within 42 days of the end of pregnancy exceeded all the leading causes of maternal mortality by more than twofold."<sup>63</sup> Conference panelists called upon

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<sup>61</sup> See Mary Emily O'Hara, *Domestic Violence: Nearly Three U.S. Women Killed Every Day by Intimate Partners*, U.S. News (Apr. 11, 2017), <https://www.nbcnews.com/news/us-news/domestic-violence-nearly-three-u-s-women-killed-every-day-n745166> [https://perma.cc/HT2A-FB4B]. Research shows that femicide increased before and during the COVID-19 pandemic. Anthony Vasquez-Peddie, *Femicide Rates On the Rise Amid COVID-19 Pandemic: Canadian Researcher*, CTVNEWS (Dec. 16, 2021), <https://www.ctvnews.ca/health/coronavirus/femicide-rates-on-the-rise-amid-covid-19-pandemic-canadian-researcher-1.5681807> [https://perma.cc/P3KS-DGMY]. Myrna Dawson, the Founder and Director of the Canadian Femicide Observatory for Justice and Accountability and Co-Director of the Canadian Domestic Homicide Prevention Initiative with Vulnerable Populations and Senior Advisor for the Femicide Watch Platform, a joint project of the United Nations Studies Association (UNSA) Global Network and the UNSA Vienna Femicide Team, points to repeated lockdowns and a lack of access to services and shelter as well as violent home environments for the steady increase in sex- and gender-related killings of women and girls. As the pandemic persists, so do these obstacles to safety for survivors, especially those marginalized by gender, race, ethnicity, and gender identity.

<sup>62</sup> N.Y.C. DOMESTIC VIOLENCE FATALITY REVIEW COMM., ANNUAL REPORT 2 (2020), <https://www1.nyc.gov/assets/ocdv/downloads/pdf/2020-FRC-Annual-Report.pdf> [https://perma.cc/W4PG-AGK8]. According to the CDC, Black and Indigenous women are at greatest risk, followed by Latinx and Asian women. 2021 was the deadliest year for transgender individuals, with 9 out of 10 victims (96%) trans women or transfeminine. Women in the sex trade have the highest homicide victimization rate of any set of women ever studied. Devon D. Brewer et al., *Extent, Trends, and Perpetrators of Prostitution – Related Homicide in the United States*, 51(5) J. FORENSIC SCI. 1101, 1101–1108 (2006). Femicide profoundly negatively impacts marginalized communities, especially communities of color, leaving children motherless, families without the members who do the lioness's share of nurturing and caregiving, and communities without the members who frequently are the most service-oriented. Survivor-of-color-led community-based anti-domestic violence organizations have prioritized this issue. Autodidact 17, *Harlem Mothers S.A.V.E. Hosts Anti-Violence Forum*, *Amsterdam News* (Oct. 14, 2021), <https://amsterdamnews.com/news/2021/10/14/harlem-mothers-sve-hosts-anti-violence-forum/> [https://perma.cc/4AEH-K4NG].

<sup>63</sup> Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States*, 138(5) *Obstetrics & Gynecology* 762 (2021).

domestic violence advocates in New York to join the international feminist community in exposing the crisis of femicide and promoting policies to address it.

## **E. Key Recommendations on Trauma, Coercive Control, Lethality Factors, and Femicide**

### **1. Train Family Law Actors, including Judges, Evaluators, Police, and ACS to Identify Lethality Factors:**

The burden should not be on the survivor to establish the risk of harm to a litigant or children; the burden should be on the Court and evaluators to assess the risk. The Court and evaluators within the system must understand both *when* and *how* to perform a risk assessment in any case where domestic violence is a factor.

Therefore:

- a. Require training for judicial personnel and all actors within the system (police, ACS, forensic evaluators) on lethality assessment and factors;
- b. Temporary/interim orders: When judges issue temporary visitation and custody orders in a child custody/visitation case:
  - i. They should be reduced to writing and include the judge's basis for the determination and factors that the judge took into consideration;
  - ii. There should be a mechanism for appeal or intermediate review so that immediate relief can be accessed if an order poses a risk to a child.

### **2. Enact Legislative Changes:**

- a. Pass legislation prioritizing the health and safety of the child:
    - i. Require judges in custody and visitation disputes to make the health and safety of the child the top
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- priority and to conduct an early safety assessment that would include lethality factors;
- ii. Update the best interest factors judges use in determining custody to prioritize the safe (non-abusive parent) receiving custody of the child and not disturbing the primary caretaking relationship;
  - iii. Prohibit the court from considering claims of parental alienation in domestic violence cases; and
  - iv. Require training for judges and hearing officers on domestic violence, including lethality factors.<sup>64</sup>
- b. Lethality Factors: Judges, custody evaluators, attorneys for the child, and other court actors involved in custody and visitation determinations should be required to consider lethality factors when assessing the safety of and risk of harm to a child, especially with respect to any temporary and/or final order that is issued.
- c. Coercive Control: The definition of “victim of domestic violence” in New York State Social Services Law (Section 459-a) should be updated to include coercive control, and Article 8 of the Family Court Act should be amended to include coercive control as a family offense.<sup>65</sup>

**3. Train judges and court personnel on trauma-informed practices and conduct an inventory of the ways in which re-traumatizing practices and interactions within the Family Court system can be minimized.**

**III. Failure to prioritize the safety of survivors and children and their allegations of domestic violence and child safety risks over the other**

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<sup>64</sup> KYRA’S LAW, <https://www.kyraschampions.org/kyras-law> [<https://perma.cc/N2R7-39QL>] (last visited May 24, 2023).

<sup>65</sup> Conference panelists agreed that while coercive control should be actionable in civil actions in the family and supreme courts, it should not be added to the penal code, and should therefore not be actionable in criminal actions.

### **party's demands for custody and visitation and claims of "parental alienation"**

Conference participants agreed that court decisions that preceded the tragic murder of two-year-old Kyra and the experience of her mother in Family Court were not outliers, but examples of a systemic pattern in which domestic violence survivors are punished or have negative case outcomes as a result of raising allegations of domestic violence or child abuse during custody/visitation cases. These unjust consequences for survivors are closely tied to another dynamic in family law: abusers invoking the concept of "parental alienation" when protective parents raise legitimate safety concerns.

"Parental alienation" is a debunked junk science theory first introduced by psychologist Richard Gardner in his 1998 book, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals*.<sup>66</sup> Gardner's theory posits a scenario in which one parent (almost always the mother) through emotional manipulation turns a child against the other parent (almost always the father) as a form of retaliation, often by making false allegations of sexual abuse. "Parental Alienation Syndrome" has never been scientifically substantiated or recognized by the American Psychiatric Association or any other medical or professional association, and it is not admissible in child custody hearings because of its lack of scientific basis.<sup>67</sup> However, the term "parental alienation" often gets considerable traction in family court, where allegations that one parent is "alienating" children from the other parent are commonplace, and regularly used by attorneys representing abusive parents to undermine the credibility of domestic violence or abuse allegations. Indeed, one parent "may be 're-framed' as a parent severely 'emotionally abusing' their children by falsely teaching them to hate and fear their other parent."<sup>68</sup>

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<sup>66</sup> RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (1992).

<sup>67</sup> See Alyssa G. Rao, *Rejecting 'Unjustified' Rejection: Why Family Courts Should Exclude Parental Alienation Experts*, 62 B.C. L. REV. 1759, 1760 (2021) (noting that parental alienation syndrome "has yet to gain acceptance by any major scientific organizations, including the American Psychiatric Association (APA) and World Health Organization," and that the "drafters of the most recent versions of the Diagnostic and Statistical Manual of Mental Diseases (DSM-5) and the International Classification of Diseases (ICD-11) declined to include parental alienation syndrome in either of these highly-respected and highly-utilized diagnostic tools, notwithstanding proposals by the syndrome's advocates").

<sup>68</sup> See Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?* 42 J. SOC. WELFARE & FAM. LAW 92 (2020). See also History of "Parental Alienation Syndrome," SANCTUARY FOR FAMILIES (October 5, 2022), <https://3fdc78ed-344c-4d81-afe2-78712303deb0.usrfiles.com/ugd/3fdc783ed5874a97d0444ab1738afc05588306.pdf> [https://perma.cc/M3L9-7YQ7].

In many cases, parental alienation claims lead to legitimate warnings<sup>69</sup> about child safety made by survivors of intimate partner violence being ignored or rejected by judges who instead accept abusers' unverified claims that survivors are "unfriendly parents." These outcomes are often rooted in the fact that New York and other states have case law that specifically adopts the "friendly parent principle," which holds that if one parent is more likely to support the child's relationship with the other parent, and/or if one parent is more likely to comply with the concept of shared parenting, then that more supportive parent should be awarded custody.<sup>70</sup> Although consideration of the friendly parent factor is just one of several best interests factors to be assessed in a custody proceeding, others of which include a demonstrated history of domestic violence,<sup>71</sup> this legal principle is frequently leveraged by abusers and their counsel when concerns about violence and ongoing threats to a child are raised. Thus, credible claims of prior history of domestic violence and/or child abuse have led to changes in custody to the abuser due to a perception that raising such claims constituted "alienating" behavior by the parent seeking to protect a child from violence<sup>72</sup> or as an attempt to "block" a child from the other parent.

Jennifer Friedman, Senior Program Director, Family Law Project and Policy at Sanctuary for Families, identified this dynamic as a backlash against survivors that has taken hold in family law since the early 2000s. She described one case in which a judge "scolded" her client for engaging in "alienating behavior," and warned she could transfer custody of the children, after Ms. Friedman's client shared legitimate fears that her ex was attempting to track her location by giving the parties' child a cell phone during a supervised visit. This followed a history of abuse perpetrated by the father, including the presence of lethality factors, such as stalking and a suicide attempt in the home while the children were present.

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<sup>69</sup> Certainly, in cases where allegations of abuse are not present, a judge's focus on encouraging co-parenting is reasonable.

<sup>70</sup> For a detailed analysis of the "friendly parent principle" and its application, see *The "Friendly Parent" Principle: Does it Get Conflated with Parental Alienation?*, SANCTUARY FOR FAMILIES (October 5, 2022), [https://3fdc78ed-344c-4d81-afe2-78712303deb0.usrfiles.com/ugd/3fdc78\\_72fd5f77c43e47c48fce0abab1852e3e.pdf](https://3fdc78ed-344c-4d81-afe2-78712303deb0.usrfiles.com/ugd/3fdc78_72fd5f77c43e47c48fce0abab1852e3e.pdf) [https://perma.cc/67CQ-XD9G].

<sup>71</sup> See N.Y. Dom. Rel. Law § 240(1)(a) (while not determinative, a court must consider domestic violence that is proven by a preponderance of the evidence in determining custody and visitation arrangements).

<sup>72</sup> These are often referred to as "alienation cross-claims."

This example, and other conference participants' observations on the extent to which claims of "alienation" can be weaponized in custody proceedings aligns with empirical data presented by panelist Joan Meier, the National Family Violence Law Center Professor of Clinical Law at the George Washington University School of Law. Professor Meier's work examines the outcomes of reflected bias in reported custody and visitation cases from around the United States<sup>73</sup> and reveals the extent to which judges undervalue survivors' allegations of domestic violence and safety threats and over-value non-custodial parent custody "rights" where parental alienation is asserted. Specifically, the data reveal that mothers' "losses" in custody cases (where a primary caregiver mother saw transfer of custody to the father) skyrocketed if an allegation of abuse was met by a cross-allegation of alienation by the father.<sup>74</sup> Professor Meier's research also highlighted gender bias within the realm of parental alienation claims, as her studies demonstrated that there was no effect on frequency of fathers' custody loss when mothers cross-claim alienation to a father's initial accusation of abuse.<sup>75</sup> Moreover, the cases reviewed by Professor Meier uncovered that when fathers assert alienation cross-claims, courts are far less inclined to accept a mother's abuse claims, including claims of partner abuse, child abuse, or child sexual abuse.<sup>76</sup> Incredibly, a review of published cases reflects that courts are *half* as likely to believe a mother's claim of abuse when a father presents an alienation cross-claim.<sup>77</sup>

Thus, survivors of domestic violence are constantly faced with a predicament: reporting abuse to the court during a custody dispute to seek protection for their children can pose the risk of being perceived as hostile,

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<sup>73</sup> A 2020 study conducted by Professor Joan S. Meier describes how the impact of parental alienation on mothers and fathers varies in situations of abuse. Her findings relied on analyzing and codifying judicial opinions posted online across the United States over a ten-year period. The research found that, in situations where fathers alleged abuse against the mother of the child, they gained custody at higher frequencies than when the mother alleged abuse against the father. Meier, *supra* note 68.

<sup>74</sup> Samantha Schmidt, 'A Gendered Trap': When Mothers Allege Child Abuse by Fathers, the Mothers Often Lose Custody, *Study Shows*, WASH. POST (July 29, 2019), [https://www.washingtonpost.com/local/social-issues/a-gendered-trap-when-mothers-allege-child-abuse-by-fathers-the-mothers-often-lose-custody-study-shows/2019/07/28/8f811220-af1d-11e9-bc5c-e73b603e7f38\\_story.html](https://www.washingtonpost.com/local/social-issues/a-gendered-trap-when-mothers-allege-child-abuse-by-fathers-the-mothers-often-lose-custody-study-shows/2019/07/28/8f811220-af1d-11e9-bc5c-e73b603e7f38_story.html) [<https://perma.cc/35X6-XWRB>].

<sup>75</sup> Meier, *supra* note 68, at 100 ("Fathers who were accused of alienation by the mother they accused of abuse lost custody only 29% (5/17) of the time, but this is not a statistically significant result due to the relatively low numbers.").

<sup>76</sup> *Id.* at 98.

<sup>77</sup> *Id.*

“unfriendly,” or “alienating,” with adverse implications for the outcome of a litigation. As has been noted:

Courts typically immediately demand co-parenting and take risks before they have time to consider the evidence of abuse or the critical context. Many court professionals immediately start promoting and pressuring for shared parenting. Victims are routinely punished if they object to cooperating with their abusers. Victim’s lawyers often tell clients not to raise abuse issues and not to object to dangerous arrangements. This results in courts making harmful decisions without ever learning about the history of abuse. This approach also serves to silence children who are exposed to the abuser.<sup>78</sup>

That environment frequently drives litigants to accept custody and visitation terms that threaten their safety and the safety of their children, or terms that require a level of communication with an abusive party that enables ongoing coercive control, including:

- Granting unsupervised visitation to noncustodial parents who have been physically abusive, including those with a history of child sexual abuse;
- Permitting exchanges of children in unsafe locations;
- Permitting access to parents who have threatened to abduct children;
- Pushing survivors to accept joint legal custody, in violation of controlling case law, which would require extensive communication and contact; and
- Awarding mutual decision-making to abusers.

Extreme and dangerous programs such as “reunification therapy” and “reunification camps” have also emerged from this overall trend of prioritizing claims of alienation over credible allegations of abuse by a parent. One conference panelist, Ally Cable, founder of the Youth Initiative at the Center for Judicial Excellence, offered her horrifying personal experience as a 16-year-old subject child in a contentious custody litigation. The court in her case accepted the father’s narrative that her mother’s claims of abuse were simply “alienation” and issued an order removing Ally and her sister from Kansas and forcibly bringing them to a “reunification camp” in a remote part of Montana, where

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<sup>78</sup> Barry Goldstein & Veronica York, Shared Parenting Places Ideology Over Children, *CTR. FOR JUD. EXCELLENCE* (Aug. 16, 2022), <https://centerforjudicialexcellence.org/2022/08/16/shared-parenting-places-ideology-over-children/> [<https://perma.cc/78GM-VM6T>].



they were made to endure a “therapy” program with their father, who sexually abused them. In her case, the guardian *ad litem* rejected the statements that Ally and her sister made describing their father’s abuse and accused them of lying about the abuse. Ally’s case exemplifies the courts re-traumatizing adult and child survivors by prioritizing parental relationships with abusers over the emotional and physical safety of children and survivors. In fact, New York State is home to Linda Gottlieb, a social worker whose so-called “therapeutic visitation” programs involve sequestration and prohibitions on contact with family members other than the parent claiming “alienation.”<sup>79</sup> In many cases, children are removed from their primary caretaker, a safe parent, and custody is awarded to an abusive parent who had claimed alienation.

Moreover, Ally’s story illustrates the extent to which participants other than judges in custody proceedings, including evaluators and guardians *ad litem*,<sup>80</sup> can also improperly prioritize parental relationships over legitimate concerns for child safety.<sup>81</sup> Indeed, as discussed above regarding bias in the family law

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<sup>79</sup> See Hannah Dreyfus, *Barricaded Siblings Turn to TikTok While Defying Court Order to Return to Father They Say Abused Them*, PROPUBLICA (Feb. 26, 2023), <https://www.propublica.org/article/parental-alienation-utah-livestream-siblings> [https://perma.cc/ZG5X-FAQD]. The “reunification camps” and other programs where children are held or forced to participate against their will, or made to interact with a parent who has credibly been alleged to pose a threat or risk to their emotional or physical health, differs greatly from the form of “supervised therapeutic visitation” that has long been accepted in New York State Family Courts, where children may engage in individual therapy sessions with a parent facilitated by a mental health professional for limited periods, such as one hour per week. See *Stephanie B. v. Joshua M.*, 183 N.Y.S.3d 309 (N.Y. App. Div. 1st Dept. 2023) (granting supervised therapeutic visitation where “the record presents no evidence that supervised therapeutic visitation with the father would physically endanger the child,” and where the “strictures that Family Court imposed on the visitation, as well as the inherent nature of the type of visitation ordered, will operate to mitigate any emotional strain on the child”). The distinction in approaches can also be traced to whether an order is made as part of an effort to protect a child’s best interests, including their emotional well-being, or whether the order is being made to prioritize the parent’s interests.

<sup>80</sup> Ally’s case was heard outside of New York. In New York State Family Courts, children are represented by attorneys for children, as their independent counsel, rather than by guardians *ad litem*. Conference panelist Michael Sherz, Esq., Director of the Domestic Violence Project at Lawyers for Children, noted the importance of providing children with this form of direct and independent representation, in order to ensure that their experiences and position can be put before the court and considered along with that of the parties.

<sup>81</sup> See Udesky, *supra* note 57 (describing a Tennessee Family Court case where the child was placed in custody of a father who had sexually abused him based on the court’s reliance on the recommendations of the custody evaluator, and an Ohio case where the judge quoted from a custody evaluator’s report that the “mother was found to have demonstrated a pattern of efforts to alienate the children from their father, to remove father from their lives, and to convince the children that only she has their interest and safety at heart,” but where children’s statements and evidence of past medical treatment supported claims that the father was physically abusive). Professor Meier also has documented how in cases with a *guardian ad litem* or an evaluator,

system, in New York State, a majority of the Governor’s Blue Ribbon Commission on Forensic Custody Evaluations members believed that the state’s custody evaluation system is so deeply biased that their use should be eliminated entirely. If these and other reports are to continue to influence the outcomes of contested custody cases, we must require training on domestic violence for all such actors and adopt assessments and factors that promote the best interests and well-being of litigants and children.

## **A. Key Recommendations to Prioritize the Safety of Survivors and their Children**

### **1. Early Safety Assessment:**

When ordering visitation and temporary custody in a child custody/visitation case, judges should be required to make and prioritize an early determination of safety risks to the child or children when there is a credible allegation of child abuse or domestic violence. Provide clear direction in the law as to when in the course of a proceeding the Court is mandated to perform such an assessment, such as at the first appearance.

### **2. Parental Alienation/Friendly Parent:**

When presented with credible evidence of domestic violence or child abuse, judges should not be permitted to consider arguments regarding the “friendly parent principle” or “parental alienation” at any point in a custody/visitation case.

### **3. Redefine Best Interest Factors to Prioritize Safety:**

Safety of the child should be a primary best interest factor and accorded more weight than other factors in custody cases. Other factors to be considered should include: the negative consequences

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mothers alleging abuse are more likely to lose custody. Joan S. Meier, *Ending the Denial of Family Violence: An Empirical Analysis and Path Forward for Family Law*, GW LAW FACULTY PUBLICATIONS & OTHER WORKS 28 (2021), [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2792&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2792&context=faculty_publications) [https://perma.cc/7MPG-P8RG] (“Not surprisingly, custody losses mirror these findings. Whereas without a GAL, abuse-alleging mothers’ custody losses average 25%, with a GAL their custody losses average 36%. Mothers thus have 1.8 greater odds of losing custody when a GAL is present ( $p < 0.001$ , CI 1.4-2.2); when alleging physical child abuse this difference increases to 3.4 ( $p < 0.001$ , CI 1.8-6.4), and when alleging mixed physical and sexual child abuse, to 5.3 ( $p = 0.033$ , CI 1.1-24.5).” Professor Meier observed that these data indicate that “these neutral court professionals are putting a heavy thumb on the scale against mothers.”

associated with separating the child from their primary attachment figure (the parent who best provides emotional security and comfort to the child); and whether either parent is better able and more likely to attend to the daily physical, emotional, developmental, educational, and special needs of the child.

#### **4. Ban Use of Family Reunification Therapy:**

No court should be permitted to authorize “family reunification therapy” or “reunification camps” where allegations of abuse are present.

### **IV. Under-resourced and poorly-functioning family courts, including insufficient numbers of judges to handle overwhelming case dockets, which undermine the equitable and timely administration of justice for victims and families**

New York State’s antiquated court system itself is a profound barrier to justice for survivors of domestic violence. Indeed, insufficient resources for the family courts have negatively impacted the safety and security of our most vulnerable populations, including primarily Black and Brown low-income women, children, and families. Moreover, the COVID-19 pandemic laid bare longstanding inequities impacting the families accessing the New York City Family Court. During the pandemic, the Family Court shut down for a substantial number of so-called “non-essential” matters over an extended period of time. These matters, however, were anything but “non-essential,” leaving many New Yorkers, including survivors of domestic violence, without access to justice on issues impacting the safety and security of their families and children. With a substantial backlog resulting in unreasonable delays, the impact of COVID will be felt for years to come, and accordingly, the need for reform has never been greater. Finally, the family law system, encompassing the Family and Supreme Courts, does not have programs, protocols, or effective training in place that acknowledge and address the vicarious trauma experienced by counsel, jurists, and other service providers who handle difficult cases on a daily basis.

#### **A. New York State’s Outdated Court Structure**

At the heart of this crisis lies New York’s antiquated court structure, combined with a lack of judges, resources, and adequate technology. As panelist Denise Kronstadt, Interim Executive Director/Director of Advocacy and Policy at the Fund for Modern Courts, described in detail, New York State has the unwanted distinction of possessing the most complex court structure in the nation, with eleven separate trial courts with varying and sometimes

overlapping jurisdiction.<sup>82</sup> The system is not only confusing but also leads to wasteful parallel proceedings with the possibility of inconsistent results. Those most negatively impacted are people of limited means, vulnerable populations, and unrepresented litigants. Of note, survivors of domestic violence often have to make repeated appearances in multiple courts, represented by different lawyers on each case – if represented at all – while subject to inconsistent court orders and rules. Furthermore, if litigants are seeking a divorce, they cannot do so in Family Court but must bring an action in the Supreme Court, where they would have to pay filing fees and are not entitled to an appointed lawyer.

Also of concern, this Byzantine court structure locks in resource disparities, negatively impacting courts—like the Family Court—which disproportionately serve the poor and people of color. The lack of sufficient funding compounding over decades means that there are not sufficient judges, staff, or technology to effectively manage the volume and seriousness of the cases before the court. This is especially detrimental given that 80% of litigants in Family Court are unrepresented.

### **B. Shortage of Family Court Judges**

The severely inadequate number of judges and insufficient staffing has for decades caused significant delay in New York City Family Court proceedings. To make up for this critical shortage, the Office of Court Administration (OCA) transfers judges from other courts (mostly the Civil Court) and assigns them to the Family Court on a temporary basis, usually (but not in all cases) for two years.<sup>83</sup> However, these temporary transfers create significant problems for litigants who are survivors of intimate partner violence and the attorneys who represent them.

First, while the Rules of the Chief Judge, Section 17.4(a), require that judges in a court that exercises criminal jurisdiction, Family Court judges, and each justice of the Supreme Court who regularly handles matrimonial matters, “shall attend, every two years,” an approved program “addressing issues relating to domestic violence,” judges from other courts are often temporarily assigned

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<sup>82</sup> See *New York Compared to Other States*, FUND FOR MODERN COURTS, <https://simplifyncourts.org/new-york-compared-to-other-states/> [<https://perma.cc/FV69-FJ6S>] (last visited May 24, 2023). The website lists other states that have simplified their court systems, including California, which adopted a single trial court throughout the state.

<sup>83</sup> *The Family Court Judicial Appointment and Assignment Process*, N.Y. CITY BAR (Dec 15, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-family-court-judicial-appointment-and-assignment-process> [<https://perma.cc/ZF2H-5NEA>] (the “Family Court Report”).

to the Family Court without receiving the required training.<sup>84</sup> As a result, it is not uncommon for judges serving in Family Court to be unfamiliar with the issues and needs of survivors of intimate partner violence.<sup>85</sup> To illustrate this problem, a panel participant described a case where a temporarily assigned Family Court judge did not know the meaning of a “therapeutic visitation”—a common term that refers to visitation between a child and the noncustodial parent with supportive services— and was poorly prepared to consider services that would protect the custodial parent and subject child in that case.

Family Court litigants also often appear before judges who have not made family law a professional priority, and others who seek to minimize their time serving in that Court. As Justice Webber explained, judges cannot be promoted to the departments of the Appellate Division directly from Family Court, meaning that any judge with ambitions to promotion would seek transfer from the Family Court as soon as possible.<sup>86</sup>

According to a New York City Bar Association report, the constant flow of judges in and out of the family court presents serious challenges. Specifically, the court found, “[e]very time an acting judge departs from the Family Court, that judge’s cases must be reassigned,” causing delay and confusion among litigants, and when judges are assigned without experience or expertise in family law as they take over cases lacking familiarity with prior proceedings, they understandably do not perform at the same level of efficiency as full-time Family Court Judges.<sup>87</sup> Vacancies often are not filled immediately, and “cases in front of a departing judge will be adjourned until a new judge is reassigned from another court or is appointed to the Family Court,” thereby causing unacceptable delay and potentially putting lives at risk in cases involving domestic violence.<sup>88</sup> As explained by the Bar Association report, “the current system leaves the Family Court in a state of constant flux, referred to by some in court leadership as a ‘transient bench,’ that compromises the administration of

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<sup>84</sup> Rules of the Chief Judge, New York State Unified Courts, 22 N.Y.C.R.R. 17.4(a) (March 1, 2021), <https://ww2.nycourts.gov/rules/chiefjudge/17.shtml>.

<sup>85</sup> As discussed throughout, advocates believe the current training requirements are insufficient to educate jurists about domestic violence and the needs of survivors. However, judges on temporary assignment are not even subject to these minimal training requirements.

<sup>86</sup> See also, 42 Tarinelli, Ryan, *Power Struggle Continues Over Return of Older NY Judges as System Announces Assignment Plan*. NEW YORK LAW JOURNAL, May 21, 2021, <https://www.law.com/newyorklawjournal/2021/05/21/power-struggle-continues-over-return-of-older-ny-judges-as-system-announces-assignment-plan/> [<https://perma.cc/35R6-NE4A>].

<sup>87</sup> *The Family Court Report*, *supra* note 83.

<sup>88</sup> *Id.*

justice, often at critical points for the safety and security of families and children.”<sup>89</sup>

Thus, in January 2022, when many judges were reassigned, attorneys at Sanctuary for Families reported to Justice Webber that several judges sitting in the Manhattan and Brooklyn family courts declared mistrials in cases that were open before them, requiring survivors to be forced to either re-testify to their traumatic experiences at a new trial or accept unfavorable settlements to avoid this scenario. Although Justice Webber, in her capacity as Co-Chair of the Franklin H. Williams Commission, contacted the Office for Court Administration supervising judge of the Family Courts and confirmed that this practice was contrary to official court policy (which was for the judge to either try the case before leaving the jurisdiction or take the case with them to the new assignment), several Sanctuary attorneys handled cases that were, in fact, ultimately mistried.

Indeed, the swapping of judges is especially prejudicial and traumatizing to survivors of domestic violence who have no choice but to bring the court up to speed and recount their experience over and over again every time a new judge is reassigned. One Sanctuary attorney is currently representing a survivor of sexual abuse and domestic violence who filed for an Order of Protection and custody in June of 2019. Her matters have proceeded before seven separate judges. A full order of protection trial took place before one judge (number 6), who sat in family court for less than a year and made findings of multiple family offenses committed. The case was then transferred to a new judge (number 7), who is unfamiliar with the case history and is conducting a full custody trial. This outrageous situation is requiring the client to re-testify to the abuse in order to educate the new judge about the history, which is imperative to best understand the custody issues. This case is not an outlier; practitioners report that many of their cases currently before the family courts have been handled by multiple judges over the course of years.

The shortage of judges also was addressed in a compelling report recently issued by the Franklin H. Williams Judicial Commission of The New York State Courts. The Commission, which is charged with addressing racial bias in New York’s courts, noted: “Further increasing the number of Family Court judges will address unconscionable delays in resolving cases, avoiding longer periods of stay in foster care for children, longer periods of uncertainty in custody cases,

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<sup>89</sup> *Id.* The report raises a number of concerns including: 1) Family Court parts go without a complete complement of judges for extended periods of time due to the lags in the appointment process and delays in the replacement of judges from other courts whose temporary assignments to Family Court have ended; and 2) Short-term appointments result in cases being handled by several different judges over the life of the case (some of whom without sufficient family law training).

longer time for resolution of juvenile delinquency cases, longer periods of anxiety for domestic violence victims, and protracted periods of the stress, instability and trauma implicit in the cases heard in Family Court.”<sup>90</sup>

The staffing issue also pertains to the inadequate number of appointed counsels, including attorneys for children, who ensure that their clients’ positions, experiences, and views can be properly assessed by the Court to protect their safety and well-being. Moreover, the only-recently addressed insufficient pay rate for court-appointed (18-B) attorneys, which had been set at \$75/hour, severely exacerbated these inequities, as a flood of departures left the remaining members of the panel with overwhelming caseloads, resulting in an inability in many cases to spend adequate preparation time on each client’s case.<sup>91</sup> The rate in New York City was recently raised to \$158 per hour as the result of a judge’s order in a class action lawsuit brought to increase counsel rates, and the 2023 New York State budget finally includes funds to pay 18-B attorneys at this rate.<sup>92</sup> Thus, with a lack of judges and counsel to adequately serve those who seek to appear and pursue their claims, the pressures on the Family Court system have never been greater.

Many efforts have been made over the years to reform New York’s court structure in order to not only simplify the system that “works against equality and dignity for everyone who enters the courtroom,” but to streamline the system to have “the authority to better distribute resources and to provide them where they are needed the most, reduce court appearances and give all litigants a better and more equal justice system.”<sup>93</sup> Simplifying the outdated and highly

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<sup>90</sup> FRANKLIN H. WILLIAMS JUDICIAL COMMISSION OF THE NEW YORK STATE COURTS, REPORT ON THE NEW YORK CITY FAMILY COURTS, <https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf> [<https://perma.cc/7WXX-RBEU>] (the “Williams Commission Report”).

<sup>91</sup> Susan Desantis, *New York State Bar Association Commences Lawsuit To Raise 18-B Rates*, N.Y.S.B.A. (Nov. 30, 2022) <https://nysba.org/new-york-state-bar-association-sues-to-ensure-people-who-cannot-afford-counsel-have-constitutionally-mandated-representation/> [<https://perma.cc/948Q-VAYP>]. In July 2022, a court injunction raised pay for 18-B counsel in New York City, and efforts remain underway to expand the increase outside the city, and to include funding for the raise in the New York State budget.

<sup>92</sup> Brian Lee, *Legal Groups Encouraged by ‘Partial Win’ for Defense Counsel Pay Hike*, N.Y. LAW J., May 4, 2023. <https://www.law.com/newyorklawjournal/2023/05/04/bar-groups-encouraged-but-not-100-satisfied-with-partial-win-for-defense-counsel-pay-hike/> [<https://perma.cc/L723-BKP4>].

<sup>93</sup> *Talking About Court Reform & Simplification, The Fund For Modern Courts*, THE N.Y. COMMUNITY TRUST <https://simplifyncourts.org/talking-about-court-simplification> [<https://perma.cc/QH26-GTVD>]. The Fund for Modern Courts explains the advantages of reform would be: 1) Interrelated issues could be decided in one court; 2) Resources would be allocated where they are most needed which would mean more judges in Family, Civil and Criminal

inefficient court structure has proven difficult, however, because it requires a constitutional amendment, which in turn requires passage from two successive legislative sessions followed by a public referendum.<sup>94</sup> There are, however, other reforms that can be implemented through legislation and by the Court itself.

To address the “revolving door” of Family Court judges that, as explained above, causes disruption and delay, the New York City Bar Association has identified several recommendations in their comprehensive report, which include increasing the number of Family Court judges, providing them with better and more uniform training, and improving communication between OCA and the Mayor’s Advisory Committee on the Judiciary in order to avoid delay in the appointment process and to provide adequate notice of vacancies to the public.<sup>95</sup> The report also recommends that OCA “collect, compile and analyze data in each county as to the length and frequency of delay caused by vacancies, which would help track caseload and staffing needs and would also help identify the causes of delay.”<sup>96</sup> While this Conference strongly endorses these recommendations, it also contributes the perspective that the outrageous condition of the family courts also places domestic violence survivors and their children at greater risk of harm and of re-traumatization by the court system itself.

### **C. Family Court’s Lack of Childcare Services and Other Supports for Low-Income Parents**

Access to the family courts and court resources is another way in which implicit bias manifests against domestic violence survivors who are predominantly women of color from low-income communities. For example, at the Conference, Justice Ellerin discussed how litigants who do not have (or cannot afford) reliable childcare are often forced to miss court hearings or are turned away at the court for attempting to bring their children with them. For a period of time, this issue was remedied through the operation of Children’s Centers inside the courts, where litigants could leave their children with appropriate care while they attended their court proceedings. Unfortunately, in recent years budget reductions have eliminated this service in many courts. This

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Courts; 3) There would be greater opportunities in the Appellate Division which would draw from a bigger pool of Supreme Court Justices; 4) A five-year implementation period would allow an orderly process for change; and 5) Court Administration could be standardized and streamlined.

<sup>94</sup> N.Y. Const. art. XIX, § 1.

<sup>95</sup> Family Court Report, *supra* note 83, at 25.

<sup>96</sup> *Id.*



one issue has significant ramifications for all participants in an overburdened system and should remain an issue of central importance to advocates for judicial reform.

The Conference also cited the economic disadvantages faced by women litigants, who often hold jobs with inflexible hours and who may recently have re-entered the workforce to achieve financial independence, especially in the domestic violence arena where economic control and restrictions/monitoring of outside employment are commonplace. In such circumstances, the inability to miss work or to not be paid for taking off an hourly shift poses too great a burden on litigants who otherwise would actively participate in their cases.

The Conference also discussed the need for accessible, high quality interpretation services in court, the absence of which has a disproportionate impact on low-income, immigrant litigants and impedes their ability to successfully litigate.

#### **D. Impact of COVID-19 on Court Administration**

In early 2020, the Family Court operated much as it had for many decades. With no electronic filing system in place, petitions had to be filed in person. If litigants needed a court document or help in filing papers, they had to show up in person at the clerk's office to make a request. Court staff did not even have the ability to work from home. Accordingly, it should come as no surprise that when the pandemic struck, a court with an insufficient number of judges and inadequate staffing levels and burdened with limited resources and technology, would face difficulty functioning and challenges transitioning to a virtual model. This is especially true given the high volume of cases: in 2019, there were a total of 192,000 new Family Court filings across the City's five counties.<sup>97</sup> Without the benefit of any increased funding or resources during the pandemic, the Family Court had to make difficult decisions which, as described below, severely impacted vulnerable populations.

##### **1. Essential v. Non-Essential Matters**

During COVID-19, the Court distinguished between matters it deemed "essential," including orders of protection and certain child protective and delinquency proceedings, and those it deemed "non-essential," including visitation, custody, adoption, guardianship, and support matters. While

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<sup>97</sup> *The Impact of COVID-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants*, THE ASS'N OF THE BAR OF THE CITY OF N.Y. 6 (JAN. 2022), [https://s3.amazonaws.com/documents.nycbar.org/files/Final\\_Family\\_Court\\_Report\\_22.2.4.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/Final_Family_Court_Report_22.2.4.pdf) [<https://perma.cc/SBS2-MQZW>] (hereinafter "COVID Report").

“essential” matters proceeded, non-essential matters stagnated for months, many for almost a year, without being calendared. The Court heard certain “non-essential” matters to the extent they qualified as an “emergency,” but that term was never defined nor broadly applied. Furthermore, the best way to attempt to have a case heard as an emergency is to file an order to show cause, something only an attorney would have the legal knowledge to do. As a result, the vast majority of the litigants—especially unrepresented litigants who make up 80% or more of the court population—had virtually no access to the Family Court.

As the pandemic progressed and especially as other New York courts were transitioning to virtual proceedings, the distinction between “essential” and “non-essential” matters in Family Court became more and more arbitrary. Thus, it is impossible to explain to a mother trying to provide food for her children or the survivor of domestic violence without the means to leave an abusive household that their child support cases were somehow “non-essential” and that their lack of access to the Court was somehow justifiable.

Panelist Karla George, Deputy Director of the Family Law Project at the Bronx Family Justice Center for Sanctuary for Families, shared a compelling experience from her practice. An abusive father who had a finding of neglect against him took the children away from Ms. George’s client, a survivor of domestic violence. When Ms. George called the Administration for Children’s Services (“ACS”), they refused to remove the children from the father as the situation was not considered an “emergency.” Despite the fact that the daughter constantly texted the mother about feeling unsafe and having suicidal ideations, ACS refused to take action, and when Ms. George filed an order to show cause with the Family Court, it was denied, as the Court categorized the situation as “non-essential.”

The effects of COVID were often felt even when “emergency” matters were taken up by the Family Court. Christine Perumal, then the Director of the Safe Horizon Domestic Violence Project, provided an example where she filed an order to show cause in a pending custody case where there was concern for the safety of her client’s daughter. Ms. Perumal explained that it took the Court about four weeks to schedule the order to show cause on what could have been a life-or-death situation for the child. When Ms. Perumal followed up, she was told that there was limited capacity, that the judge did not have a court attorney, and that she should check back in with the petition room. Ms. Perumal recounted the stories of other survivors who contacted Safe Horizon and stated that the inability to obtain child support orders and payments during the pandemic forced them to remain in a household with an abuser, so as to not be left without resources while seeking safety.

## **2. Virtual Proceedings and Access to Justice**

As highlighted by the pandemic, nowhere is the disparity among New York's various trial courts more profound than in the use of technology. Many New York courts transitioned relatively smoothly to remote proceedings, including the Supreme Court which, in divorce proceedings, even addressed many of the same family law issues as the Family Court. While the Supreme Court had embraced electronic filing and had the capacity for remote proceedings leading up to the pandemic, the same was not true for the Family Court. In addition, Family Court personnel were not even equipped with the technology to enable them to work from home."<sup>98</sup> As discussed above, this epitomizes what former U.S. Secretary of Homeland Security Jeh Johnson observed in his groundbreaking report on racial justice in the New York Courts system as a "second-class system of justice for people of color in New York State."<sup>99</sup>

While COVID-19 exposed weaknesses and inequities in the court system, it also underscored the importance of technology in furthering access to justice. Panelist Joan Gerhardt, NYSCADV's Director of Public Policy and Advocacy, explained some of the advantages of remote proceedings for survivors of domestic violence. Avoiding a trip to the courthouse means not having to take a day off from work and makes child care concerns more manageable. It also provides physical separation from abusers who otherwise would be in close proximity both in the courtroom and the waiting area, reducing both the anticipatory anxiety of court dates and trauma experienced by survivors from in-person experiences.

However, special considerations must be taken into account as remote proceedings become a permanent fixture in Family Court. Some litigants do not have access to technology, a reliable internet connection or a safe place to access court proceedings remotely. There is also a lack of technical support from the court, making it difficult for some to navigate remote proceedings. Cases have been compromised and even dismissed as a result of these issues. This is especially of concern when English is not the litigant's first language. Also of concern is that the expansion of remote proceedings has occurred without any uniform rules about when and how these proceedings should be conducted and without sufficient training for judges and staff.

### **E. Vicarious Trauma**

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<sup>98</sup> COVID Report, *supra* note 97, at 4.

<sup>99</sup> *Id.* at 25 n.37. The report further notes the following: "Making matters worse, the Family Court struggled to develop an effective system to disseminate updates and guidance to the public. People were turned away from courthouses with limited information. Even now, the Family Court's website provides limited and often unclear information on the status of the Court's operations and offers only limited guidance for unrepresented litigants." *Id.* at 5.

Trauma in the court system also extends beyond survivors, and affects social workers, lawyers, and other professionals who routinely engage with survivors about their trauma and work closely with them throughout their cases. As discussed in the panel, *Self-Care as Self-Preservation: Understanding Vicarious Trauma & Enhancing Support for Providers*, the issue of vicarious trauma (clinically referred to as Secondary Traumatic Stress) is particularly acute for attorneys, and, as one conference panelist observed, has become a “workplace hazard” for those who work and appear in Family Court.

In an empirical study on secondary traumatic stress, lawyers—compared to mental health professionals and social workers—ranked highest in levels of secondary traumatic stress, burnout, and caseloads with traumatized clients.<sup>100</sup> Family Court attorneys and court personnel, who face traumatic client experiences in their work on a daily basis,<sup>101</sup> frequently report symptoms associated with vicarious trauma, including irritability, emotional detachment or exhaustion, secretive self-medication, and over-vigilance.<sup>102</sup> Typically, the effects of this secondhand or vicarious trauma manifest over a period of years, reflecting the cumulative, transformative effects of working with survivors in a cycle of trauma. This trauma may be particularly acute for women and people of color, who often share intersecting experiences of trauma with their clients based upon experiences of race and/or gender bias.

Accordingly, courts must be trained in identifying the manifestations of trauma and secondary trauma among litigants, attorneys, and court personnel themselves. Indeed, at the conference Professor Joan Meier posited that judges themselves may be responding to vicarious trauma from handling voluminous dockets involving abuse when they minimize survivors’ experiences. When

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<sup>100</sup> Mark Rabila, Dawn McQuistona & Kimberly D. Wiseman, *Secondary Trauma in Lawyering: Stories, Studies, and Strategies*, 56 WAKE FOREST L. REV. 825, 832 (2021) (citing Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 250 (2003)).

<sup>101</sup> See, e.g., Jennifer Baum, *Compassion Fatigue: Caveat Caregiver?*, AMERICAN BAR ASSOCIATION (Jan. 13, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/compassion-fatigue-caveat-caregiver/> [<https://perma.cc/J9ZM-HC3R>]; Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. HEALTH & BIOMEDICAL L. 1 (2014); William Silverman, *Coping With Secondary Trauma From Pro Bono Work*, LAW 360 (Aug. 9, 2021), <https://www.law360.com/pulse/articles/1408481> [<https://perma.cc/CE5T-VHMM>].

<sup>102</sup> *Compassion Fatigue*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/lawyer\\_assistance/resources/compassion\\_fatigue/](https://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue/) [<https://perma.cc/XRV6-ZNN2>] (last accessed Oct. 4, 2022).

courts come to understand the manifestations of trauma in the courtroom, case outcomes will more closely align with the needs of litigants and subject children.

## **F. Key Recommendations for Increasing Resources and Modernizing the Court System:**

### **1. End Rotation of Judges Through Family Court:**

Rotating judges through the Family Court for temporary assignments causes massive turnover of judges' entire case dockets. Litigants whose lives have been laid bare to one jurist suddenly have a new jurist with no knowledge of the family history. The new judge might not be adequately trained.

### **2. Expand Mandated Domestic Violence Training to Members of the Judiciary Throughout the Court System:**

Expanding domestic violence training to all judges acknowledges the reality that domestic violence impacts litigants throughout the legal system.

### **3. Attract Quality Talent Committed to Serving in the Family Court:**

Family Court should not be a mere stepping stone toward more prestigious court appointments. The mayoral committee must find judges who are deeply committed to the Family Court, want to remain there and will undergo the necessary training to succeed.

### **4. Increase Resources, Modernize the Family Courts:**

The Family Courts must be allocated more resources to address the profound operational problems and institutional inequities that lead to unjust outcomes and appalling litigant experiences. Court simplification and unification would ameliorate the gross imbalance of resources faced by the Family Courts as compared to other courts by reducing costs, centralizing administration and providing greater access to qualified judges. However, Conference participants were aware that the process necessary to fully reform and unify the court system would be long, complex, and challenging. In the interim, and to immediately

address the current problems with the overburdened Family Court system, resources from other courts should be redirected to the Family Courts now and additional court reforms be implemented. These include:

- a. Increase the number of judges with long-term assignments in the Family Courts, and require full training, including on the dynamics of domestic violence.
- b. Increase funding for adequate staffing of clerks, court attorneys, and other personnel to put on equal footing with other courts;
- c. Address language barriers for litigants;
- d. Improve accessibility of virtual proceedings by bridging the digital divide (the gap between those who have internet access and those who do not) and enabling accessibility for those with limited technological abilities;
- e. Adopt NYSCEF, which is used effectively in the Supreme Court and other trial courts across the state. Until that system is in place, the Court should grant UCMS access to all attorneys in Family Court, including nonprofit legal services agencies representing low-income litigants. Court staff should be made available in person and remotely to help unrepresented litigants file documents;
- f. Modernize the Office for Court Administration (OCA) website to be more transparent, user-friendly and informative, providing information including advance notice regarding appointments and reassignment of judges, posting easily understandable basic court information in multiple languages, such as filings, court appearances, scheduling/deadlines, and related court requirements.

5. **Institute a system for tracking and investigating litigant complaints of bias and unfair treatment by judges, court personnel and the court system, and providing notice of outcomes of investigations.**
6. **Fund and develop programs to address vicarious trauma to recognize its impacts as a workplace hazard/issue among advocates, attorneys, and court personnel.**
7. **Institute coordinated community response for stakeholders, including law enforcement, courts, and domestic violence advocates.**

**V. Lack of administrative oversight of judges, uniform court rules, transparent mechanisms to report misconduct by judges and court staff, and a viable appellate mechanism for improper interim decisions**

The New York State Family Court system suffers from a lack of transparency and methods of oversight. There are few official protocols that are consistent across courts, and judges are afforded wide discretion in how they manage their courtrooms. For example, there is a lack of uniform procedural rules that specify the methods by which litigants introduce various forms of evidence in virtual and in-person proceedings. Nor are there rules that clarify when virtual proceedings are available, including proceedings by phone. This lack of accountability and consistency allows bias and other judicial mistreatment to go unchecked. Moreover, whether due to shortcomings in training, unfamiliarity with the family court system, error, or a failure to abide by a rule of judicial conduct,<sup>103</sup> including, but not limited to, a misapprehension of the role of the judge as a neutral arbiter, or making inappropriate or

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<sup>103</sup> See Part 100. JUDICIAL CONDUCT, RULES OF THE CHIEF ADMINISTRATIVE JUDGE, NEW YORK STATE UNIFIED COURTS, 22 N.Y.C.R.R. § 100, <https://ww2.nycourts.gov/rules/chiefadmin/100.shtml> [<https://perma.cc/DU6T-NDWX>] (provide guidance to judges and candidates for elective judicial office and provide a structure for regulating conduct through disciplinary agencies). The New York State Commission on Judicial Conduct is the independent state agency, established under New York State law, that will review a complaint, and, if a complaint proceeds to a final Determination, the Commission's actions can include dismissal of charges, issuance of a letter of caution, admonition, censure, or removal from office. See N.Y. State Comm'n on Jud. Conduct, <https://cjc.ny.gov/> [<https://perma.cc/CN22-JP3V>]. Notably, many of the individuals who preside in Family Court matters in New York State are not "judges" who are subject to the Commission's disciplinary system, including Support Magistrates and Referees. However, these individuals are employees of the Unified Court System and can be subject to disciplinary action through the supervising or administrative judge of the court in which they serve, and through the Inspector General of the Unified Court System.

humiliating statements towards a litigant,<sup>104</sup> panelists described the barriers that prevent litigants and attorneys from obtaining full relief through the court system.

As conference panelist Robert Tembeckjian, Administrator & Counsel, NYS Commission on Judicial Conduct, explained, when judges behave improperly, litigants or counsel can file a formal complaint with the New York State Commission on Judicial Conduct. If proven, the result can be a decision to admonish, censure, or remove the judge. This solution has multiple drawbacks. Often, attorneys are reluctant to report or invoke available disciplinary procedures, for fear of delaying or undermining claims within a particular case, or of retribution—either within the court system overall or by a particular judge. Also, this process does not apply to a judicial ruling within a case itself, such as where a judge’s application of the law threatens the health or safety of litigants or subject children. In those instances, even if such interim or final order was the result of an improper departure from application of the law that constituted misconduct or of bias or conflict of interest, that ruling still must be addressed by re-argument or appeal.

Moreover, with regard to judicial decisions, the current appellate process is insufficient for temporary orders, which are put in place by judges early on and can stay in place for years during the pendency of a case until a final result is reached. The challenge is that temporary orders are often issued with very little background information or in some instances, by coerced agreement of the parties. As discussed above, long delays in cases result in temporary orders remaining in place for years, thus becoming the status quo. The temporary order then becomes exceedingly difficult to undo, even at times in the face of evidence that it was inappropriate in the first place. Moreover, since a temporary order granting or denying custody is not a final order, it is not appealable as of right. The only recourse for litigants in this predicament is to obtain permission for an interim appeal, the process of which is strict, confusing, and not easily obtainable.

### **A. Key Recommendations for Selection, Training and Accountability of Judges and Court Personnel**

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<sup>104</sup> For example, a decision of the New York State Commission on Judicial Conduct removed a judge from office after finding that he or she violated the Rules Governing Judicial Conduct by failing to comply with the law when he did not inform several Family Court litigants of their right to an attorney, and also by making “inappropriate comments of a sexual nature while presiding over” a proceeding in a Treatment Court. *Matter of Abramson*, 2010 WL 4485946 (N.Y. Comm’n on Jud. Conduct).



Judges presiding over family law cases in the Family and Supreme Courts should be knowledgeable in family law and family procedure, and have an understanding of domestic violence, child abuse and related trauma. This should be the case both for judges assigned to family court on an interim basis and those taking the bench longer-term. The application process should require that applicants demonstrate an awareness of bias and facility with cultural sensitivity.

**1. Require annual, enhanced training on legal updates and related family law issues for judges presiding in Family Court:**

This training would address judges' misapplication of the law when presiding over custody/visitation cases. The process would also require annual training requirements on substantive law, family court procedure, understanding of domestic violence, child abuse and related trauma, as well as robust anti-bias training. Such training must include segments addressing:

- i. "parental alienation" as a commonly-raised defense when a litigant raises safety concerns, and the gendered aspects of how alienation allegations are considered;
- ii. coercive control and lethality factors, to move away from "incident-based" view of domestic violence;
- iii. the opportunities provided for under the law for a subject child's views and safety concerns to be heard directly by the Court, through an attorney for the child or directly to the Court through testimony or interviews *in camera*;
- iv. vicarious trauma and how it may impact counsel, court staff, and the judiciary itself;
- v. all judges should be trained in domestic violence, not only those in the Family Court.

**2. Establish Uniform Procedural Rules:**

There should be uniform procedural rules across parts, including for evidence/exhibits, virtual proceedings, and all other aspects of court procedure.

**3. Commission a Study:**

Examine long-term impact of Family Court experience/decisions on a diverse range of subject children, for presentation to judges and court personnel.

**4. Temporary/Interim Determinations:**

There should be transparency regarding the factors that a judge considers in making temporary/interim determinations and a process for interim appeal of such decisions.

**5. Broaden Access to Information about Available Disciplinary Tools for Judicial Misconduct:**

The court system should provide litigants and counsel with easily accessible information about when and how complaints can be made.

**VI. Insufficient Training of Judges and Court Personnel in Family Law, Domestic Violence and Trauma**

Conference panelists agree that enhanced training of judges and court personnel in family law, domestic violence and trauma is crucial to transforming the current family law systems. In topics ranging from bias to coercive control to custody law, panelists described experiences in which judges, court personnel, forensic evaluators, court-appointed attorneys and others have displayed a need for training in these areas. Therefore, training has been integrated in the key recommendations in every section of this report.

**CONCLUSION**

The New York family law system will continue to marginalize domestic violence survivors and their families unless a multi-faceted reform strategy is implemented to address the numerous barriers to justice. It is our hope that the broader domestic violence community will be successful in its efforts to advocate for meaningful reforms that will not only achieve equitable treatment of survivors, but also ensure the safety and protection for survivors and their children.

## **APPENDIX A: FAMILY LAW ROUNDTABLE AND CONFERENCE**

Jennifer Friedman, Senior Program Director, Family Law Project & Policy at Sanctuary for Families, launched this initiative and led the Conference alongside Jennifer Barry, Legal Volunteer, Sanctuary for Families' Legal Center. The work of the Conference flowed from a previously convened Family Law Roundtable led by Friedman and Barry, consisting of lawyers from the following organizations which provide legal services to domestic violence survivors and their families in New York City: Sanctuary for Families, New York Legal Assistance Group, Her Justice, Safe Horizon, and Proskauer Rose LLP, a law firm which provided pro bono support to the Roundtable. The vast majority of clients served by these organizations are low-income or indigent women of color residing in New York City, and a significant proportion are immigrants. Maya Grosz, an independent consultant, facilitator and former family law practitioner and legal educator (who is now the Director of Training at NYLAG), facilitated the Roundtable meetings.

The law firms of Proskauer Rose LLP and Gibson, Dunn & Crutcher LLP hosted the Conference. Pro bono support in the preparation of this Report was provided by Proskauer Rose LLP and Simpson Thacher & Bartlett LLP.

### **I. Roundtable Participants:**

- A. Shani Adess, Vice President, NYLAG
- B. Jennifer Barry, Legal Volunteer, Sanctuary for Families
- C. Rachel Braunstein, Director, Policy, Her Justice
- D. Anna Maria Diamanti, Director, Family and Matrimonial Practice, Her Justice
- E. Jennifer C. Friedman, Senior Program Director, Family Law Project & Policy, Sanctuary for Families
- F. Karla George, Associate Program Director, Family Law Project, Sanctuary for Families
- G. Maya Grosz, Director of Training, NYLAG
- H. Barbra Kryszko, Senior Program Director, Family Law Project, Sanctuary for Families

I. Christine Perumal, Former Director, Safe Horizon Domestic Violence Project, Safe Horizon

J. William C. Silverman, Partner and Head of Pro Bono, Proskauer Rose LLP, and Chair, The Fund for Modern Courts

K. Lisa Vara, Director, Matrimonial and Economic Justice Project and Cynthia B. Rubin Matrimonial Fellow, Sanctuary for Families

## **II. Conference Co-Sponsors:**

A. Bronx Women's Bar Association

B. Day One

C. Empire Justice Center

D. Lawyers Committee Against Domestic Violence

E. Legal Services NYC

F. New York State Coalition Against Domestic Violence

G. Pace Women's Justice Center

H. The Legal Aid Society, Civil

I. Urban Justice Center

## **III. Conference Agenda**

### **A. DAY 1:**

#### **Welcoming Remarks**

- William C. Silverman, Partner and Head of Pro Bono at Proskauer Rose LLP, and Chair of The Fund for Modern Courts
- Jennifer C. Friedman, Senior Program Director, Family Law Project & Policy, Sanctuary for Families

#### **Keynote Panel 1: Addressing Inequity and Injustice in the Family Law System**

Moderator:

- The Hon. Judy Harris Kluger, Executive Director, Sanctuary for Families

Speakers:

- Hon. Troy K. Webber, Associate Justice, New York Supreme Court Appellate Division First Judicial Department
- The Hon. Betty Weinberg Ellerin, Chair, New York State Judicial Committee on Women in the Courts

**Keynote Panel 2: How Bias Manifests in New York State's Family Law System**

Moderator:

- Hamra Ahmad, Director of Law and Policy, Her Justice

Speakers:

- Shain Filcher, Executive Director, LGBT Bar Association & Foundation of New York ("LeGaL")
- Jacqueline Franchetti, Executive Director & Kyra's Mom, Kyra's Champions
- Linda Lopez, Deputy Director, CBWLS, Sanctuary for Families
- Dr. Carolyn M. Springer, Associate Professor, Gordon F. Derner School of Psychology, Adelphi University

**Lunchtime Keynote**

Introduction:

- Dorchen Leidholdt, Director, CBWLS, Sanctuary for Families

Speaker:

- Stephanie McGraw, Founder CEO, W.A.R.M. (We All Really Matter)

**Aligning the Law with Today's Conceptions of Domestic Violence: Coercive Control, Lethality, and Femicide**

Moderator:

- Jennifer C. Friedman, Senior Program Director, Family Law Project & Policy, Sanctuary for Families

Speakers:

- Paula Cohen, Senior Attorney, Supporting Families Workgroup, Legal Aid Foundation of Los Angeles (LAFLA)

- Anna Maria Diamanti, Director of the Family and Matrimonial Practice, Her Justice
- Dr. Chitra Raghavan, Professor of Psychology and Director of The Forensic Mental Health Counseling Program, John Jay College
- Tanya Selvaratnam, Writer and Emmy-Nominated Producer

### **Fixing What's Broken: Reforming the System**

#### Moderator:

- William C. Silverman, Partner and Head of Pro Bono at Proskauer Rose LLP, and Chair of The Fund for Modern Courts

#### Speakers:

- Karla S. George, Deputy Director, Bronx Family Law Project, Sanctuary for Families
- Denise Kronstadt, Deputy Executive Director/Director of Advocacy and Policy, The Fund for Modern Courts
- Christine Perumal, Former Director, Safe Horizon Domestic Violence Project
- Joan Gerhardt, Director, Public Policy and Advocacy, NYSCADV

### **B. DAY 2:**

#### **Welcoming Remarks:**

- Mylan Dennerstein, Partner, Gibson Dunn

### **Protecting the Child: Focus on Intimate Partner Violence and Custody Law**

#### Moderator:

- Angela Yeboah, Advocacy Services Program Manager, Fairfax County Division for Domestic and Sexual Violence Services (DSVS)

#### Speakers:

- Kara Bellew, Partner, Rower LLC
- Ally Cable, Founder, Center for Judicial Excellence (CJE) Youth Speak
- The Hon. Anne-Marie Jolly, Administrative Judge, New York City Family Court
- Joan Meier, National Family Violence Law Center Professor of Law, George Washington University Law School
- Michael Scherz, Director, Domestic Violence Project, Lawyers for Children

**Spotlight on Justice Initiatives:**

- The Hon. Edwina Mendelson, Deputy Chief Administrative Judge for Justice Initiatives, NYS Office of Court Administration

**Promoting Equity from the Bench: Judicial Selection, Oversight and Training**

## Moderator:

- Hon. Shahabuddeen A. Ally, Supervising Judge/Acting Justice of Supreme Court, New York County Civil Court

## Speakers:

- The Hon. Juanita Bing Newton, Retired Judge, New York Court of Claims
- Savina P. Playter, President, Bronx Women's Bar Association
- Robert H. Tembeckjian, Administrator & Counsel, NYS Commission on Judicial Conduct
- The Hon. Tamra Walker, Family Court Judge

**Self-Care as Self-Preservation: Understanding Vicarious Trauma & Enhancing Support for Providers**

## Moderator:

- Lisa Alexander, Former Supervising Attorney, Day One

## Speakers:

- Hawthorne Emery Smith, Director, Bellevue Program for Survivors of Torture
- Victoria Goodlof, Senior Staff Attorney, NYLAG, Coordinating Attorney, Community Outreach and Clinics\*
- Dorcas Miller, Senior Trainer, Safe Horizon
- Josie Torielli, LCSW

**Advocacy Planning**

## Moderator:

- Maya Grosz, Director of Training, NYLAG

## Speakers:

- Shani Adess, Vice President, NYLAG
- Hamra Ahmad, Director of Law and Policy, Her Justice
- Anna Maria Diamanti, Director of the Family and Matrimonial Practice, Her Justice

- Jennifer C. Friedman, Senior Program Director, Family Law Project & Policy, Sanctuary for Families
- Karla S. George, Deputy Director, Bronx Family Law Project, Sanctuary for Families
- Christine Perumal, Former Director, Safe Horizon Domestic Violence Project
- Lisa Vara, Director, Matrimonial and Economic Justice Project and Cynthia B. Rubin Matrimonial Fellow for Sanctuary for Families