IN THE

District of Columbia Court of Appeals

Nos. 06-FM-165 & 06-FM-1609

PEGGY FAIRCHILD,

Appellant,

v.

NICHOLAS CARSON,

Appellee.

On Appeal from the
Superior Court of the District of Columbia,
Family Division

BRIEF FOR APPELLANT PEGGY FAIRCHILD

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CERTIFICATE REQUIRED BY RULE 28(a)(2)
OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned, counsel of record for Appellant Peggy Fairchild, certifies that the following listed parties and counsel appeared below:

Party	Counsel
Peggy Fairchild	Christine Thomas, Legal Aid Society
Nicholas Carson	Curt S. Hansen, Hansen & Christ

John P. Darling, then of Pillsbury Winthrop LLP and now of Nixon and Vanderhye PC, participated in the proceedings as guardian ad litem.

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Jessica L. Ellsworth
Attorney for Appellant Peggy Fairchild

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STATEMENT OF THE ISSUES

1. Whether the trial court, in awarding the father sole legal and physical custody of the parties' children, erred in failing to weigh against the father his commission of intrafamily offenses against the mother.

2. Whether the trial court erred in failing to consider two statutory factors relevant to the custody determination—namely, the mother's more extensive prior involvement in the children's lives and the children's preference to live with her.

3. Whether the trial court erred in concluding that the mother did not make decisions in her children's best interest, such as when she chose to flee the District of Columbia with the children to escape domestic abuse.

4. Whether the trial court erred in disregarding the guardian ad litem's recommendation that the mother be granted sole custody of the children.

5. Whether the trial court erred in denying the motion of the mother, who had been granted in forma pauperis status, for free transcripts necessary to pursue this appeal.

STATEMENT OF THE CASE

This appeal arises out of a child custody case brought by appellee Nicholas Carson, the father, against appellant Peggy Fairchild, the mother. Within months after finding that Mr. Carson had committed two intrafamily offenses against Ms. Fairchild involving physical violence, the trial court (Byrd, J.) awarded him sole legal and physical custody of the couple's children. In so doing, the court failed to consider the intrafamily offenses and other factors that District of Columbia law deems relevant to determining children's best interests with respect to custody. The court also disregarded the recommendation of the guardian ad litem that custody be awarded to Ms. Fairchild. When Ms. Fairchild, who had been granted in forma pauperis status, then filed a motion for transcripts to pursue this appeal, the court denied the motion.

1. The Parties: Ms. Fairchild and Mr. Carson are the parents of two sons: Nicolas John Carson, who was 10 years old at the time of trial, and River Brandon Carson, who was 7 years old. A 18. Ms. Fairchild and Mr. Carson, who were never married, lived together in a house owned by Mr. Carson from November 1994, shortly before Nicolas's birth, until August 2004. A 21. During most of that period, Mr. Carson was the primary breadwinner, while Ms. Fairchild was the primary homemaker and caregiver to the children. A 21.

2. Prior Proceedings Involving The Parties: On August 16, 2004, Ms. Fairchild filed a petition for a civil protection order (CPO) against Mr. Carson, which alleged that he had committed acts of domestic violence against her on three occasions. She was granted a

temporary protection order (TPO) that required him to stay 100 feet away from her, her home, and the home of a friend where she was then staying. The TPO also granted Ms. Fairchild sole temporary custody of the children, with no visitation rights for Mr. Carson. Although a hearing on the CPO was scheduled for August 27, 2004, neither Ms. Fairchild nor Mr. Carson appeared for the hearing. See A 19; TPO, Fairchild v. Carson, IF No. 2467-04; Petition and Affidavit for CPO, Fairchild v. Carson, IF No. 2467-04.

Shortly after obtaining the TPO, Ms. Fairchild fled with the children to her family's home in Wisconsin, where they remained until January 2005. A 23. She did not inform Mr. Carson of their whereabouts during this period, although he was able to communicate with the children occasionally by e-mail and telephone. A 23, 301, 306.

On January 6, 2005, District of Columbia authorities obtained an arrest warrant against Ms. Fairchild for felony parental kidnapping, which led to the discovery of Ms. Fairchild and the children in Wisconsin. The trial court then granted Mr. Carson sole temporary custody of the children at an ex parte emergency hearing. A 21. Although Ms. Fairchild was charged with parental kidnapping, a nolle prosequi was entered on April 14, 2005. A 24 (citing District of Columbia v. Fairchild, No. D-193-05).

On May 18, 2005, the trial court conducted an evidentiary hearing on Ms. Fairchild's reinstated CPO petition. After receiving testimony from both parties and photographs of Ms. Fairchild taken after one of the occasions at issue, the court found that Mr. Carson had committed two intrafamily offenses. The court found that, on June 15, 2004, Mr. Carson dragged Ms. Fairchild down a hallway and punched her with his closed fist in the head and arm, causing swelling, bruises, and a black eye. The court also found that, on August 16, 2004, Mr. Carson slapped Ms. Fairchild in the face and yelled at her for more than an hour. A 3-4, 196-

199; see also CPO (signed May 27, 2005).

Ms. Fairchild testified that the children were in the home during both of those incidents. With respect to the June 2004 incident, she stated that the children were awakened by the assault and that, after Mr. Carson left, "they both opened the bedroom doors and came out with scared looks on their faces and tears in their eyes." A 85. As for the August 2004 incident, she stated that the older son, Nicolas, twice came from his bedroom into the hallway where the confrontation was occurring to urge his father to go back to sleep. A 86-87.

3. The Custody Trial. The same trial judge presided over the custody case. He took testimony from the parties and six witnesses on October 5 and 6, 2005, and reconvened on November 17, 2005, to hear from the guardian ad litem (GAL). The court also took judicial notice of the proceedings in the CPO case. A 305.

Certain matters were undisputed. The parties and their witnesses agreed that Nicolas and River are bright, engaging children who appear to love both parents. A 258-261, 329-330, 341-342, 362-367, 373; 444, 498. The parties agreed that Ms. Fairchild had been the children's primary caretaker for most of their lives, while Mr. Carson had been the primary breadwinner. A 250, 264, 290-291, 296, 371-372. They also agreed that joint custody was not a workable option. A 28, 279, 447-448, 540.

Several areas of past dispute between the parties with regard to parenting were identified at trial. One was the decision to educate the children at home—a decision in which the parties had initially concurred. A 250-251. Ms. Fairchild testified that she had visited several schools when Nicolas was of kindergarten age, that he had been admitted to a private school that Mr. Carson refused to pay for, and that she was not satisfied with the local public school (Key Elementary) because the classroom in which the child would have been placed was "chaotic" and

the school did not offer any acceptable plan for dealing with a dairy allergy that sometimes caused him to lose bowel control. A 398-399. Ms. Fairchild, who had taken education courses in college, thus opted for home schooling, which included participating in a network of families that engaged in joint educational and enrichment activities. A 400, 471-472. Mr. Carson testified that he came to conclude that home schooling was not academically rigorous enough for the children. A 249-253, 279, 295. Once he obtained temporary custody, he enrolled the children in public school. A 244.[1]

Mr. Carson's principal complaint with Ms. Fairchild was her flight with the children to Wisconsin, see A 275, 516-517, while Ms. Fairchild's principal complaint with Mr. Carson was his abusive behavior that precipitated the flight, see A 528. The court did not, however, allow Ms. Fairchild to present evidence of incidents of abuse beyond that offered at the CPO hearing. See A 29 n.5, 31, 393.

4. The GAL's Report And Testimony. The report of John P. Darling, the GAL, concluded that the children's best interest would be served by awarding sole custody to Ms. Fairchild. A 8. In conducting his analysis, the GAL considered the factors enumerated in D.C. Code 16-914(a)(3), and indicated whether each factor favored Ms. Fairchild, Mr. Carson, or neither party. The GAL explained, however, that his ultimate conclusion was not the product of "a simple score keeping exercise, with one party having more factors in their favor than the other," observing that "[s]ome factors are clearly more important than others" and that "a balancing" is required. A 17. The factors that appeared to figure most prominently in the GAL's

[1] Other areas of past dispute identified by the parties concerned whether Mr. Carson adequately provided for the family financially, see A 406-407; whether Ms. Fairchild should have completed Nicolas's toilet training or River's weaning more expeditiously, see A 277-279; and whether Ms. Fairchild included Mr. Carson in decisions and activities involving the children, see A 274, 279.

recommendation were the children's preference to live with Ms. Fairchild (A 9), the children's "clearly closer and more comfortable" relationship with her (A 10), and her more extensive prior involvement in their lives (A 14). The GAL also noted that the statutory factor involving evidence of intrafamily offenses "clearly weighs in favor of Ms. Fairchild" because "a CPO was entered against Mr. Carson in May, 2005." A 13.

At the November 2005 hearing, the GAL testified, based on his discussions with the children, that they enjoyed spending time with both parents, but wanted to live primarily with Ms. Fairchild. A 574-575. The GAL observed that the children seemed to prefer Ms. Fairchild's "less structured" parenting style, to which they had been accustomed for most of their lives. A 574-575, 625. The GAL explained that, if the custody determination were to be based only on whether the children would benefit more from Mr. Carson's choice of public schooling than from Ms. Fairchild's choice of home schooling, his conclusion might be different; but the GAL concluded that, when all of the statutory factors were taken into account, the children's best interests would be served by granting custody to Ms. Fairchild. A 594-595.[2]

5. The Custody Order. On December 21, 2005, the trial court issued its decision awarding Mr. Carson sole legal and physical custody of the children, with visitation for Ms. Fairchild. A 18 (Order for Custody of Two Minor Children [hereinafter, Custody Order]). As an initial matter, the court recognized that, because Mr. Carson had been found to have committed intrafamily offenses, "the presumption that joint custody is in the best interest of the children is vitiated," and that neither party was seeking joint custody. A 28. The court then turned to which parent should be awarded sole custody of the children.

With respect to Mr. Carson, the court stated that, "[s]ince January 2005, [he] has been an

[2] Like Ms. Fairchild in her earlier testimony (A 397), the GAL noted that granting her custody would not necessarily mean a return to home schooling. A 572.

exemplary parent, consistently making decisions with the best interest of the minor children in mind." A 28. The court did not specifically identify what those "decisions" were, although the court had previously made reference to Mr. Carson's decisions to place the children in public school and to cut back on his working hours. A 26.

With respect to Ms. Fairchild, the court stated that "the evidence strongly suggests that [she] did not have in mind the best interest of the minor children when she made decisions." A 29. As examples, the court identified Ms. Fairchild's decision to leave the District with the children in August 2004, shortly after Mr. Carson's second intrafamily offense, and her decision to continue home schooling the children against his wishes. A 29-30.

In a footnote, the court expressed "disagree[ment]" with the GAL's recommendation that custody be awarded to Ms. Fairchild. A 29 n.4. The court criticized the GAL's methodology as "simplistic," purportedly because it treated all of the statutory factors bearing on a child's best interest as "of equal importance," and criticized the GAL's findings on six of those factors as "incredulous [sic]." A 29 n.4.

6. The Denial Of Appeal Transcripts. After she filed a Notice of Appeal from the Custody Order, Ms. Fairchild, though counsel, filed a Motion for Appeal Transcript on the form provided by the Superior Court. A 33. She requested the transcripts from October 5 and 6, and November 17, 2005, having previously obtained the transcript of the May 18, 2005, hearing on her request for a CPO. Although the form did not indicate any need to do so, she appended a short memorandum explaining that she was appealing the outcome of a three-day custody trial and that the Custody Order on appeal affected her fundamental rights as a parent, citing In re T.L., 859 A.2d 1087, 1091 (D.C. 2004). A 34-35.

After learning that the initial motion never reached the Appeals Coordinator's Office, Ms. Fairchild filed a renewed motion, which was forwarded to the judge who presided over the custody and CPO trials. A 38. He denied the motion on the basis that Ms. Fairchild had not met her burden of "convincing" him that there was any "substantial" question for appeal. A 47-48 (citing Hancock v. Mutual of Omaha Ins. Co., 472 A.2d 867 (D.C. 1984)).

Ms. Fairchild moved for reconsideration. A 49. She identified several issues that she intended to raise on appeal: (1) Whether the court erred in not applying a statutory presumption against granting custody to the perpetrator of intrafamily offenses; (2) Whether the court erred in ruling that Ms. Fairchild did not act in the children's best interests when she fled with them to Wisconsin; (3) Whether the court erred in disregarding the GAL's recommendation that custody be granted to Ms. Fairchild; and (4) Whether the court erred in giving undue weight to Mr. Carson's role as primary caretaker during the pendency of the case and ignoring Ms. Fairchild's role as primary caretaker during the remainder of their lives. A 53-56.

The court denied the motion on the ground that each of the issues that Ms. Fairchild sought to raise on appeal was "frivolous." A 59-65.

SUMMARY OF THE ARGUMENT

A trial court does not have unfettered discretion in deciding disputes between parents over custody of their child. Rather, a court's discretion is constrained by the custody statute, in which the Council identified factors that courts "shall consider" in determining which custody arrangement would be in the child's best interest and required courts to weigh a parent's commission of intrafamily offenses against him in that determination. A court's discretion is also constrained by a standard of review that requires that even discretionary choices be the product of reasoned decisionmaking based on a firm factual foundation. Here, the Custody

Order does not reflect any consideration of three factors that the Council has specifically identified as relevant to a child's best interest; does not comply with the Council's directive to weigh against a parent his commission of intrafamily offenses; does not reflect sound reasoning as to why Ms. Fairchild should be faulted for fleeing with the children to escape Mr. Carson's abuse or for adhering to a schooling choice made jointly while the parties lived together; does not provide any coherent explanation for disregarding the guardian ad litem's recommendation that custody be given to Ms. Fairchild; and does not even accurately find the facts on which the award purportedly rests. The Custody Order should not, therefore, be allowed to stand.

First, although the trial court previously found that Mr. Carson had committed two intrafamily offenses against Ms. Fairchild, the court essentially ignored those offenses in its Custody Order. The court did not address the intrafamily offenses in its analysis of the children's best interests, even though it was required to do so by Section 16-914(a)(3)(F) of the D.C. Code. Nor did the court adhere to the requirements of Section 16-914(a-1), which has the effect of creating a rebuttable presumption against giving custody or visitation to a parent who has abused the other parent. Under that provision, the court was required to make specific findings justifying an award of custody or visitation to Mr. Carson, as well as to impose on him the burden of proving that even visitation would not be physically or emotionally harmful to the children. The court relied on the intrafamily offenses only as eliminating the custody statute's presumption of joint custody, which the court erroneously viewed as leaving it equally free to award sole custody to the abusive father as to the abused mother.

Second, the trial court failed to address two other factors that the Council has identified as relevant to determining a child's best interest as to custody: the children's desire to live with Ms. Fairchild, as expressed to the GAL, and Ms. Fairchild's more extensive prior role in the

children's lives. With respect to the first of those factors, this Court has recognized that even very young children are capable of expressing a preference about custody, so the court had no reason to ignore the children's preference here. With respect to the second factor, the parties did not dispute that Ms. Fairchild was the children's primary caregiver during most of their lives, and the court was not entitled to focus only on Mr. Carson's assumption of that role in the months preceding the trial under a temporary custody order.

Third, the trial court's attempt to justify its conclusion that Ms. Fairchild had not acted in the children's best interests does not withstand scrutiny. The court faulted her for fleeing with the children from the District to avoid further abuse, suggesting that she was unreasonable to fear that a man who had assaulted her twice within the preceding two months would assault her again. In such circumstances, however, a woman acts in the best interests of herself and her children by moving them a distance away from a violent partner, such as to the home of a family member who can provide financial and emotional support while she gets her life in order. The court had no basis on the record of this case or in common tragic experience to assume that Mr. Carson, if made aware of Ms. Fairchild's whereabouts, would not have pursued her in order to resume his pattern of abuse. Nor was the court warranted in faulting Ms. Fairchild for the choice to home school the children, given that Mr. Carson initially concurred in that choice and at least passively accepted it so long as the family lived together.

Fourth, the trial court further erred in disregarding, without any sound reason, the GAL's recommendation that custody be granted to Ms. Fairchild. While the court criticized the GAL's methodology as supposedly giving all of the "best interest" factors equal weight, the GAL expressly stated that he did not do so, and nothing in his report or testimony suggests otherwise. And, while the court labeled as "incredulous [sic]" the GAL's allocations of certain of those

factors to one party or to neither, the court made no attempt to defend its characterization, and the GAL's allocations are reasonable on their face.

The trial court subsequently erred in denying appeal transcripts to Ms. Fairchild, who had been granted in forma pauperis status in the underlying case. The Supreme Court has recognized that transcripts should be available to indigent appellants in cases involving fundamental rights, and this Court has required indigent appellants in all civil cases to identify nothing more than a single colorable issue to obtain transcripts at no cost. Ms. Fairchild amply satisfied that requirement here.

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING SOLE CUSTODY TO THE FATHER WITHOUT WEIGHING HIS TWO INTRAFAMILY OFFENSES AGAINST HIM

District of Columbia law requires a court to exercise particular caution in granting custody or visitation to a parent who has committed an intrafamily offense. The custody statute requires a court to consider "evidence of an intrafamily offense" in determining which custody arrangement would be in a child's best interest. D.C. Code 16-914(a)(3)(F). The statute further requires the court to make specific written findings to justify any grant of custody or visitation to a parent who has committed an intrafamily offense, and places on that parent the burden of proving that even "visitation will not endanger the child or significantly impair the child's emotional development." D.C. Code 16-914(a-1). Those provisions effectively create a rebuttable presumption against an award of sole custody to an abuser, just as the later-enacted Section 16-914(a)(2) expressly creates a rebuttable presumption against an award of joint custody to an abuser.

The trial court disregarded those provisions in this case. Only months before issuing the Custody Order, the same judge found that Mr. Carson had committed two intrafamily offenses

against Ms. Fairchild and, accordingly, issued a CPO that required Mr. Carson to stay away from Ms. Fairchild and her home. Yet, although the proceedings in the CPO case were made a part of the record in this case and the Custody Order acknowledges the outcome of those proceedings (see A 20-21, 83), the judge essentially ignored his own findings of intrafamily offenses in awarding sole custody to Mr. Carson. That was error.

A. The D.C. Council, recognizing the harm to a child of exposure to a parent who has engaged in domestic violence, has imposed significant obstacles to awarding custody or visitation to such a parent

The District of Columbia Council has included several provisions in the custody statute to constrain a court's discretion to award custody or visitation to a parent who has committed an intrafamily offense against the other parent. Those provisions reflect the Council's awareness that exposure to the abusive parent may threaten the child's physical and emotional well-being.

1. In the Evidence of Intrafamily Offenses in Child Custody Act of 1994, D.C. Law 10-154 [the 1994 Act], the Council added "evidence of an intrafamily offense as defined in [D.C. Code] 16-1001(5)" to the list of statutory factors that "the court shall consider" in determining a child's best interest with regard to custody. D.C. Code 16-914(a)(3) (emphasis added).[3] As a result of that addition, a court's failure expressly to weigh the intrafamily offense in making a custody award constitutes reversible error. See Dumas v. Woods, 914 A.2d 676, 679 (D.C. 2007) ("A failure by the trial court to make findings as to each of the relevant factors [in Section 16-914(a)(3)] requires remand."); Ysla v. Lopez, 684 A.2d 775, 781 (D.C. 1996) (remanding a custody order that merely listed certain of the Section 16-914(a)(3) factors without "show[ing] why the trial court resolved in the way it did the considerable tensions which the findings of fact

[3] Section 16-1001(5) defines an intrafamily offense as "an act punishable as a criminal offense committed by an offender upon" various categories of persons, including a person "[t]o whom the offender is related by blood, legal custody, marriage, domestic partnership, having a child in common, or with whom the offender shares or has shared a mutual residence."

show existed among those factors"); see also Young-Jones v. Bell, 905 A.2d 275, 277-278 (D.C. 2006) (remanding because the court had not adequately addressed the statutory criteria for division of marital property); Burwell v. Burwell, 700 A.2d 219, 224 (D.C. 1997) (same).[4]

But that is not all that the Council did in the 1994 Act to seek to assure that courts would exercise great caution before awarding custody or visitation to a parent who abused the other parent. The Council also went on to require that:

> [I]f the judicial officer finds by a preponderance of the evidence that a contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination.

D.C. Code 16-914(a-1). In the same provision, the Council directed that, when an intrafamily offense has occurred, the court "shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party," and placed on the perpetrator of the intrafamily offense "the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development." Id.

Section 16-914(a-1) thus has the effect of erecting a rebuttable presumption against granting custody or visitation to a parent who has committed an intrafamily offense. It does so both by placing a burden on the abuser of proving that a grant of visitation, much less custody, would not be physically or emotionally harmful to the child and by placing a burden on the court to justify in writing any grant of custody or visitation to the abuser. Although the sentence imposing the burden of proof on the abuser refers expressly only to "visitation" and not also to

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[4] The trial judge in this case was also the trial judge in Dumas, 914 A.2d at 679 (vacating and remanding an order granting the father sole custody of the child notwithstanding the parties' agreement to share custody and the home study recommendation that the mother retain physical custody), and Young-Jones, 905 A.2d at 278 (vacating and remanding an order ruling that the homemaker wife, who had been the target of the husband's domestic violence, was entitled to only 10% of the proceeds from the sale of real property acquired during the marriage).

"custody," the Council surely intended the burden to apply to full custody as well as occasional custody (i.e., visitation), for any risk to the child could be expected to increase along with the amount of time spent with the abuser. See Report of the Committee on the Judiciary, Bill 10-7, the "Evidence of Intrafamily Offenses in Child Custody Act of 1994" [hereinafter, Judiciary Report on 1994 Act], at 8 (April 27, 1994) (noting that Section 16-914(a-1) was intended to "apply to all proceedings in which custody or visitation is at issue").

2. The legislative history of the 1994 Act confirms the Council's intent that parents' commission of intrafamily offenses weigh heavily against them with regard to custody or visitation. In its report on the Act, the Judiciary Committee identified the risks to a child of living in a household where domestic abuse occurs, whether or not the child has been a target of the abuse:

> Research reveals that children exposed to spouse abuse often suffer emotional and physical harm. Research findings also indicate that even where these children do not directly witness the abuse, their knowledge of domestic violence can lead them to experience shock, fear, guilt, impairment of self-esteem and impairment of developmental and socialization skills.

Judiciary Report on 1994 Act, at 3.[5]

The Judiciary Committee explained that, while existing law was broad enough to allow a

[5] Other legislatures, courts, and authoritative bodies have also recognized the many ways that children are harmed by exposure to domestic violence. See, e.g., Act of May 21, 1996, ch. 85, 1996 N.Y. Laws 273, 273-274 ("The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children even when the children have not been physically abused themselves or witnessed the violence."); Brainard v. Brainard, 523 N.W.2d 611, 614-615 (Iowa Ct. App. 1994) (noting, in affirming a sole custody award to an abused mother, expert testimony that "[c]hildren raised in homes touched by domestic abuse are often left with deep scars, revealed in the form of increased anxiety, insecurity, and a greater likelihood for later problems in interpersonal relationships"); American Law Institute, Principles of the Law of Family Dissolution § 2.11, Reporter's Notes (3) (2002) ("The effect of domestic violence between parents on a child's mental and physical health has been the subject of increasing study and legislative concern. Several experts note the concurrence of parental and child abuse. In addition, there is general agreement that children are harmed by witnessing the abuse of their parent.").

court to consider a parent's intrafamily offense in a custody case, the new law would require a court to do so. The Committee noted the new law would respond to concerns expressed in the 1992 Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts that domestic violence was not being given appropriate consideration in custody decisions. See Judiciary Report on 1994 Act, at 3-4. Under the new law, a court no longer could, for example, "determine that an intrafamily offense has occurred, but find that there is insufficient proof that said domestic violence is detrimental to the children involved." Id. at 8; see id. at 4 (describing the provision as "explicitly recogniz[ing] domestic violence as relevant in all child custody disputes"). In effect, the court would have to presume that the intrafamily offense was harmful to the child.[6]

The Judiciary Committee's reference to a recent Concurrent Resolution of Congress, which urged states to adopt "a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse," provides further indication that the 1994 Act was intended to operate as such a presumption. See Judiciary Report on 1994 Act, at 3 (quoting H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5182 (1990)). The Committee also noted that eight states had by that time enacted presumptions against awarding custody to a parent who abused the other parent. Id.[7]

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[6] In a case that arose before the effective date of the 1994 Act, this Court recognized that trial judges even then could not close their eyes to domestic violence in awarding custody. In Prost v. Greene, 652 A.2d 621, 632 (D.C. 1995), the Court remanded an award of custody to the father so that the judge could give "more careful consideration" to alleged domestic abuse and "its relevance to issues central to the decision of who should be entrusted with the primary care of the[] children." In so doing, the Court explained that "the relevance of violence between spouses to the issue of fitness to assume custody is well-recognized," because "[e]vidence of such assaults reflects upon the character and emotional control" of the abuser. Id. at 631.

[7] In 1994, the National Council of Juvenile and Family Court Judges promulgated the Model Code on Domestic and Family Violence, which contains "a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody,

3. Two years later, the Council enacted the Joint Custody of Children Act of 1996, D.C. Law 11-112 [the 1996 Act], which again touched on issues of custody and domestic violence. In that Act, the Council established "a rebuttable presumption that joint custody is in the best interest of the child or children," which applies to all cases except those in which a court has found "an intrafamily offense," "child abuse," "child neglect," or "parental kidnapping." D.C. Code 16-914(a)(2). For those categories of cases, the Council provided "a rebuttable presumption that joint custody is not in the best interest of the child or children." Id.[8]

The 1996 Act did not itself instruct courts how to proceed once the joint custody presumption is rendered inapplicable because of an intrafamily offense, child abuse, child neglect, or parental kidnapping. But there is no reason to suppose that the Council intended in such circumstances that both parents would be considered equally suitable candidates for sole custody. After all, the Council was legislating against the backdrop of Section 16-914(a-1), which already required courts to weigh the commission of an intrafamily offense against a parent, both by requiring courts to justify in writing any award of custody or visitation to an abuser and by requiring an abuser to prove that the award would not be physically or emotionally detrimental to the child.

Moreover, in creating an exception to Section 16-914(a)(2)'s general presumption that

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joint legal custody, or joint physical custody with the perpetrator of family violence." National Council of Juv. & Fam. Ct. Judges, Model Code on Dom. & Fam. Violence § 401 (1996). Other authorities have also proposed such a presumption. See American Law Institute, Principles of the Law of Family Dissolution § 2.11(3) (providing that a parent who has engaged in domestic violence "should have the burden of proving that an allocation of custodial responsibility or decisionmaking responsibility to that parent will not endanger the child, other parent, or other household member"); American Bar Association Center on Children and the Law, The Impact of Domestic Violence on Children 13 (1994) (proposing a presumption against granting custody or visitation to a parent who engaged in severe or repeated abuse of the other parent).

[8] Although Ms. Fairchild was charged with parental kidnapping in connection with her August 2004 flight to Wisconsin, the charge was later dropped. The court did not make any finding in this case that she had committed parental kidnapping. See A 24, 31.

joint custody is in children's best interest, the Council was surely acting, at least in part, to protect children from intrafamily offenses, child abuse, child neglect, and parental kidnapping. See Margaret Martin Barry, The District of Columbia's Joint Custody Presumption [Barry], 46 Cath. U. L. Rev. 767, 798 (1997) (describing the inclusion of intrafamily offenses in Section 16-914(a)(2) as "consistent with the District's legislative strides to protect survivors of domestic violence and their children"). The Council would not have intended, for example, that a parent who abused or neglected the child, although not a suitable candidate for joint custody by virtue of Section 16-914(a)(2), would be considered as suitable a candidate for sole custody as the parent who did not commit abuse or neglect. Such a reading of Section 16-914(a)(2) would authorize a result that, by vesting sole custody in the abusive or neglectful parent, would put the child at even greater risk than would joint custody. That result would be absurd. See, e.g., George v. Dade, 769 A.2d 760, 762-763 (D.C. 2001) (noting that statutes are to be construed to avoid "absurd or plainly unjust results").

It would be equally incorrect to read Section 16-914(a)(2) as expressing neutrality in an award of sole custody as between the perpetrator of an intrafamily offense and the target of that offense. "A presumption against joint custody to an abuser is based not only on the notion that post-separation contact is dangerous, but also on the premise that a batterer is unfit for any type of custody." Developments in the Law—Battered Women and Child Custody Decisionmaking, 106 Harv. L. Rev. 1597, 1618 n.118 (1993). Moreover, an abused parent could be deterred from seeking protection through the judicial system if, by doing so, she could open the door to an award of sole custody to the abuser, thereby reducing the abused parent to a distinctly subordinate position in the child's life and possibly leaving the child as the new target for abuse. An abused parent might opt to remain silent about the intrafamily offenses, despite the personal

risk, so as to assure her continued access to the child through the presumption of joint custody.[9]

Accordingly, Section 16-914(a)(2) should be understood as confirming the presumption (albeit a rebuttable one) against granting any sort of custody to a parent who has been found to have committed an intrafamily offense.

B. The court failed to perform its duty under District law to weigh the father's intrafamily offense against him in determining which custody arrangement was in the children's best interests

Although the trial court noted its own earlier findings that Mr. Carson had committed two intrafamily offenses against Ms. Fairchild (see A 20-21), the court failed to engage in the inquiry required by the District's custody statute whenever a parent has been found to have committed an intrafamily offense. The court's disregard of its statutory obligations to treat domestic violence seriously requires reversal.

Contrary to the mandate of Section 16-914(a)(3) that courts "shall consider" a parent's commission of an intrafamily offense as a "relevant factor" in determining a child's best interest with regard to custody, the court engaged in no such consideration here. A court's failure to address any applicable factor identified in Section 16-914(a)(3) constitutes reversible error. See pp. 12-13, supra (citing cases). The findings and evidence in the parties' CPO trial before the same judge a few months earlier should have raised particular concern about the children's well-

[9] An earlier version of the legislation that became the 1996 Act would have expressly provided "a rebuttable presumption that it is not in the best interest of the child to be placed in sole or joint custody with a parent who has committed an intrafamily offense." Judiciary Report on Bill 11-26, at 16. During the Judiciary Committee's consideration of the measure, Councilmember Brazil offered the substitute language that appears in the final version for seemingly technical reasons (i.e., because "a negative presumption is awkward, inconsistent with the rules of legislative drafting, and provides no legal standard for the court"); that version was accepted by the Committee on a vote of two members to one, with two absent. Id. at 16, 18. Whatever one makes of Councilmember Brazil's drafting concerns, the legislative record provides no basis to conclude that the Council that enacted the 1996 Act intended that the abusive parent would stand on an equal footing with the abused parent with respect to custody.

being in Mr. Carson's custody: The offenses involved physical violence by Mr. Carson (including, on one occasion, his punching Ms. Fairchild in the face with a closed fist); they were relatively recent in time, having occurred a little more than a year before the custody trial; and they occurred while the children were in the home and, in fact, awakened one or both of them. See A 20-21, 81-86, 196-199.[10] On one of those occasions, Ms. Fairchild testified, Mr. Carson persisted in his abuse of her despite the older child's pleas that he go back to bed. See A 86-87.

Ironically, the court relied on Mr. Carson's intrafamily offenses for only one purpose: to provide the legal predicate for an award of sole custody to him under the Section 16-914(a)(2) presumption against joint custody in cases involving intrafamily offenses. But that is not how the Council intended that presumption to operate. As explained above, the Council added Section 16-914(a)(2) to a comprehensive custody statute that already contained a species of presumption in Section 16-914(a-1) against granting custody or even visitation to parents who commit intrafamily offenses. The court ignored the requirements of Section 16-914(a-1) in this case. The court neither justified its award of sole custody to Mr. Carson with "a written statement * * * specifying factors and findings which support that determination," nor required Mr. Carson to bear the burden of proving that such an award would "not endanger the [children] or significantly impair the [children's] emotional development." D.C. Code 16-914(a-1). (As explained above, since the statute expressly requires persons who commit intrafamily offenses to meet that burden to obtain mere "visitation," the Council surely intended that such persons also meet that burden to obtain custody.)

The Custody Order does not include the sort of "written statement" that Section 16-

[10] Although Mr. Carson denied that either incident occurred (see A 149, 159), the court necessarily deemed his testimony not credible in finding that both incidents did, in fact, occur. Cf. Prost, 652 A.2d at 633 (Schwelb, J., concurring) (suggesting that a parent's perjury in denying his commission of domestic violence is relevant to the custody calculus).

914(a-1) requires. At a minimum, any such statement must reflect that the court specifically considered the physical and emotional risks to a child of placement with a parent who committed an intrafamily offense and came to a reasoned conclusion as to why those risks should be disregarded in the circumstances of the particular case. See Judiciary Report on 1994 Act, at 4 (explaining that Section 16-914(a-1) "[s]pecifically requires the court to state in writing the specific factors and findings which support any determination that custody or visitation is to be granted to the abusive parent"). Here, although the court offered some general reasons for preferring Mr. Carson over Ms. Fairchild as the custodian of the children, the court gave no indication that Mr. Carson's intrafamily offenses had been factored into that analysis.

Nor does the Custody Order reflect that the court gave any consideration to the risks to Ms. Fairchild of an arrangement under which her abuser would have custody of the children and she would have visitation. Such an analysis is an essential component of any decision awarding custody to the perpetrator of intrafamily offenses. The Council provided in Section 16-914(a-1) that, when an intrafamily offense has been found, the court "shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party." Whether the court is considering awarding an abusive parent custody or only visitation, the court is obligated to undertake the same consideration of the safety of the abused parent. The court failed to do so here.[11]

[11] The trial court compounded its error by treating Ms. Fairchild's flight with the children to escape from Mr. Carson's abuse as a principal factor militating against an award of custody to her. See Section III-A, infra.

II. THE TRIAL COURT ERRED IN NEGLECTING TO ADDRESS ADDITIONAL FACTORS RELEVANT TO THE CUSTODY DETERMINATION

A. The court erred in failing to consider the children's preference to live with their mother

The first of the factors that Section 16-914(a)(3) directs a court to consider in determining a child's best interest with regard to custody is "the wishes of the child as to his or her custodian, where practicable." The record here reflects that both Nicolas and River expressed a preference to live with Ms. Fairchild. The court nonetheless failed to address the children's preference in awarding custody to Mr. Carson. It thereby committed reversible error. See pp. 12-13, supra (citing cases involving a court's failure to address the factors articulated in Section16-914(a)(3)).

Although the court did not hear from the children directly, the court appointed a guardian ad litem (GAL) to represent their interests in the case. The GAL submitted a report to the court that disclosed, among other things, that "[t]he children wish to live primarily with Ms. Fairchild," but to have visitation with Mr. Carson. A 9. At trial, the GAL confirmed that the children had expressed a preference to live with Ms. Fairchild. See A 573-574; cf. A 626-627 (GAL testifies that the children did not appear to have been coached).

Mr. Carson did not dispute that the children had expressed a preference to live with their mother. Moreover, while the court questioned some aspects of the GAL's analysis of the custody issue (see A 29 n.4), the court did not question the GAL's finding that the children wanted to be in Ms. Fairchild's custody.

The court was not entitled to ignore the children's preference merely because of their ages. (Nicolas was 10 years old at the time of trial, and River was 7 years old. A 18.) As this Court has instructed, a "child's chronological age * * * is not necessarily conclusive," and "[c]hildren as young as four years old have had their preferences followed with their desires

called an "important factor," and children as old as fourteen have not had their preferences followed.'" In re A.R., 679 A.2d 470, 479 n.14 (D.C. 1996) (quoting 1 Jeff Atkinson, Modern Child Custody Practice § 4.44, at 295-296 (1986)); see, e.g., In re L.B., 631 A.2d 1225, 1232 (D.C. 1993) (recognizing that children 12 and 8 years old "were certainly old enough" to express an opinion about their best interest); Shelton v. Bradley, 526 A.2d 579, 581 (D.C. 1987) (observing that a child "at nine years old was undoubtedly capable of expressing her feelings about her father and her grandmother, as well as her thoughts on the issue of custody"). Moreover, the parties, their witnesses, and the GAL agreed that Nicolas was "mature for his age." A 260 (testimony of Mr. Carson); see A 341 (neighbor describes Nicolas as "almost a young man walking around in child's clothing"); A 377 (testimony of Ms. Fairchild); A 10 (GAL's finding that "Nicolas is a very intelligent boy, and is mature for his age.").

In sum, while the court was not required to follow the children's views with regard to custody, the court was required, at least, to consider those views under Section 16-914(a)(3)(A). Nothing in the Custody Order suggests that the court did so in this case. A court's compliance with that requirement is particularly important in cases that involve domestic violence, as does this case, because a child's stated preference to live with the abused parent may reflect an unstated fear of the abusive parent.[12]

B. The court erred in failing to consider the parents' "prior involvement" in the children's lives

The trial court also ignored its obligation under Section 16-914(a)(3)(I) to consider "the

[12] The issue here is not, as in some cases, whether the court erred in not allowing testimony or other evidence about the children's views, but rather whether the court, after being presented with the children's views, could simply ignore them in its custody analysis. Cf. In re A.R., 679 A.2d at 475 (contrasting "the judge's undoubted statutory duty to consider the evidence in the record relating to the child's opinion with a purported (and far more controversial) obligation to investigate the case on the judge's own initiative").

prior involvement of each parent in the child's life" when analyzing the child's best interest with respect to custody. This is an important consideration for several reasons. It relates to which parent has demonstrated the long-term motivation and commitment to place caring for the child ahead of the parent's career and other personal interests; it provides a greater sense of continuity and stability for the child; and it preserves the stronger emotional bond that the child typically has to his or her primary caretaker. See Barry, supra, 46 Cath. U. L. Rev. at 786-787; Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 771-773 (1988); see also, e.g., David M. v. Margaret M., 385 S.E.2d 912, 916-918 (W. Va. 1989); Burchard v. Garay, 724 P.2d 486, 492-493 (Cal. 1986); Commonwealth v. Jordan, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982).

The parties did not dispute that Ms. Fairchild was the children's primary caretaker for almost all of their lives. See A 264, 290-291, 296, 371-372. She was "a stay-at-home mom" (A 408) who was with the children "basically 24-7" (A 371). Among other things, she got them up in the morning (A 428), cooked their meals (A 372), cared for them when they were sick (A 372), took them to the pediatrician and the dentist (A 267-268, 372), conducted their home schooling (A 249, 372), scheduled their play dates (A 428); and arranged for River's speech therapy (A 294-295. 312-313). Although Mr. Carson had an office in the home, he was occupied with his business during the workday, and generally spent time with the children only on evenings and weekends. A 250-251, 263-264, 295, 409. It was not until January 2005, after Ms. Fairchild's arrest on a (since dismissed) parental kidnapping charge, that Mr. Carson become the primary caretaker.[13]

[13] Consistent with the trial evidence, the GAL found, based on his interviews with the children and the parents, that Ms. Fairchild had the more extensive prior involvement in the children's lives. See A 14.

Despite this significant body of evidence on the relative "prior involvement of each parent in the child's life," D.C. Code 16-914(a)(3)(I), the court did not address that factor in its Custody Order, and thus committed additional error. Indeed, to the extent that the court made any reference to the parents' involvement in the children's lives, the court focused disproportionately on Mr. Carson's role during the months immediately preceding the trial, crediting him for performing the same sorts of tasks for about ten months (e.g., assisting with the children's schooling, taking them to the pediatrician) that Ms. Fairchild had performed for nearly ten years for Nicolas and nearly seven years for River. See, e.g., A 26-27 (describing Mr. Carson's activities "since January 2005"); A 29 ("Since January 2005, the plaintiff has been an exemplary parent."). As this Court has stated, however, the parents' roles during a temporary custody period are appropriately viewed "within the framework of the children's entire lives," especially when, as here, the parent with temporary custody was not previously the primary caretaker. Prost v. Greene, 652 A.2d 621, 627 (D.C. 1995). The Court explained that "[h]ighlighting [one parent's] role in the most recent, interim custody arrangement at the expense of the attachment the children had formed with both parents could be contrary to the children's best interests." Id. Here, the court erred in viewing the parents' roles from that unduly restrictive perspective.[14]

[14] Even in discussing that recent period, the court failed to acknowledge the role of Ms. Fairchild, who has visitation with the children two afternoons a week and alternate weekends (see A 368, 429), and thereby overstated the role of Mr. Carson. For example, the court stated that Mr. Carson "takes [the children] to school every day and picks them up" (A 26), without noting that Ms. Fairchild picks up the children from school nearly half of the time. See A 368-369, 440. While the court stated that Mr. Carson "takes [the children] on trips and vacations" (A 26), the court failed to note that Ms. Fairchild does the same. See A 272 (Mr. Carson testifies that Ms. Fairchild recently took the children on a vacation to Vermont); A 369 (Ms. Fairchild describes a recent trip to a nature center). And, while the court credited Mr. Carson for "retain[ing] a regular pediatrician and dentist for [the children]" (A 27), the parties agreed that the pediatrician was retained by Ms. Fairchild. See A 431-432 (Ms. Fairchild testifies that she

III. THE TRIAL COURT'S RULING THAT MS. FAIRCHILD DID NOT ACT IN HER CHILDREN'S BEST INTEREST IS NOT SUPPORTED BY SUBSTANTIAL REASONING BASED ON A FIRM FACTUAL FOUNDATION IN THE RECORD

In deciding that the children's best interests would be served by granting sole custody to Mr. Carson, the trial court focused on two instances in which it perceived that Ms. Fairchild "did not have in mind the best interest of the minor children in making decisions." A 29. One was Ms. Fairchild's flight with the children to her family's home in Wisconsin shortly after the August 2004 intrafamily offense; the other was Ms. Fairchild's choice, at least initially with Mr. Carson's concurrence, to educate the children at home. A 29-30. The court's disposition of this central issue is not "supported by substantial reasoning based upon a factual foundation in the record," In re A.S.C., 671 A.2d 942, 947 (D.C. 1996), and thus constitutes an abuse of discretion.

A. The court's finding that Ms. Fairchild acted contrary to the children's best interests by fleeing with them from the District is flawed by a failure to take seriously the risks to a mother of remaining in proximity to her abuser and the limited options available to a mother without financial resources

The trial court displayed a callous disregard for the circumstances of mothers who are subjected to domestic violence—especially those with few financial resources of their own—in penalizing Ms. Fairchild for fleeing with the children from the District after Mr. Carson's latest assault. Although Ms. Fairchild sought to introduce evidence of additional intrafamily offenses by Mr. Carson to demonstrate why she was in fear of imminent physical harm at the time of her flight, the court excluded that evidence as irrelevant. The court nonetheless then proceeded to find that any such fear by Ms. Fairchild was unreasonable, apparently based on the untenable assumption that abusers do not violate civil protection orders. The court also purported to support its conclusions that Ms. Fairchild acted contrary to the children's interests with findings

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chose the pediatrician); A 265 (Mr. Carson testifies that the children have had the same pediatrician "[s]ince they were born").

about the Wisconsin stay that were without record support.

As a threshold matter, a parent's choice to move with his or her child away from "home, friends, and familiar surroundings" (A 30) is one that the law usually leaves to the parent. It is not a basis for questioning the parent's suitability as a custodian of the child. As the Oregon Supreme Court explained in the case of a parent who moved multiple times within a short period:

> Although, other things being equal, frequent changes of school and residence are not ideal for children, such changes are a fact of life for many families. A parent who serves in the military, works for a large corporation, or labors in the fields may be required to move often. Such moves do not necessarily indicate that the parent fails to act in the best interests of the children.

In re O'Donnell-Lamont, 91 P.3d 721, 737 (Ore. 2004); see Janet M. Bowermaster, Relocation Custody Disputes Involving Domestic Violence [hereinafter, Bowermaster], 46 U. Kan. L. Rev. 433, 445-446 (1998) ("When intact families move with their children, it is assumed that the parents have made the decision to move with the best interests of their children in mind.").

1. When, as here, a mother moves with her children to escape domestic violence, there is particular reason to view the move as consistent with the children's interests. Indeed, "[a] parent's move away from an unhealthy relationship and noxious influences to begin a new life elsewhere may well be the best thing a parent can do for a child, as a parent's well-being—emotional, physical, mental—is recognized in our [abuse and neglect] statute as a necessary foundation for successful parenting." In re C.M., 916 A.2d 169, 180 (D.C. 2007) (Ruiz, J., concurring). That understanding is reflected in the Model Code on Domestic and Family Violence, which provides that, "[i]f a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation." National Council of Juv. & Fam. Ct. Judges, Model Code on Dom. & Fam. Violence § 402(2).

Moreover, when a mother has been financially dependent on her abuser, her only means of providing for herself and her children in the near term may be to move in with family members, who may be located some distance from the abuser. Here, Ms. Fairchild had not worked outside the home for six years, had no assets of her own, and sometimes had to borrow money from a friend to pay for necessities, as she did immediately before her departure with the children for Wisconsin. See A 405-407, 498-499, 506-509, 513.

Of the options available to Ms. Fairchild at the time, the most sensible one for both her and the children may well have been moving to Wisconsin. If she had remained in this area with the children, she would have placed herself at greater risk of further violence by Mr. Carson, with consequent adverse effects on her physical, mental, or emotional well-being and her ability to care for the children. She would also have had a more difficult time providing for the children financially. If, on the other hand, she had fled alone, the children would have been left with a volatile individual who was unaccustomed to dealing with their daily needs. Moreover, if she subsequently sought custody of the children, she might well have been accused of abandoning them. See Bowermaster, supra, 46 U. Kan. L. Rev. at 452 (noting that abused parents' "flight without the children may be characterized as abandonment and used against them by the abusive parents in subsequent custody proceedings"); Naomi R. Cahn, Civil Images of Battered Women, 44 Vand. L. Rev. 1041, 1092 (1991) ("Judges often view a woman's flight from battering without taking the children as evidence that the mother does not care about the children.").

2. The court seems to have assumed that, once Ms. Fairchild obtained a TPO against Mr. Carson and moved out of the home, she had no reason to fear further abuse and, consequently, had no reason to leave the District. See A 23 n.2. That assumption is unsound.

A civil protection order is not an around-the-clock bodyguard. If abusers could always

be counted upon to adhere to the terms of civil protection orders, Congress would have had no need to enact 18 U.S.C. 2262, which makes it a federal crime to travel in interstate or foreign commerce to violate a protection orders. As one commentator has explained:

> Legal remedies, such as restraining orders, are helpful tools for law enforcement, but they are insufficient protection against violence. Media reports after women have been shot or killed by their intimate partners often quote law enforcement officials and victim advocates reminding the public that "restraining orders are not bulletproof." Indeed, recent research suggests that having a permanent restraining order does not deter most types of abuse.

Bowermaster, supra, 46 U. Kan. L. Rev. at 457. For that reason, "[s]udden, long distance moves are sometimes necessary to adequately assure the[] safety" of battered women who flee with their children. Id.

If anything, a woman who obtains a protection order and attempts to separate from her abuser may put herself and her children at greater risk. As Congress has found, "a batterer's violence toward an estranged spouse often escalates during or after a divorce," H.R. Con. Res. 172, and the same potential exists when unmarried partners separate. See, e.g., American Law Institute, Principles of the Law of Family Dissolution, § 2.11, Reporter's Notes (3) ("The most dangerous time for an abused partner is said to be when she attempts to leave her abuser."); Act of May 21, 1996, ch. 85, 1996 N.Y. Laws 273, 273-274 (legislative finding that "domestic violence frequently escalates and intensifies upon the separation of the parties"); Joan S. Meier, Domestic Violence, Child Custody, and Child Protection [hereinafter, Meier], 11 Am. U. J. of Gender, Soc. Pol'y & L. 657, 704 (2003) ("[M]any batterers refuse to let their victims 'leave' and be safe. Rather, separation from their adult victim, even after a legal divorce proceeding, often triggers greater and more serious violence against her or other members of the family."); Town of Castle Rock v. Gonzales, 545 U.S. 748, 751-754 (2005) (describing "[t]he horrible facts" of a case in which a man, who was subject to a restraining order not to "molest or disturb"

his estranged wife and children, abducted and murdered the children).

Nor was the court correct in assuming that Ms. Fairchild, once in Wisconsin, could not reasonably have feared that Mr. Carson, if informed of her whereabouts, "would travel over 800 miles to physically harm her or the children." A 23 n.2. The existence of federal criminal statutes prohibiting interstate or foreign travel to engage in domestic violence, see 18 U.S.C. 2261, 2262, demonstrates Congress's awareness that batterers may travel significant distances to resume their abuse of a former partner. See, e.g., United States v. Al-Zubaidy, 283 F.3d 804 (6th Cir. 2002) (case in which an abusive husband pursued his estranged wife as she moved from Nebraska to Illinois to Michigan in order to continue to threaten and harass her); United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) (case in which an abusive husband and his new girlfriend traveled from New York to the home of his estranged wife in Maine, where they kidnapped her and killed her new boyfriend and her brother). The record establishes not only that Mr. Carson had ample financial resources to travel from the District to Wisconsin, see A 26 (noting Mr. Carson's adjustable gross income of $55,157 in 2004), but also that he made that very trip in January 2005 to retrieve the children from the home of Ms. Fairchild's family, see A 300-301.

As this Court has recognized, intrafamily offenses are not confined to physical assaults, but also may involve harassment and other forms of psychological abuse. See Richardson v. Easterling, 878 A.2d 1212, 1216-1217 (D.C. 2005) (holding that an intrafamily offense may consist of harassment by telephone). Ms. Fairchild testified that Mr. Carson had engaged in such activity in the past. See, e.g., A 80 (Ms. Fairchild testifies that Mr. Carson "frequently" would "wake [her] up during the night and yell at [her] for two or three hours"). It would have been reasonable for her to fear that, even from a distance of 800 miles, he could continue to inflict emotional abuse on her.

3. There is an additional reason to disregard the trial court's finding that Ms. Fairchild could not reasonably have been in fear of Mr. Carson at the time of her flight to Wisconsin and thereafter. See A 23 n.2, 30. In addition to the evidence of the two intrafamily offenses that occurred in June and August 2004, Ms. Fairchild sought to introduce evidence of additional abuse by Mr. Carson. The court did not allow that evidence to be introduced.

Ms. Fairchild sought to offer the intrafamily offense evidence, in part, to establish that she did not violate the parental kidnapping statute because she came within its defense for "fleeing from imminent physical harm," D.C. Code 16-1023(2). See Memorandum of Points and Authorities in Support of Motion for Evidentiary Hearing Regarding Domestic Violence Defense Prior to the Entry of a Finding that Parental Kidnapping Occur[r]ed (filed Nov. 3, 2005).[15] Although the criminal charge of parental kidnapping had been dismissed by that time, the court still might have taken parental kidnapping into account in applying the presumption in Section 16-914(a)(2) of the D.C. Code. See Section I-A, supra. The court ruled that, because its decision to award sole custody to Mr. Carson was not based on whether Ms. Fairchild had committed parental kidnapping, the intrafamily offense evidence was "immaterial." In so holding, however, the court failed to recognize that such evidence was material to its analysis of whether Ms. Fairchild had acted in the children's best interests in fleeing to Wisconsin (and, more generally, to whether granting Mr. Carson custody was in the children's best interests, see Section I-B, supra.).

The court was not entitled to have it both ways. It could not both exclude as "immaterial" evidence of Mr. Carson's further abuse—which was offered specifically to prove

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[15] The Memorandum argued (at 4-5) that Mr. Carson's prior acts of abuse "are material and relevant facts that relate to Ms. Fairchild's decision to leave the jurisdiction and [are] relevant to this Honorable Court's determination of custody."

the reasonableness of Ms. Fairchild's fear of him during the period of August 2004 to January 2005—and then effectively rule that she had failed to prove that any such fear was reasonable. While a court has considerable discretion over the admission of evidence, a court cannot exclude a party's proffered proof as irrelevant, only to base its decision on the absence of such proof.

Nor was the court justified in excluding the evidence of other incidents of domestic violence based on any failure by Ms. Fairchild to identify specific such incidents in her responses to interrogatories. When Ms. Fairchild sought to testify on the first day of trial about additional incidents of abuse by Mr. Carson involving her or the children, the court barred her from doing so on the ground that the incidents had not been disclosed to Mr. Carson during discovery. See A 29 n.5, 393-394. At that time, however, the court left open the possibility that Ms. Fairchild could introduce the evidence later—specifically, after the GAL submitted his report and testified at a hearing that had been scheduled for a month later (and that actually occurred six weeks later). See A 229, 393-394, 413-414. As Mr. Carson's counsel acknowledged (see A 423-424), Ms. Fairchild's counsel had provided him with a document identifying the specific incidents at issue shortly before the start of trial, so that Mr. Carson would have ample time to prepare a response by the end of trial. In these circumstances, the court abused its discretion in not allowing Ms. Fairchild to testify about those incidents at the later hearing, given the Council's insistence that intrafamily offenses be given serious consideration in custody cases, see D.C. Code 16-914(a)(3)(F), and the significance that the court itself accorded to whether Ms. Fairchild had reasonable cause to fear further abuse by Mr. Carson.

4. In concluding that Ms. Fairchild did not act in her children's best interests in fleeing with them from the District, the court relied on findings about their Wisconsin stay that are not supported by the evidence or that are so incomplete in light of the evidence as to be misleading.

The court's failure to rest its custody decision "on a firm factual foundation," In re T.L., 859 A.2d 1087, 1090 (D.C. 2004), provides an additional reason to reject it.

For example, although the court found that Ms. Fairchild "admitted that she did not register to conduct home schooling as required under Wisconsin law" (A 24; cf. A 30), she admitted to no such thing. To the contrary, Ms. Fairchild testified that she completed the paperwork required for home schooling in Wisconsin (A 477-478), and Mr. Carson offered no evidence that she did not. Similarly, although the court found that River "did not receive [speech] therapy during the five months he was in Wisconsin" (A 30), there is no evidence in the record to support that finding. To the contrary, Mr. Carson's counsel, during cross-examination of Ms. Fairchild, recited her interrogatory response that "River received speech therapy at General Mitchell School September '04 to January '05" (A 479-480), referring to the period when she and the children were in Wisconsin.

In addition, while the court implied that Mr. Carson's contact with the children during their stay in Wisconsin was limited to "two or three e-mails" (A 23), the record indicates more extensive contact. Mr. Carson testified that he "received five phone calls" from the children during that period. A 301. His testimony also suggests that his e-mail communications with the children were not as few as the court stated. See A 306 ("I was able to send an email to Ms. Meehan and sometimes it would take, you know, over a week. She travels a lot, * * * and she would redirect them. And on occasion I would get replies. Not always.").

The court's finding that, "[w]hile in Wisconsin, the children did not receive medical or dental care" (A 30), is potentially misleading to the extent that it implies that the children required such care during that time. There was no evidence that either child had even a cold, much less an illness or injury requiring professional attention, during the four to five months that

they spent in Wisconsin. The court's finding disregards Ms. Fairchild's testimony that she had made dental appointments for the children in January 2005, which had to be canceled because of their unexpected return to the District. A 482. It also disregards the testimony of both parties that Ms. Fairchild had been the parent who had always taken the children to the doctor and cared for them when they were ill (see, e.g., A 267-268, 372)—testimony that undermines any suggestion that Ms. Fairchild would not have dealt appropriately with an injury or illness to the children while they were in Wisconsin.[16]

Finally, while faulting Ms. Fairchild from removing the children from "their home, friends, and familiar surroundings" (A 30), the court ignored the GAL's observation that the children were content in Wisconsin aside from missing Mr. Carson. According to the GAL, the children "didn't express any particular difficulty with living in Wisconsin" and "enjoyed interacting with their cousins in Wisconsin and essentially their arrangements there with Ms. Fairchild and her family." A 587; see A 483-484 (Ms. Fairchild testifies that that the children had friends and played in a soccer league while in Wisconsin).

While no single defect in the court's fact-finding might be sufficient to call its custody decision into question, the combination of those defects is. The court made relatively few specific findings of fact to support its decision. Of those findings that the court did make, however, a significant number are erroneous or incomplete, all in a manner that casts Ms.

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[16] Ms. Fairchild testified that, while the children were in Wisconsin from August 2004 to January 2005, they did not receive certain annual immunizations (A 482), which Mr. Carson testified that they had to receive before enrolling at Key Elementary School (A 268). But there was no evidence that the immunizations were overdue by Wisconsin standards. See A 482 (Ms. Fairchild testifies to her understanding that Wisconsin, unlike the District, did not require the immunizations to be administered before the beginning of the school year). Moreover, in view of Mr. Carson's concession that he allowed the children's health insurance coverage to lapse in "June or July of 2004" (A 307), he would seem to share responsibility for any delay in the children's receiving the immunizations.

Fairchild in a less favorable light than the evidence warrants. See pp. 18-24, supra (discussing the court's failure to address the statutory "best interest" factors that weigh in Ms. Fairchild's favor); p. 24 n. 14 supra (discussing other inaccurate or incomplete factual findings).

B. The court's finding that Ms. Fairchild acted contrary to the children's best interests by choosing to educate them at home is flawed by its failure to assign Mr. Carson any responsibility for that choice and its drawing of unsupported conclusions about the home-schooling program

The trial court's other example of Ms. Fairchild's supposed failure to act in the best interests of the children was her preference for home schooling over public schooling. See A 29-30. The court's reasoning in that regard is flawed for several reasons.

First, during all but the final few months of the children's home schooling, they lived with both parents. Mr. Carson, by his own admission, initially agreed to home schooling. A 250. Although he testified that he later came to believe that the children should go to public school (A 250-251), he did not testify to taking any action to bring about that result, except occasionally to complain to Ms. Fairchild (A 279). As far as the record reflects, he did not, for example, obtain an expert assessment of the children's appropriate educational placement, or visit the local elementary school to seek support for his position from the principal and teachers, or propose that the couple participate in counseling or mediation to resolve this area of disagreement. Nor did he become actively involved in the children's home-schooling network. A 251. In view of Mr. Carson's choice to remain passive with respect to his children's education throughout most of their lives, the court erred in absolving him of any blame (if blame there should be) for the choice of home schooling, and placing all of that blame on Ms. Fairchild.[17]

[17] While the court mentioned that Mr. Carson is "a graduate of Woodrow Wilson High School" (A 29), the court omitted any mention of Ms. Fairchild's college education and other experience bearing on her ability to home school the children. See A 400 (Ms. Fairchild testifies that she "ha[s] a master's degree," "started out in elementary education for [her] bachelor's

Second, the court failed to give Ms. Fairchild any credit for a second decision that she made about the children's schooling—namely, her efforts to assure that River received speech therapy at Key Elementary School. Mr. Carson acknowledged that it was Ms. Fairchild who had taken the lead in having River's speech problem evaluated and enrolling him in speech therapy. A 294-295; see A 312-313 (school principal testifies that Ms. Fairchild enrolled River in speech therapy and took him to sessions). In fairness, if the court could hold Ms. Fairchild's choice of home schooling against her, the court should have held her choice of school-based speech therapy for River in her favor.

Third, although the court found that "home schooling was implicated in the academics deficits that was [sic] noted when the children enrolled in Key" (A 30), the record offers scant support for that finding. No educator testified at trial to any direct connection between the children's home schooling and their academic levels in January 2005. The principal of Key Elementary School was the only educator to testify. While he testified that the children were "behind in their academics" at the time of their enrollment, he did not attribute that assessment to their home schooling; he also noted that the children had "some problems adjusting" to the school, which he attributed simply to their "enroll[ing] in the middle of the school year." A 314. He added that Nicolas caught up with his peers quickly, although River "seem[ed] to still be struggling" at the time of trial. A 319.

There are many reasons why children—even bright children like Nicolas and River—may lag behind academically or socially. One reason that experts have identified is violence in the home. As Congress and the Council have found, a child who is exposed to one parent's abuse of the other may suffer "impairment of developmental and socialization skills." H.R. Con.

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degree," and "taught at a pre-school for at least a couple of years"); A 464 ("I had three years in a bachelor's degree in elementary special ed.").

Res. 172; Judiciary Report on 1994 Act, at 3; see, e.g., Brainard v. Brainard, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994) (noting expert evidence that "children who stand as observers to domestic abuse may develop a low self-esteem and achieve less academic success"); Margaret Martin Barry, Protective Order Enforcement, 6 Hast. W. L.J. 339, 341-342 (1995) ("The effect of parental violence on children is also evidenced by delayed speech, delayed motor and cognitive skills, and poor school performance."). There is evidence here that the children were present in the home during both of the intrafamily offenses found by the court and were aware of one or both incidents. See A 85-87.

Yet, the court seemed to assume that, if the children were behind academically or socially, the explanation must lie in Ms. Fairchild's home schooling, rather than in Mr. Carson's domestic abuse or any of the myriad other reasons why children develop at different paces. That was an additional deficiency in the court's reasoning.

Finally, the court's emphasis on a parent's choice of schooling in its "best interest" inquiry has potentially troubling implications. Today, parents have multiple options as to the educational placement of their child: enrolling the child in the District public school in the parent's neighborhood; enrolling the child in a magnet school, a charter school, or other public school outside the neighborhood; enrolling the child in a parochial school or other private school; moving to Virginia or Maryland in order to place the child in a public school there; and home schooling. In choosing among those options, parents typically take into account their own interests as well as the child's, and the law allows them to do so. A parent may choose not to place the child in the school that would be optimal academically because, for example, that would require the parent to change residence, or spend more time transporting the child to and from school, or incur the costs of private school tuition, or forgo the child's receiving an

education reflecting the parent's religious faith or social values. Cf. Wisconsin v. Yoder, 406 U.S. 205 (1972). A parent may also take into account factors specific to the child that may make such a placement inappropriate (such as Ms. Fairchild's concern that the local public school would not deal sensitively with Nicolas's health problem, see A 398-399).

To the extent that the decision below implies that a parent may be held to have acted contrary to the child's best interest by choosing something other than the most academically rigorous educational option, it creates the potential for custody decisions to turn on the individual judge's personal preferences. See generally Fitzgerald v. Fitzgerald, 464 A.2d 110 (D.C. 1983) (reversing and remanding a custody order that turned largely on the father's church attendance). At least so long as a child is being schooled in a manner permitted by District law, courts should generally refrain from considering the parent's school choice in the "best interest" calculus.

IV. THE TRIAL COURT ERRED IN DISREGARDING THE GUARDIAN AD LITEM'S RECOMMENDATION THAT THE MOTHER HAVE SOLE CUSTODY OF THE CHILDREN

The trial court appointed a GAL to represent the children's best interests. After meeting privately with each child, as well as with the parents, teachers, and a family friend, the GAL recommended that Ms. Fairchild receive sole custody, with visitation for Mr. Carson. A 7, 17. Aside from crediting one of the GAL's findings that was favorable to Mr. Carson (i.e., that the GAL had found no evidence that he abused the children), the court disregarded the GAL's other findings and custody recommendation. See A 29 & n. 4.

We do not dispute that the court would have had the discretion to reject the GAL's recommendation for any "substantial reason[]" supported by the record. A.S.C., 671 A.2d at 947; see generally Dumas, 914 A.2d at 679 (remanding because of the court's failure to explain why, among other things, it "did not follow the home study recommendation"). But the reasons given by the court do not satisfy that standard.

A. The court's criticism of the GAL's methodology was misplaced

The trial court's first reason for ignoring the GAL's recommendation was what the court characterized as the GAL's "somewhat simplistic" methodology—which, according to the court, involved the GAL's "allocat[ing] each [statutory] factor either to the plaintiff, the defendant, or to neither," "add[ing] the factors that were located to each party, and "conclud[ing] that the party with the highest number of allocations should be granted custody." A 29 n.4.

If the GAL had actually employed that methodology, the court might have been justified in rejecting it as "simplistic." But the court had no basis to conclude that the GAL approached his task in that manner. The GAL made clear that his methodology was entirely different:

> Providing my conclusions as to each factor is not meant as a simple score keeping exercise, with one party having more factors in their favor than the other parent. I am aware that a balancing of the factors is precisely that, a balancing. Some factors are clearly more important than others. Where the case law provides guidance as to how to weight a particular factor, I have so stated. I have considered and weighted the factors as best I could in light of the evidence that I reviewed and as guided by the relevant case law I was able to find.

A 17 (emphasis added). Nothing in the body of the report suggests that the GAL did not adhere to the methodology that he described. Nor did Mr. Carson's counsel attempt at trial to impeach the GAL's description of his methodology or otherwise to demonstrate that the GAL had given each of the statutory factors equal weight in his analysis. Hence, the court's first reason for disregarding the GAL's recommendation does not withstand scrutiny.

B. The court's rejection of the GAL's findings on the statutory custody factors lacked any reasoned basis

The trial court offered a second reason for disregarding the GAL's recommendation: that the GAL's findings were "incredulous [sic]" as to whether certain statutory factors—specifically "factors two, four, seven, ten, eleven, and twelve"—favored Ms. Fairchild, Mr. Carson, or neither party. A 29 n.4. The court offered no explanation as to why it perceived any of those

findings to be inconsistent with the law, the facts, or common sense. Nor does an examination of the GAL's findings on those factors justify the court's conclusion.

Of the six statutory factors on which the court disputed the GAL's findings, four of those factors were found by the GAL to favor neither party. As to those factors, the GAL's findings were not merely reasonable ones, but also were the most reasonable ones in the circumstances. The second factor, for example, involves a consideration of "the wishes of the child's parent or parents as to the child's custody," D.C. Code 16-914(a)(3)(B). In a case in which both parents were vigorously contending for custody, the GAL's finding that the factor favored neither parent is unassailable.

Similarly, the GAL found that the seventh factor, "the capacity of the parents to communicate and reach shared decisions affecting the child's welfare," D.C. Code 16-914(a)(3)(G), favored neither parent since each was seeking sole custody. A 13. That finding is reasonable. Although Mr. Carson portrayed himself as more willing than Ms. Fairchild to communicate about the children (see A 269-273), in custody cases involving domestic violence, an abuser's professed willingness to cooperate or communicate is entitled to no weight. See, e.g., Ford v. Ford, 700 So.2d 191, 196 (Fla. Ct. App. 1997) (faulting the trial court for "attempt[ing] to harmonize the non-abusive parent's conduct with 'friendly parent' provisions" and "fail[ing] to recognize the probability that [the parent's] actions were justified"); Meier, supra, 11 Am. U. J. of Gender, Soc. Pol'y & L. at 679 ("'Friendly parent' provisions are implicitly 'unfriendly' to battered women, who may need to avoid interaction with their abusers for their safety and mental health."); Family Violence in Child Custody Statutes, 29 Fam. L. Q. 197, 202 (1995) (noting the position of the American Bar Association's Center on Children and the Law that "friendly parent" provisions should not be applied in domestic violence cases).

As for the eleventh factor, "the geographic proximity of the parental homes," D.C. Code 16-914(a)(3)(K), the GAL reasonably found that the factor favored neither party since the parents lived close to each other and Ms. Fairchild contemplated seeking more permanent housing nearby. A 15. In any event, since this factor (like the previous factor) appears to have been designed for cases in which joint custody is an option, the GAL appropriately gave it no weight here. The GAL likewise found that the twelfth factor, "the demands of parental employment," D.C. Code 914(a)(3)(L), favored neither party, since both parents had flexible work schedules that enabled them to be with the children after school. A 15. Each of those findings makes eminent sense.

The court took issue with only one of the GAL's findings in favor of Ms. Fairchild—namely, his finding on the tenth statutory factor, "the potential disruption of the child's social and school life." D.C. Code 16-914(a)(3)(J). The GAL acknowledged that awarding custody to Ms. Fairchild would "result in some disruption," but discounted it because the children preferred to live with their mother, despite having to move to a new home and possibly a new school, and had not expressed any concern to him about any resulting disruption. A 14. Even if awarding the factor to neither party or to Mr. Carson might have been more appropriate in the circumstances, there is no reason to assume that the GAL's award of the factor to Ms. Fairchild significantly affected his custody recommendation. The GAL recognized, as did this Court in Prost, that a child's most recent custody arrangement under a pendente lite order should not be accorded disproportionate weight in deciding permanent custody. A 14; see Prost, 652 A.2d at 627. That is particularly so when, as here, the pendente lite order itself effected a significant disruption in the children's "social and school life."

The final finding of the GAL that the court identified as problematic favored Mr. Carson.

That was the GAL's finding on the fourth statutory factor, which considers "the child's adjustment to his or her home, school, and community." D.C. Code 16-914(a)(3)(D). The GAL found that this factor favored Mr. Carson because the children had lived in his home for most of their lives and were adjusting well to their school. A 11-12. The court's claim to have been left "incredulous" by that finding makes no sense, especially since the court made essentially the same finding itself in awarding custody to Mr. Carson. See A 24-25.

In sum, the Custody Order cannot stand for the additional reason that the court did not advance any substantial reason for rejecting the GAL's recommendation that custody be granted to Ms. Fairchild.

V. THE TRIAL COURT ERRED IN DENYING MS. FAIRCHILD'S REQUEST FOR TRANSCRIPTS.

The trial court denied Ms. Fairchild's request, as an appellant proceeding in forma pauperis, to obtain transcripts on the ground that she failed to show "a substantial question on appeal that would not be frivolous." A 65. As demonstrated above, Ms. Fairchild has presented several such questions on appeal, which were at least generally identified in her transcript request below. To the extent that indigent parties need make any threshold showing of merit to obtain transcripts, this Court should clarify that the showing is a minimal one, so that trial judges are not too easily able to insulate their rulings from appellate review. That is especially important in cases, such as this one, that implicate fundamental rights.

Although the transcripts in this case were ultimately purchased by pro bono counsel, the issue is not moot, because the Court could order that counsel be reimbursed. The Court should address the issue because many indigent appellants, especially those proceeding pro se, will not have the financial resources to buy transcripts or the knowledge of what to say to obtain them at

no cost, as neither the Court's Rule 10(b)(5)(A) nor its pro se guide provides any clear standard on its face. The issue is thus one that is capable of repetition but evades review.[18]

A. Individuals proceeding in forma pauperis are not required to meet a rigorous standard to obtain transcripts necessary for an appeal

The Supreme Court has recognized that appellants who have been granted in forma pauperis status ordinarily should be able to obtain transcripts necessary to pursue appeals in cases implicating their fundamental rights. The "substantial question" standard announced in Hancock v. Mutual of Omaha Insurance Co., 472 A.2d 867, 871 (D.C. 1984), which did not even involve any fundamental right, requires nothing more than that the question not be frivolous. That standard should be applied with particular leniency in a case such as this one that involves a significant interference with a parent's relationship to her children.

1. The Supreme Court has identified certain categories of cases in which indigent appellants are entitled to appeal transcripts without having to make any threshold showing of merit. In the criminal context, the Supreme Court invalidated a state rule permitting a trial judge to deny an indigent defendant's request for a free transcript if the judge determined the appeal was frivolous. Draper v. Washington, 372 U.S. 487, 499-500 (1963). The Court reasoned that the state rule had the impermissible effect of depriving a defendant "of any means of getting adequate review on the merits in the State Supreme Court, when no such clog on the process of

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[18] While the rule contains a citation to Hancock v. Mutual of Omaha Insurance Co., 472 A.2d 867, 871 (D.C. 1984), the plain language of the rule itself does not contain a substantial or non-frivolous question requirement. The Court's pro se guide likewise fails to mention a substantial question requirement for in forma pauperis litigants seeking free transcripts. The guide directs in forma pauperis litigants to file a motion with the trial judge requesting free transcripts. The guide explains that blank motion forms are available from the Appeals Coordinator, and the guide explains that an appellant must simply "fill in what transcripts you need and explain why you need them." D.C. Court of Appeals, Representing Yourself in A Civil Appeal, available at http://www.dcappeals.gov/dccourts/appeals/represent/civil.jsp. The motion form does not even contain space for giving any such explanation.

getting contentions before the State Supreme Court attend[ed] the appeals of defendants with money." Id. at 498. Under Draper, then, a court system must "provide the indigent as adequate and effective an appellate review as that given appellants with funds." Id at 496. This ensures that an indigent party has "means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." Id.

The Supreme Court has since extended the principles of Draper to one important category of civil proceedings. In M.L.B. v. S.L.J., 519 U.S. 102 (1996), the Court held that a state may not refuse to allow an in forma pauperis litigant to appeal a decision terminating her parental rights because she was unable to pay for transcripts in advance. The Court emphasized that a parent has a strong interest in the "companionship, care, custody, and management of his or her children," one that courts should be careful not to usurp unless there are "powerful countervailing interest[s]." Id. at 117-118 (quoting Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27 (1981), and Stanley v. Illinois, 405 U.S. 645, 651 (1972)). Because of the fundamental interest at stake in M.L.B.— the permanent loss of parental rights—the parent had a right to ensure the trial court's determination was accurate, which required a trial transcript. The Court explained that "[o]nly a transcript [could] reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." Id. at 122. Under M.L.B., a parent has a constitutional right, grounded in both due process and equal protection, to a free transcript to appeal the lower court's adverse decision, without any inquiry into the merits of the appeal. Id. at 120-121. This interest outweighs the government's financial interest in receiving payment for the transcript. Id. at 122. See, e.g., In re Jeisean M., 812 A.2d 80, 84 (Conn. Ct. App. 2002) ("[W]e hold that the conclusion of the trial judge that an indigent's

appeal is frivolous is an inadequate substitute for full appellate review in a termination of parental rights case.").

While M.L.B. dealt with parental rights terminations, which "sever permanently a parent-child bond," 519 U.S. 116, and distinguished paternity and custody cases, id. at 127, much of the Supreme Court's reasoning applies equally in other cases involving the parent-child relationship. For instance, the Court repeatedly emphasized that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Id. at 116 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)). The Court's reasoning in M.L.B. consistently focused on the importance of the parent-child relationship and the strong interest parents have in making decisions about their children. See id. at 116-119.

Those considerations have substantial force in child custody cases like Ms. Fairchild's. Although of somewhat differing legal magnitude, the practical effects of losing custody of a child can be similar to losing parental rights: Both serve to undermine the parent-child relationship. See Leading Cases: Right to Appeal the Termination of Parental Rights, 111 Harv. L. Rev. 197, 257 & n. 68 (1997). Although the Court in M.L.B. distinguished custody from parental rights termination on the premise that custody orders can be modified, see 519 U.S. at 127-128, the reality is that such a modification is difficult or impossible to obtain, especially for an indigent parent. In order to obtain a modification, a parent must bear the burden of proving that there has been "a substantial and material change in circumstances and that the modification * * * is in the best interest of the child." D.C. Code 16-914(f)(1), (2); see D.C. Code 16-914(a)(3)(D), (J) (providing that factors bearing on the child's best interest include "the child's

adjustment to his or her home, school, and community" and "the potential disruption of the child's social and school life"). That burden is a heavy one for any parent to satisfy, much less an indigent parent who may lack counsel. See Jennifer Wriggins, Parental Rights Termination Jurisprudence: Questioning the Framework, 52 S.C. L. Rev. 241, 257 (2000); Leading Cases, supra, 111 Harv. L. Rev. at 257 & n.67. It is thus vital to the parent to ensure that the original custody order placing her children in the hands of another is accurate.

2. In Hancock, this Court ruled that a "losing civil litigant who proceeds in forma pauperis has the burden of convincing the trial court that a substantial question exists on appeal in order to get a free transcript." 472 A.2d at 871. As an initial matter, the standard stated in Hancock, a case concerning insurance coverage, should not necessarily govern a case that implicates fundamental rights. Hancock should be read in light of subsequent decisions such as M.L.B. to impose no more than a minimal burden on indigent appellants in such cases.[19]

Moreover, Hancock itself makes clear that its standard is not onerous, relying on the D.C. Circuit's decision in Lee v. Habib, 424 F.2d 891, 901 (D.C. Cir. 1970). In Lee, the D.C. Circuit looked to 28 U.S.C. 753(f), which states that an in forma pauperis appellant is entitled to a free transcript "if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)." 28 U.S.C. 753(f). The statute thus equates "substantial" with "not frivolous." The D.C. Circuit held that the same standard must apply to in forma pauperis appellants in the District of Columbia courts. Lee, 424 F.2d at 902-903 (citing D.C. Code 11-935 (now D.C. Code 11-1727(b)), which states that the rules, practice, and procedure governing

[19] This Court's Rule 10(b)(5)(C), which specifically addresses transcripts in cases in which counsel has been appointed under the Prevention of Child Abuse and Neglect Act, see D.C. Code 16-2304, provides for the trial court's "approval" of transcript vouchers.

transcript fees in the local courts shall "conform[] as nearly as practicable to the rules, practice, and procedure established for the United States District Court for the District of Columbia").

Hancock further instructs that a close question about the non-frivolous nature of the appellate issue is sufficient: "Doubts about substantiality of the questions on appeal and the need for a transcript to explore them should be resolved in favor of the petitioner." Hancock, 472 A.2d at 871 (quoting Lee, 424 F.2d at 905); cf. In re Turkowski, 741 A.2d 406, 408 (D.C. 1999) (holding that a trial court may not dismiss an individual's motion to proceed in forma pauperis based on its assessment of the underlying merits of the claim).

Other courts have similarly interpreted the non-frivolous requirement in 28 U.S.C. 753(f) "liberally, not restrictively," recognizing that the "statute is aimed at alleviating the disparity that exists as a result of a litigant's financial situation." Militello v. Bd. of Educ. of Union City, 803 F. Supp. 974, 977 (D.N.J. 1992). "[A] restrictive interpretation of section 753 defeats the purpose behind the related in forma pauperis statute which allows indigent litigants with nonfrivolous claims to proceed in forma pauperis." Id. (granting request for transcript where it was "an essential tool for the effective and efficient review" and the plaintiff's appeal would be "seriously hindered" without it).[20]

B. Ms. Fairchild made a sufficient showing to entitle her to appeal transcripts

Here, since Ms. Fairchild's issues on appeal could not have been adequately presented without the record of the trial proceedings, the trial court's denial of transcripts would effectively

[20] A court may properly deny a request for an appeal transcript, where, for example, the issues on appeal do not require an examination of trial transcript, e.g., Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir. 1985) (denying transcript request where appellant failed to bring to the court's attention "any facts that might require a close examination of the trial transcript"); O'Neal v. Nassau, 992 F. Supp. 524, 536 (E.D.N.Y. 1997) (denying request for free transcripts of a case management conference where the request did not indicate why the case management conference was necessary for the appeal).

have deprived her of a full appellate examination of those issues based on her in forma pauperis status. See, e.g., In re E.T.A., 880 A.2d 264, 265 (D.C. 2005) ("The judgment of the trial court is presumed to be correct, and it is incumbent upon the appellant to provide this court with a record which affirmatively shows that error occurred."); McGinnis v. Gustafson, 978 F.2d 1199, 1201 (10th Cir. 1992) (explaining that an appellant's failure to file a transcript "raises an effective barrier to informed, substantive appellate review").

In a custody case, a full transcript is particularly important because it enables appellate review of whether the trial court considered all of the relevant factors to reach a decision supported by the record. See, e.g., Fitzgerald, 464 A.2d at 111 (reversing custody decision where the Court determined, based on the transcript, that the trial court did not appropriately consider all of the relevant statutory factors). In Ms. Fairchild's request for appeal transcripts, she indicated her intent to argue on appeal that the trial court had not considered all statutory factors relevant for a custody determination, that the court had incompletely and incorrectly analyzed other factors, and that the court had relied on an improper factor in holding her flight to Wisconsin against her. See A 53-56. Each of these issues was sufficient independently for an appeal transcript, and each demonstrates that the trial court abused its discretion in denying it.

First, Ms. Fairchild took issue with the trial court's apparent understanding that, once the joint custody presumption of D.C. Code 16-914(a)(2) was rendered inapplicable by Mr. Carson's intrafamily offenses, the court "was equally free to award custody to either the abuser or his victim." A 53. Ms. Fairchild argued that "[t]hat is not what the [custody] statute contemplates," and that the abusive parent is instead required to overcome a presumption that granting him sole custody would not be in the children's best interests. A 53-54. That argument is addressed at greater length in Section I of this brief.

Second, Ms. Fairchild argued that the trial court erred in "effectively holding against Ms. Fairchild her flight with the children to Wisconsin in order to avoid further abuse by Mr. Carson." A 54. Ms. Fairchild argued that, contrary to the court's analysis, "[a] mother acts in her children's best interests when she refuses to abandon them to her abuser, and instead seeks to make a new life for them in a safer place." A 54. That argument is addressed at greater length in Section III-A of this brief.

Third, Ms. Fairchild argued that the trial court failed to consider a relevant factor in disregarding the GAL's finding that the children preferred to live with her as well as the GAL's recommendation that she be granted sole custody. A 55. Those arguments are addressed at greater length in Section II-A and Section IV of this brief.

Fourth, Ms. Fairchild argued that the trial court accorded too much weight to Mr. Carson's role as primary caretaker during the pendency of the case, and not enough to Ms. Fairchild's role as primary caretaker during the remainder of the children's lives. A 55-56. That argument is addressed at greater length in Section II-B of this brief.

Contrary to the intimations of the trial court here, a party should not be required to engage in extended briefing, including research into such matters as the legislative record, simply to obtain transcripts for an appeal. Nothing in Rule 10(b)(5)(A) or Hancock suggests any such requirement, which would be difficult to reconcile with the short time contemplated for filing the motion. Cf. Rule 10(b)(1) (requiring transcripts to be ordered within 10 days after filing the notice of appeal). As the Court noted in Hancock, moreover, "substantiality of the questions would be difficult to assess with an incomplete record," especially when, as here, appellate counsel was not present at trial. See Cole v. United States, 478 A.2d 277, 283 (D.C. 1984) ("[T]he absence of a complete and accurate transcript impairs the ability of appellate

counsel to protect his client's basic rights. These difficulties are 'greatly exacerbated when * * * the attorney representing the appellant is different from the counsel who represented him at trial.'") (quoting United States v. Workuff, 422 F.2d 700, 702 (D.C. Cir. 1970)). Finally, to the extent that many indigent parties are proceeding pro se, at least at the initial stages of an appeal, any standard for obtaining transcripts should be applied with liberality. Cf. Bird v. DuPont Glore Forgan, Inc., 333 A.2d 395, 396 n.2 (D.C. 1975) (describing the allowance of an extension of time to file an appeal as "provident under the circumstances" given the appellant's explanation that he was "proceeding pro se and did not have a lawyer's familiarity with the possible grounds for appeal and with the procedures through which such grounds can be asserted").

CONCLUSION

For the foregoing reasons, the trial court's Order for Custody of Two Minor Children and Order denying appeal transcripts should be reversed.

Respectfully submitted,

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[21] Counsel intend to divide argument time, with Ms. McDowell addressing the issues presented in No. 06-FM-165 and Ms. Ellsworth addressing the issue presented in No. 06-FM-1609.

CERTIFICATE OF SERVICE

I, Jessica L. Ellsworth, certify that on this 31st day of May, 2007, a copy of the foregoing Brief for Appellant Peggy Fairchild was served via postage prepaid first-class mail on the following:

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