

Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns

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“Although there is a need for much more practice experience and research, our current knowledge of risk factors for continued abuse of women and children means that decision-makers must exercise great caution in awarding custody or visitation to perpetrators of domestic violence. If visitation is granted, coordination with the courts, careful safety planning, and specific conditions attached to the court order are crucial for lowering the risk of harm to children and their mothers.”

Applied Research papers synthesize and interpret current research on violence against women, offering a review of the literature and implications for policy and practice.

The Applied Research initiative represents a collaboration between the National Resource Center on Domestic Violence, the National Sexual Violence Resource Center, and the Minnesota Center Against Violence and Abuse.

VAWnet is a project of the
National Resource Center on
Domestic Violence.

It may be hard to believe that an abusive partner can ever make good on his threat to gain custody of the children from his victim. After all, he has a history of violent behavior and she almost never does. Unfortunately, a surprising number of battered women lose custody of their children (e.g., Saccuzzo & Johnson, 2004). This document describes how this can happen through uninformed and biased courts, court staff, evaluators, and attorneys and how the very act of protecting ones' children can lead to their loss. It also describes the major legal and social trends surrounding custody and visitation decisions and the social science evidence supporting the need to consider domestic violence in these decisions. It ends with some recommendations for custody and visitation in domestic violence cases.

Legal Trends

Over the past 200 years, the bases for child custody decisions have changed considerably. The patriarchal doctrine of fathers' ownership of children gave way in the 1920s and '30s to little formal preference for one parent or the other to obtain custody. When given such broad discretion, judges tended to award custody to mothers, especially of young children. The mother-child bond during the early, "tender years" was considered essential for children's development. In the 1970s, "the best interests of the children" became the predominant guideline, although it remains somewhat ambiguous (Fine & Fine, 1994). It was presumably neutral regarding parental rights. Little was known then about the negative impact of domestic violence on women and children, and domestic violence was not originally included in the list of factors used to determine the child's best interest.

States more recently came to recognize that domestic violence needs to be considered in custody decisions (Dunford-Jackson, 2004; Cahn, 1991; Hart, 1992; for legislative updates from 1995 through 2005, see NCJFCJ, <http://www.ncjfcj.org/content/blogcategory/256/302/>). Every state now lists domestic violence as a factor to be considered, but does not necessarily give it special weight. However, since the mid-1990s, states have increasingly

adopted the custody/visitation section of the Model Code on Domestic and Family Violence developed by the National Council of Juvenile and Family Court Judges (NCJFCJ, 1994), increasing from 10 states using the code in 1995 to 24 in 2006 (NCJFCJ, 1995a; 2007). These statutes use the model's wording, or similar wording, that there is 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, joint legal custody, or joint physical custody with the perpetrator of family violence" (p. 33).¹ Although statutes have become increasingly precise regarding definitions of domestic violence, they may leave children vulnerable to psychological abuse when it is not included in the definition (Dunford-Jackson, 2004).

Statutes also address other issues about custody and visitation, such as standards for supervised visitation and similar safeguards (Girdner & Hoff, 1996; Hart, 1990; Jaffe, Lemon, & Poisson, 2003), exempting battered women from mandated mediation (Dunford-Jackson, 2004; Girdner, 1996),² protecting battered women from charges of "child abandonment" if they flee for safety without their children (Cahn, 1991), and enabling a parent to learn if a person involved in a custody proceeding has been charged with certain crimes (see Pennsylvania's Jen & Dave Program on the Web at <http://www.jendaveprogram.us/>). Some recent statutes make it easier for victims to relocate if needed for safety reasons (Jaffe, et al., 2003; NCJFCJ, 1995a; 1999; see Zorza, 2000).

Other legal protections are also available. For example, in one state (Tennessee), if a parent alleges that a child is exposed to domestic violence, such allegations cannot be used against the parent bringing the allegation (NCJFCJ, 2004). In another state (Texas), a mediated agreement can be declined by the court if domestic violence affected the victim's ability to make the agreement (NCJFCJ, 2005). Some states (Massachusetts, Ohio) now make the presumption that custody or visitation should not be granted to anyone who is found guilty of murdering the other parent (for a more complete review of the above trends, including legal reforms in Australia, Canada, and New Zealand, see Jaffe, et al. 2003).

Unfortunately, courts and the mental health professionals advising them (Johnson, Saccuzzo, & Koen, 2005; Fields, in press) and lawyers (Fields, 2006) may pressure women to stay tied to their abusers. In addition, "friendly parent" provisions in statutes or policies create another factor for courts to assess in custody decisions, favoring the parent who will encourage frequent and continuing contact with the other parent or foster a better relationship between the child and the other parent (Zorza, 1992). Despite a reasonable reluctance to co-parent out of fear of harm to themselves or their children, battered women may end up being labeled "unfriendly," thereby increasing the risk of losing their children (APA, 1996).

Along with legal changes, training and resource manuals for judges and court managers are available, including guidelines for selecting custody evaluators and guardian ad litem (Dalton, Drozd, & Wong, 2006; Maxwell & Oehme, 2001; Goelman, Lehrman, & Valente, 1996; Lemon, Jaffe, & Ganley, 1995; NCJFCJ, 1995b; NCJFCJ, 2006; National Center for State Courts, 1997). One benchbook covers cultural considerations for diverse populations (Ramos & Runner, 1999). A recent trend is the use of "parenting coordinators" or "special masters," a mental health or legal professional with mediation training who focuses on the children's needs and helps the parents resolve disputes. With the approval of the parties and/or the court, they can make decisions within the bounds of the court order. The Association of Family and Conciliation Courts provide guidelines for parenting coordinators and a discussion of implementation issues (AFCC, 2006; Coates, et al., 2004). The guidelines require that parenting coordinators have training on domestic violence and caution that "the parenting coordinator's role may be inappropriate and potentially exploited by perpetrators of domestic violence who have exhibited patterns of violence, threat, intimidation, and coercive control over their co-parent" (AFCC, 2006, p. 165). When one parent seeks to maintain dominance over another, the parenting coordinator may need to act primarily as an enforcer of the court order.

Another legal trend is the ordering of "virtual visitation" (Flango, 2003; Shefts, 2002). Web cams and

videoconferencing can supplement face-to-face visits or replace face-to-face visits in more dangerous cases. Parents can read and play games with their children and help them with homework. The practice may loosen restrictions on parents moving to different communities. In one court case, the judge ordered each parent to purchase and install computer equipment that would allow video-conferencing (Flango, 2003). In 2004, Utah passed a law stating that virtual visitation should be permitted and encouraged if available. In some states, prisons provide virtual visitation services (Pennsylvania Department of Corrections, <http://www.cor.state.pa.us/dallas/site/default.asp>). Virtual visits are untested in domestic violence cases and are likely to require the same type of monitoring that occurs with telephone and in-person visits.

Despite the above trends for improved protections, some parents and children believe the legal system has failed them. They may form grassroots support and advocacy groups, such as networks in Arizona (<http://www.azppn.com/>) and California (<http://www.protectiveparents.com/>), that conduct court watches and help parents share common court experiences, especially when they lose custody when trying to protect children and themselves from abuse. The Courageous Kids Network in California makes suggestions to other children who are forced to live with an abuser or molester when professionals do not believe them. They describe themselves as “a growing group of young people whose childhood was shattered by biased and inhumane court rulings, which forced us to live with our abusive parents while restricting or sometimes completely eliminating contact with our loving and protective parent. We know how horrible it is to be forced into the arms of an abuser” (<http://www.courageouskids.net/>). A national organization, Kourts for Kids, works to better protect abused children in the family courts by increasing awareness and education for judges, attorneys, guardians ad litem, social workers, officers of the law, legislators, and advocates (http://www.kourtsforkids.org/index.php?option=com_frontpage&Itemid=1).

In 2007, 10 mothers and a victimized child (now an adult) and national and state organizations filed suit

against the United States with the Inter-American Commission on Human Rights. They claimed that the human rights of abused mothers and children were not protected because custody was awarded to abusers and child molesters (Klein, 2007; Stop Family Violence: <http://www.stopfamilyviolence.org/ocean/host.php?folder=3>).

In summary, courts in all states must now consider domestic violence in custody and visitation decisions, but only about half of them make it the primary consideration. Legal innovations include protections for survivors who need to relocate due to safety concerns and exemptions from mandated mediation. Many states still have “friendly parent” statutes that do not recognize battered women’s realistic reluctance to co-parent. Domestic violence training materials and guidelines are increasingly available for judges, court managers, custody evaluators and parenting coordinators. Recent trends include the use of “virtual visitation” and the development of grass roots protective parent and advocacy organizations.

Parent Most at Risk for Physically and Emotionally Abusing the Children

Social science evidence can help establish which parent is most at risk to harm their children. The most convincing evidence that men who batter their partners are also likely to batter their children comes from a nationally representative survey (Straus, 1983). Half the men who battered their wives also abused their children. Abuse was defined as violence more severe than a slap or a spanking. Battered women were half as likely as men to abuse their children. Several non-representative surveys show similar results (reviewed in Saunders, 1994, and Edleson, 2001). When battered women are not in a violent relationship, there is some evidence that they are much less likely to direct anger toward their children (Walker, 1984). As expected, time away from the abuser seems to benefit battered mothers and their children (Rossman, 2001).

Emotional abuse of children by men who batter is even more likely than physical abuse because nearly all of these men’s children are exposed to domestic

violence (Wolfe, Crooks, McIntyre-Smith, & Jaffe, 2004). This exposure to domestic abuse by their fathers often constitutes a severe form of child abuse. The serious problems associated with witnessing abuse are now clearly documented (e.g., Edleson, 1999; Graham-Bermann & Edleson, 2002; Kitzmann, Gaylord, Holt, & Kenny, 2003; Wolfe, Crooks, McIntyre-Smith, & Jaffe, 2004). These include short- and long-term negative emotional and behavioral consequences for both boys and girls. However, one must be cautious about generalizing these findings to most or all children since many children find resources that buffer the ill effects of the violence (Edleson, 2006). Parents may not realize that their children can be affected, even if they do not see the violence. For example, children may be hiding in their bedrooms listening to repeated threats, blows, and breaking objects. They may be afraid their mother will be injured or killed and in many cases they intervene physically (Edleson, Mbilinyi, Beeman, & Hagemester, 2003). However, they may have other reactions, such as divided loyalties toward their parents, guilt about not being able to intervene effectively, and anger at their mothers for not leaving (Margolin, 1998; Saunders, 1994). If mothers cannot find safety, their fears and depression may reduce their ability to nurture and support their children as they normally would (Jaffe & Crooks, 2005).

As a result of children's exposure to domestic violence, mothers may be unjustly blamed for harming their children in cases where evaluators and practitioners do not understand the dynamics of abuse (Edleson, 1999). Cases are sometimes labeled as a "failure to protect" since mothers are supposedly capable of protecting their children from the physical and emotional abuse of their partners (Enos, 1996). Battered women may even face criminal charges (Kaufman Kantor & Little, 2003; Sierra, 1997) or removal of their children into foster care (Edleson, Gassman-Pines, & Hill, 2006). However, battered women's actions usually come from their desire to care for and protect their children. They may not leave because of financial needs, family pressures, believing the children need a father, or the fear that he will make good on threats to harm the children

or gain custody (Hardesty & Chung, 2006; Hardesty & Ganong, 2006). They often leave the relationship when they recognize the impact of violence on their children, only to return when threatened with even greater violence or out of economic necessity (Anderson & Saunders, 2003, 2007). Innovative programs have been developed to address these concerns by helping to coordinate the actions of child protection, domestic violence, and family court systems. The "Greenbook Initiative" sponsored by the federal government is a notable example (Dunford-Jackson, 2004; for information see: <http://www.thegreenbook.info/>). On a policy level, a few states allow evidence to show that the non-abusive spouse feared retaliation from her partner and thus could not reasonably prevent abuse to the child. However, most of these states impose restrictions on how quickly the protective parent must provide this evidence and how it must be done (Jaffe, et al., 2003).

Factors Related to Risk to the Children

In a given custody case, a number of factors may correctly or incorrectly be attributed to the risk of child abuse and exposure to domestic violence. Several of these factors — parental separation, childhood victimization of the parents, the parents' psychological characteristics, and abuser interventions — are discussed next.

Parental Separation

Parental separation or divorce does not prevent abuse to children or their mothers. On the contrary, physical abuse, harassment, and stalking of women continue at fairly high rates after separation and divorce and sometimes only begin or greatly escalate after separation (Hardesty & Chung, 2006). Homicidal threats, stalking, and harassment affect as many as 25%-35% of survivors (e.g., Bachman & Saltzman, 1995; Leighton, 1989; Thoennes & Tjaden, 2000). In addition, up to a fourth of battered women report that their ex-partner threatened to hurt the children or kidnap them (e.g., Liss & Stahly, 1993), and children may witness violence more often after separation than before

(Hardesty & Chung, 2006). Separation is a time of increased risk of homicide for battered women (Saunders & Browne, 2000), and these homicides sometimes occur in relation to custody hearings and visitation exchanges.

Many abusers appear to use the legal system to maintain contact and harass their ex-partners (Bancroft & Silverman, 2002; Hardesty & Ganong, 2006), at times using extensive and lengthy litigation (Jaffe, et al., 2003). Children may also be harmed if the abuser undermines their mothers' authority, disparages her character in front of the children, and attempts to use the children to control the mother (Bancroft & Silverman, 2004); this appears to occur more often after separation by the most severe abusers (Beeble, Bybee, & Sullivan, 2007). Children are also likely to be exposed to renewed violence if their fathers become involved with another woman. Over half of men who batter go on to abuse another woman (Wofford, Elliot, & Menard, 1994). As a result, judges should not necessarily consider the remarriage of the father as a sign of stability and maturity.

Parents' Characteristics

Evaluators may look to childhood risk factors of each parent to assess their child abuse potential. The link between being abused in childhood and becoming a child abuser is not as strong as was once thought, with about 30% of child abuse victims becoming child abusers (Kaufman & Zigler, 1987). Some evidence suggests that this link with child abuse is stronger in men than in women (Miller & Challas, 1981). Neither parent is likely to have severe and chronic mental disorders (e.g., schizophrenia, or bipolar disorder) (Gleason, 1997; Golding, 1999). Personality disorders, as distinct from mental disorders, are much more likely to appear on the psychological tests of the parents. However, the parents' personality traits and psychological disorders are generally poor predictors of child abuse (Wolfe, 1985). In addition, great care must be taken when interpreting parents' behaviors and psychological tests. Men who batter often have the types of personality disorders—such as anti-

social, dependent, and narcissistic (Holtzworth-Munroe, Meehan, Herron, Rehman, & Stuart, 2000)—that may keep childhood traumas and other problems hidden from evaluators and judges.

To the extent that psychological disorders continue to be used to describe battered women, they can be placed at a serious disadvantage. Compared with the chronic problems of her partner, a battered woman's psychological problems, primarily depression and posttraumatic stress disorder, appear to be reactions to the violence. These problems seem to decrease as victims become safer (Erickson, 2006). Many battered women may seem very unstable, nervous, and angry (APA, 1996; Erickson, 2006; Crites & Coker, 1988). Others may speak with a flat affect and appear indifferent to the violence they describe (Meier, 1993). These women probably suffer from the numbing symptoms of traumatic stress. The psychological test scores of some battered women may appear to indicate severe personality disorders and mental illness. However, their behaviors and test scores must be interpreted in the context of the traumas they faced or continue to face (Dalton, Drozd, & Wong, 2006; Dutton, 1992; Rosewater, 1987). For example, psychological test findings of borderline and paranoid traits can be misleading when the impact of domestic violence is not considered (Erickson, 2006). The psychological tactics used by abusers parallel those used against prisoners of war (Golding, 1999) and include threats of violence, forced isolation, degradation, attempts to distort reality, and methods to increase psychological dependence (Stark, 2007). Severe depression and traumatic stress symptoms are the likely results (Golding, 1999). When women fear losing custody of children to an abusive partner, the stress can be overwhelming (Erickson, 2006; Bancroft & Silverman, 2004).

Interventions for the Abuser

Although there are numerous treatment programs around the country for abusive partners and parents, successful completion of a batterer intervention program does not mean that the risks of child and woman abuse are eliminated. The evaluation

of programs for men who batter is in its infancy, including programs for men of color (Gondolf, in press; Saunders & Hammill, 2003). A substantial proportion of women (35% on average across a number of studies) report that physical abuse by their partners recurs within 6-12 months after treatment and psychological abuse often remains at high levels. In controlled studies, the recidivism rates average only 5% lower for the “treated” groups than the control groups (Babcock, Green, & Robie, 2004). These results are less optimistic than those implied in the section of the Model State Statute on Domestic and Family Violence (NCJFCJ, 1994) that recommends the successful completion of abuser treatment as a condition for visitation.

Only two studies of programs for men who batter investigated the reduction of actual or potential violence toward the children (Myers, 1984; Stacey & Shupe, 1984). Both of these studies showed promising results but did not specifically focus on parenting issues. Special parenting programs for men who batter have developed in recent years, either as modules within existing intervention programs or as stand-alone programs (Edleson, Mbilinyi, & Shetty, 2003; Edleson & Williams, 2007).

In summary, contrary to what one would expect, separation is a time of increased risk of violence, abusers’ chronic problems may not be apparent, and the trauma from violence and continuing, intense fears may make battered women appear “crazy.” Furthermore, successful completion of an abuser intervention program does substantially reduce the risk of re-abuse on average.

Factors that Compromise Safety of Children and Survivors

Negative outcomes for domestic violence victims and their children include (1) dangerous offenders in contact with ex-partners and children due to unsupervised or poorly supervised visitation; (2) sole or joint custody of children awarded to a violent parent, rather than a non-violent one; and (3) urging or mandating mediation that compromises victims’ rights or places them in

more danger. Such negative outcomes are likely to be compounded for women of color, lesbian mothers, survivors whose English is not proficient, and/or immigrant women with little or no knowledge of the U.S. legal system (Barnsley, Goldsmith, Taylor, 1996; Ramos & Runner, 1999).

Joint custody can be quite beneficial for children of non-violent, low-conflict couples.³ However, joint custody—in particular, joint physical custody or “shared parenting”—can obviously increase the opportunities for abusers to maintain control and to continue or to escalate abuse toward both women and children. Enthusiasm for joint custody⁴ in the early 1980s was fueled by studies of couples who were highly motivated to “make it work” (Johnston, 1995). This enthusiasm has waned in recent years, in part because of social science findings. Solid evidence about the impact of divorce and custody arrangements is difficult to find because most data are gathered at one point in time, and thus statements about cause and effect are not possible (e.g., Bender, 1994). There is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents *before* the divorce and not because of the divorce itself (e.g., Kelly, 1993). Johnston (1995) concluded from her review of research that “highly conflictual parents” (not necessarily violent) had a poor prognosis for becoming cooperative parents. In a study by Kelly (1993), more frequent transitions between high-conflict parents were related to more emotional and behavioral problems of the children. If exposure to “high conflict” parents is damaging to children, then they are even more likely to be damaged by exposure to domestic violence. We now have evidence that a high percentage of couples labeled “high conflict” are experiencing domestic violence, and thus attempts to detect domestic violence within “high conflict” families are crucial (for further review, see Jaffe & Crooks, 2007).

In general, domestic violence is often not detected or not documented in custody/visitation proceedings (Johnson, Saccuzzo & Koen, 2005; Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). In one study that interviewed survivors with documented abuse, there were frequent failures to consider documentation of domestic abuse

and/or child abuse in the custody decision; unsupervised visitation or custody was often recommended or granted to men who used violence against their partners and/or children (Silverman, Mesh, Cuthbert, Slote, & Bancroft, 2004). One study found that battered and non-battered women were equally likely to be awarded custody; in addition, offenders were just as likely as non-offenders to be ordered to supervised visits (Kernic, et al., 2005). Similarly, in a random sample of court cases, only minor differences existed between the custody evaluation process and custody recommendations for domestic violence versus non-domestic violence cases (Logan, Walker, Jordan, & Horvath, 2002). Most fathers with protection orders against them were not awarded custody (Rosen & O'Sullivan, 2005); however, this was not the case when mothers withdrew their petitions, which may have been from pressure from their abusers. Mediators in one study were about equally likely to recommend joint legal and physical custody for both domestic violence and non-domestic violence cases; rates of supervised and unsupervised visitation also did not differ between violent and non-violent cases (Johnson et al., 2005). Similarly, O'Sullivan and her colleagues report two studies showing that a history of domestic violence has little impact on courts' decisions regarding visitation (O'Sullivan, 2000; O'Sullivan, King, Levin-Russell, & Horowitz, 2006). (For further review, see Jaffe & Crooks, 2007.)

A number of reports from state and local commissions on gender bias in the courts have documented negative outcomes. For example, negative stereotypes about women, especially about their credibility, seem to encourage judges to disbelieve women's allegations about child abuse (Danforth & Welling, 1996; Meier, 2003; Zorza, 1996). A lack of understanding about domestic violence leads to accusations of lying, blaming the victim for the violence, and trivializing the violence (e.g., Abrams & Greaney, 1989). When the abuse is properly taken into account, court decisions that awarded abusive fathers custody are often reversed on appeal (Meier, 2003). Research evidence is now growing that allegations of domestic violence are generally not more common in disputed custody cases; and one study shows that mothers are more likely to have their abuse allegations substantiated than fathers

(Johnston, Lee, Oleson, & Walters, 2005).

The influence of fathers' rights groups on evaluators and judges is unknown, but some groups tend to lobby for the presumption of joint custody and co-parenting and doubt the validity of domestic violence allegations (Williams, Boggess, & Carter, 2004). For example, the National Fathers' Resource Center and Fathers for Equal Rights "demands that society acknowledge that false claims of Domestic Violence" are used to "gain unfair advantage in custody and divorce cases" (NFRC, 2007). They state, "Fathers' organizations now estimate that up to 80% of domestic violence allegations against men are false allegations." Consistent with what might be expected from the gender bias reports, female judges in one study showed more knowledge of domestic violence and greater support for victim protections (Morrill, Dai, Dunn, Sung, & Smith, 2005). Women of color and immigrant women can expect to be placed in "double jeopardy," as many states report racial and ethnic bias in the courts, in addition to gender bias (Ramos & Runner, 1999).

Research is also illuminating the negative impact of "friendly parent" provisions. Zorza (1996; in press) notes that "friendly parent" statutes and policies work against battered women because any concerns they voice about father-child contact or safety for themselves are usually interpreted as a lack of cooperation and thus the father is more likely to gain custody. A woman might refuse to give her address or consent to unsupervised visitation (APA, 1996). Parents who raise concerns about child sexual abuse can be severely sanctioned for doing so. The sanctions include loss of custody to the alleged offender, restricted visitation, and being told not to report further abuse or take the child to a therapist (Faller & DeVoe, 1995; Neustein & Goetting, 1999; Neustein & Leshner, 2005). Even in jurisdictions with a presumption that custody should be awarded to the non-abusive parent, a "friendly parent" provision tends to override this presumption (Morrill, et al., 2005). At least 32 states have statutes with "friendly parent" provisions (Zorza, in press). "Unfriendly behaviors" generally include only those of the custodial parents and not behaviors of noncustodial parents, like nonpayment of child support (Zorza, in press).

The beliefs and training of custody evaluators and judges in relation to outcomes have received very little attention. Evaluators and judges may need more information on the continued safety risks to children from abusive fathers, the likelihood of post-separation violence, risks of mediation, the inadmissibility of Parent Alienation Syndrome (Dalton, Drozd, & Wong, 2006), false allegations, and the limits of criminal justice and treatment interventions (Jaffe, Lemon, & Poisson, 2003; Saunders, 1994). Ackerman and Ackerman (1996) found that psychologists who conducted child custody evaluations did not consider domestic violence to be a major factor in making a recommendation. However, three-fourths of them recommended against sole or joint custody to a parent who “alienates the child from the other parent by negatively interpreting the other parent’s behavior.” In a more recent study of evaluators, Bow and Boxer (2003) found that many sources of information were used in evaluations, but evaluators did not tend to use domestic violence screening instruments — only 30% administered specialized questionnaires, instruments, or tests pertaining to domestic violence. When domestic violence was detected, it weighed heavily in their recommendations. In one study of judges, those with domestic violence education and more knowledge of domestic violence were more likely to grant sole custody to abused mothers (Morrill, et al., 2005). Some states require initial and/or continuing domestic violence education for judges,5 custody evaluators, and mediators, which is essential to close the gap between professional standards and their implementation (Jaffe & Crooks, 2005).

Recommendations for Custody and Visitation

Some recommendations can be made based on practice experience and the growing body of research reviewed above. The past and potential behavior of men who batter means that joint custody or sole custody to him is rarely the best option for the safety and well-being of the children. In addition to their propensity for continued violence toward children and adult partners, these men are likely to abuse alcohol (Bennett & Williams, 2003), be poor role models (Jaffe, Lemon, & Poisson, 2003), and

communicate in a hostile, manipulative manner (Holtzworth-Munroe, et al., 2000). As noted earlier, the Model Code State Statute of the National Council of Juvenile and Family Court Judges states that there should be a presumption that it is detrimental to the child to be placed in sole or joint custody with a perpetrator of family violence (NCJFCJ, 1994). The model statute emphasizes that the safety and well-being of the child and the parent-survivor must be primary. In addition, states should repeal friendly parent provisions or, at a minimum, say that they have no weight in cases where domestic or family violence has occurred.

The perpetrator’s history of causing fear and physical harm, as well as the potential for future harm to the mother or child, should be considered. A parent’s relocation in an attempt to escape violence should not be used as a factor to determine custody. Courts sometimes label battered women as “impulsive” or “uncooperative” if they leave suddenly to find safety in another city or state. The model statute specifies that it is in the best interest of the child to reside with the non-violent parent and that this parent should be able to choose the location of the residence, even if it is in another state. The non-custodial parent may also be denied access to the child’s medical and educational records if such information could be used to locate the custodial parent.

The model statute (NCJFCJ, 1994) states that visitation should be granted to the perpetrator only if adequate safety provisions for the child and adult victim can be made. Orders of visitation can specify, among other things, the exchange of the child in a protected setting, supervised visitation by a specific person or agency, completion by the perpetrator of a program of intervention for perpetrators, and no overnight visitation (NCJFCJ, 1994). If the court allows a family member to supervise the visitation, the court must set the conditions to be followed during visitation (O’Sullivan, et al., 2006). For example, an order might specify that the father not use alcohol prior to or during a visit and that the child be allowed to call the mother at any time (see Bancroft & Silverman, 2002, for a description of different levels of supervision).

Unsupervised visitation should be allowed only after the abuser completes a specialized program for men who batter (APA, 1996) and does not threaten or become violent for a substantial period of time. Practitioners need to be aware of the strong likelihood that men who batter will become violent in a new relationship and that they often use non-violent tactics that can harm the children. Visitation should be suspended if there are repeated violations of the terms of visitation, the child is severely distressed in response to visitation, or there are clear indications that the violent parent has threatened to harm or flee with the child. Even with unsupervised visitation, it is best to have telephone contact between parents only at scheduled times, to maintain restraining orders to keep the offender away from the victim, and to transfer the child in a neutral, safe place with the help of a third party (Johnston, 1992). Hart (1990) describes a number of safety planning strategies that can be taught to children in these situations.

In response to the need for safe visitation, supervised visitation and exchange programs are expanding rapidly across North America. Many programs follow the standards of the Supervised Visitation Network, an international organization. The standards include a special section on domestic violence that requires policies and procedures designed to increase safety for domestic abuse survivors and their children (<http://www.svnetwork.net/Standards.html>). In addition, a number of authors and programs have described the special features needed at these programs to increase the safety of domestic abuse survivors, including heightened security, staff knowledge of domestic violence, and special court reviews (Maxwell & Oehme, 2001; Sheeran & Hampton, 1999). Close coordination with family courts, lethality assessment prior to referral, and recognition of common abuser behaviors are some of the ingredients needed for effective operation of these programs (Maxwell & Oehme, 2001). Programs also need to be aware of the risks of keeping detailed intake, observation, and other records because currently they cannot be kept confidential in family court proceedings (Stern & Oehme, 2002, 2007). The evaluation of visitation programs has occurred only on a small scale thus far (e.g., Tutty, Weaver-Dunlop, Barlow, & Jesso, 2006). Finding promising practices is complicated by

the growing recognition that not all men who batter are alike and that interventions need to be tailored to different types of abusers, with variations occurring by levels of dangerousness and the motivation to control. A “think tank” of advocates and legal and mental health professionals met in 2007 to explore the implications of such differences for custody and visitation decisions (Dunford-Jackson & Salem, 2007).

In 2003 the Office on Violence Against Women of the U.S. Department of Justice began the Safe Havens program in order to increase awareness of visitation/exchange programs and their community collaborators of the special needs of domestic violence cases. “Safety audit” reports from four demonstration sites are available, covering the role of visitation/exchange centers in domestic violence cases, how to increase culturally sensitive practices, centers’ relationships with courts, and many other topics related to the infusion of domestic violence knowledge and awareness into programming (<http://www.usdoj.gov/ovw/safehavens.htm>).

Finally, termination of access needs to be considered more seriously than in the past. Those with a history of severe abuse and who have engaged in high levels of antisocial behavior may never be able to provide the safety and nurturing that their children need (Jaffe & Crooks, 2005; Stover, Van Horn, Turner, Cooper, & Lieberman, 2003).

In conclusion, although there is a need for much more practice experience and research, our current knowledge of risk factors for continued abuse of women and children means that decision-makers must exercise great caution in awarding custody or visitation to perpetrators of domestic violence. If visitation is granted, coordination with the courts, careful safety planning, and specific conditions attached to the court order are crucial for lowering the risk of harm to children and their mothers.

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Endnotes

¹ A few states set specific standards for meeting the definition of “domestic violence”; for example, “conviction of domestic abuse” and “convicted of a felony of the third degree or higher involving domestic violence.”

² The term “mediation” can cover many different practices and is not easily defined. Although many regard it as always unsafe for battered women, this view is not universally held, especially if risk assessment is done properly (e.g., Ellis & Stuckless, 2006).

³ Recently, however, concerns have been raised about how well joint custody works in general (e.g., Wallerstein, 2000).

⁴ Generally, joint physical custody is being referred to here rather than joint legal custody. There is a trend toward the term “shared parental rights” instead of “joint custody.”

⁵ As of October 2006, 18 states required education on domestic violence for judges (from a document obtained from the National Council of Juvenile and Family Court Judges: “State Legislation: Mandatory Domestic Violence Training for Judges”).

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by Linda Baker & Alison Cunningham Centre for Children & Families in the Justice System
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When Dad Hurts Mom: Helping Your Children Heal the Wounds of Witnessing Abuse, 2004

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Little Eyes, Little Ears: How Violence Against a Mother Shapes Children as They Grow, 2007

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Supervised Visitation: Information for Mothers, 2007

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<http://fvpfstore.stores.yahoo.net/supervised-visitatin-information-for-mothers.html>

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National Council of Juvenile and Family Court Judges
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Reno, NV 89507
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Suggested Citation: Saunders, D. (2007, October). *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence. Retrieved month/day/year, from: <http://www.vawnet.org>



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The production and dissemination of this publication was supported by Cooperative Agreement Number U1V/CCU324010-02 from the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the CDC, VAWnet, or the National Resource Center on Domestic Violence.

In Brief: Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations

Daniel G. Saunders

- Approximately half of all state laws make a presumption that it is harmful to the child and *not* in the best interest of the child to be placed in sole custody or joint physical or legal custody with the perpetrator of domestic violence. In the remaining states, domestic violence is merely one factor in a list of factors that must be considered in custody and visitation decisions.
- States have increasingly provided protections for battered women in the divorce process, for example exempting them from mandated mediation, protecting them from charges of “child abandonment” if they flee for safety without their children, and making it easier for them to relocate if they are in danger.
- Despite a reasonable reluctance to co-parent out of fear of harm to themselves or their children, battered women may end up being labeled “unfriendly,” thereby increasing the risk of losing their children because there may be a “friendly parent” statute that favors the “cooperative” parent.
- A recent trend is the use of “parenting coordinators” or “special masters,” a mental health or legal professional with mediation training who focuses on the children’s needs and helps the parents resolve disputes. They can make decisions within the bounds of the court order but it is important that they have training on domestic violence and realize when they need to act primarily as an enforcer of the court order.
- Another recent trend is the use of “virtual visitation.” Web cams and videoconferencing can supplement face-to-face visits or replace face-to-face visits in more dangerous cases.
- When parents believe the legal system has failed them, they sometimes form grassroots support and advocacy groups. They may conduct court watches and help parents share common court experiences, especially when they lose custody when trying to protect children and themselves from abuse.
- Half the men who batter their wives also abuse their children, a rate twice as high as that of battered women.
- Emotional abuse of children by men who batter almost always occurs because nearly all of these men exposed their children to domestic violence, and such exposure often has traumatic and lasting effects.
- Mothers may be unjustly blamed for harming their children through “failure to protect,” since mothers are supposedly capable of protecting their children from the physical and emotional abuse of their partners.
- Parental separation does not prevent abuse to children or their mothers. Indeed, physical abuse, harassment, and stalking of women continue at fairly high rates after separation and divorce and the risk of homicide increases. Attempts to undermine the mothers’ authority and to disparage her in front of the children also increase.

- Men who batter often have chronic but well hidden psychological disorders and problems stemming from childhood traumas that are often not apparent to evaluators and judges; on the other hand, battered woman's psychological problems, primarily depression and posttraumatic stress disorder, appear to be reactions to the violence.
- Successful completion of an abuser intervention program does not substantially reduce the risk of re- abuse. Special parenting programs for men who batter are growing in number but remain untested.
- A high percentage of couples labeled "high conflict" are experiencing domestic violence, and thus attempts to detect domestic violence within "high conflict" families are crucial. Unfortunately, domestic violence is often not detected or not documented in custody/visitation proceedings.
- Contrary to common belief, allegations of domestic violence are *not* generally more common in disputed custody cases. When allegations are made, one study found that mothers are more likely to have their abuse allegations substantiated than fathers.
- Evaluators and judges may need more information on the continued safety risks to children from abusive fathers, the likelihood of post-separation violence, risks of mediation, the inadmissibility of Parent Alienation Syndrome, and the limitations of criminal justice and treatment interventions.
- The past and potential behavior of men who batter means that awarding joint custody or sole custody to them is rarely the best option for the safety and well-being of the children.
- Visitation should be granted to the perpetrator only if adequate safety provisions for the child and adult victim can be made. Orders of visitation can specify, among other things, the exchange of the child in a protected setting, supervised visitation by a specific person or agency, and completion of an intervention program for perpetrators.
- Visitation should be suspended if there are repeated violations of the terms of visitation, the child is severely distressed in response to visitation, or there are clear indications that the violent parent has threatened to harm or flee with the child.
- Some professional standards developed for supervised visitation/exchange programs contain a section on domestic violence that requires policies and procedures designed to increase safety for domestic abuse survivors and their children. In addition, the U.S. government is providing technical assistance to increase the awareness of visitation/exchange programs and their community collaborators of the special needs of battered women and their children.

See the full Applied Research paper: Saunders, D. (2007, October). *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*. Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence. Retrieved month/day/year, from: <http://www.vawnet.org>

The production and dissemination of this publication was supported by Cooperative Agreement Number U1V/CCU324010-02 from the Centers for Disease Control and Prevention.
