

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

Daniel G. Saunders

“Despite the dearth of sound research in this area, some tentative recommendations can be made from practice wisdom and the research that does exist. There is general agreement that joint custody has many advantages when a woman has good financial resources and an ex-partner who is nonabusive and supportive as a co-parent. However, the past and potential behavior of men who batter means that joint custody (or sole custody to him) is rarely the preferred option for these families.”

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

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It may be hard to believe an abusive partner can ever make good on his threat to take the children away 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. The actual number is not known and offenders appear to be no more successful in gaining custody than non-offenders (Liss & Stahly, 1993). However, violence against one parent by another is often considered in custody-determination proceedings (Family Violence Project, 1995). This document describes some of the legal and cultural trends surrounding custody and visitation decisions and the social science evidence supporting a need to consider domestic violence in these decisions.

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 1920's and 30's to little preference for one parent or the other obtaining 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 1970's, "the best interests of the children" became the predominant guideline (Fine & Fine, 1994) and presumably was neutral regarding parental rights. Exposure to domestic violence was not originally included in the list of factors used to determine the child's best interest.

States recently came to recognize that domestic violence needs to be considered in custody decisions (Cahn, 1991; Hart, 1992; for a review of state laws see Family Violence Project, NCJFCJ, 1995, and legislative updates for 1995, 1996, and 1997). While a growing number of states specifically mention domestic violence as a factor to be considered, most of them allow wide discretion and do not give it special weight. It is simply one additional factor when considering the best interests

of the child. By the end of the 1997 legislative session, 13 states had adopted the Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges (NCFCJ, 1998). These statutes specify 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).

Statutes now address other concerns related to custody and the recent proliferation of legislation seems likely to continue. Statutes in some states now cover: the prevention of child abduction by the perpetrator through supervised visitation and similar safeguards (Girdner & Hoff, 1996; Hart, 1990), providing a defense against child abduction charges if battered women flee with their children, exempting battered women from mandated mediation (Girdner, 1996), protecting battered women from charges of “child abandonment” if they flee for safety without their children (Cahn, 1991), and allowing parents to check on the criminal charges against a divorce partner (Pennsylvania’s Jen & Dave’s law). Recent case law makes it easier for battered women to relocate far away from their abusers (Dunford-Jackson, in press). Unfortunately, courts may apply psychological pressures that keep women tied to their abusers. “Friendly parent” statutes ask courts to assess each parent’s willingness to co-parent when making custody decisions (Zorza, 1992). Despite their reasonable reluctance to co-parent, battered women may end up being labeled “uncooperative,” with an increased risk of losing their children. Along with legal changes, training and resource manuals for judges and court managers have recently been published, including guidelines for selecting custody evaluators and guardian ad litem (Goelman, Lehrman, Valente, 1996; Lemon, Jaffe, & Ganley, 1995; NCJFCJ, 1995; National Center for State Courts, 1997). For further discussion of these topics, see the references at the end of this document.

General Views About Joint Custody

Enthusiasm for joint custody in the early 1980’s 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. For example, Johnston (1995) concluded from her most recent review that “highly conflictual parents” (not necessarily violent) had a poor prognosis for becoming cooperative parents and there is increasing evidence that children of divorce have more problems because of the conflict between the parents before the divorce and not because of the divorce itself (Kelly, 1993). “High conflict” parents should be allowed to develop separate parenting relationships with their children. Frequent visits and joint custody schedules led to more verbal and physical abuse. More frequent transitions between high-conflict parents were related to more emotional and behavioral problems of the children. If this is true of “high conflict” parents, it is likely to be even more true if mothers are being physically victimized.

Not all social scientists conclude that joint custody can be problematic. For example, Bender (1994) believes that “even the small percentage of parents who are very angry may be able to work out procedures to alleviate anger so that the child is not caught in the middle” (p. 126). However, his conclusion relies on data gathered at one point in time and thus statements about cause and effect are not possible. For example, better child adjustment is likely to result when joint custody is requested by (or ordered to) non-violent, low-conflict couples rather than from joint custody per se. Joint custody can be quite beneficial to the children of these nonviolent, low-conflict couples, but not in cases of battering.

Parents Most at Risk for Physical and Emotional Abuse of a Child

Social science evidence can help to establish which parent is most likely to harm the children. The most convincing evidence for the potential of men who batter their partners also 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). 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).

Emotional abuse of children by men who batter is even more likely because nearly all of these men's children are exposed to domestic violence (Pagelow, 1990). This exposure often constitutes a severe form of child abuse since the problems associated with witnessing abuse are now clearly documented (e.g., Edleson, in press). There are short and long-term emotional and behavioral consequences for both boys and girls. Parents may not realize that their children can be affected even if they do not see the violence. For example, the children may be hiding in their bedrooms listening to repeated threats, blows, and breaking objects. Obviously, they may be afraid their mother will be injured or killed, but they may also have divided loyalties between their parents, guilt about not being able to intervene, and anger at their mothers for not leaving (Saunders, 1994). If mothers cannot find safety, their fears and depression may keep them from being as nurturing and supportive to their children as they normally would be.

Although state laws include emotional abuse in their statutory definitions of child abuse, such abuse is difficult to substantiate and child protection workers often give it low priority.

Mothers may also be blamed for harming their children in cases where evaluators and practitioners do not understand the dynamics of abuse (Edleson, 1997). Their cases are sometimes labelled as "failure to protect" since they are supposedly able to protect their children from the physical and emotional abuse of their partners (Enos, 1996). Battered women

may even face criminal charges (Sierra, 1997). However, battered women's actions often come from their desire to care for their children. They may not attempt to leave because of financial needs, because they believe that the children need a father, or because they fear losing the children to their abuser. They often leave the relationship when they see the impact of violence on their children, only to return when threatened with even greater violence or out of economic necessity.

Innovative programs, like Project Protect in Massachusetts, were developed to address these concerns. They use specially trained staff and multidisciplinary teams to integrate interventions for child abuse and domestic violence (Davidson, 1995). On a policy level, states generally allow evidence to show that the non-abusive spouse feared retaliation from her partner and thus could not try to stop or prevent abuse to the child. However, only a few states explicitly authorize this type of evidence.

Factors Related to Risk to the Children

In a given custody case, a number of factors related to or incorrectly attributed to child abuse and exposure to domestic violence may be present. Several factors—parental separation, childhood victimization of the parents, 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. In one study, a fourth of the women reported threats against their lives during visitation (Leighton, 1989). Separation is a time of increased risk of homicide for battered women (Wilson & Daly, 1994) and these homicides sometimes occur during custody hearings or visitation exchanges of children. In rare cases, men kill children in retaliation for their female partners women leaving them.

Children are also likely to be exposed to renewed violence if their fathers become involved with other women. Over half of men who batter go on to abuse a second woman (Wofford, Elliot, & Menard, 1994). Judges who consider the remarriage of a man to be a sign of stability and maturity should instead consider it as a possible sign that the children will once again be emotionally harmed.

Parents' Childhood Victimization

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 abusers (Kaufman & Zigler, 1987). Some evidence suggests that the link is stronger in men than in women (Miller & Challas, 1981).

Parents' Psychological Characteristics

The parents' personality traits and psychological disorders are generally poor predictors of child abuse (Wolfe, 1985). Neither parent is likely to have chronic mental disorders of genetic origin (e.g., schizophrenia, or bipolar disorder). Personality disorders are much more likely to appear on the psychological tests of both parents. Great care must be taken, however, when interpreting parents' behaviors and psychological tests. Men who batter often have the types of personality disorders that keep childhood traumas, anxiety, and other problems hidden (Holtzworth-Munroe & Stuart, 1994).

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 their partners, battered women's psychological problems are much more likely to decrease as she becomes safer. Many battered women may seem very unstable, nervous, and angry (Crites & Coker, 1988). Other battered women 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 indicate severe personality disorders and mental illness. However, their behaviors and test scores must be interpreted in the context of the traumas they have faced or continue to face (Rosewater, 1987). The tactics used by their abusers parallel those used against prisoners of war and include threats of violence, forced isolation, degradation, and attempts to distort reality and increase psychological dependence. Severe depression and traumatic stress symptoms are the likely results. When women fear losing custody of children to an abusive partner, the stress can be overwhelming.

Interventions for the Abuser

Successful completion of treatment does not at all mean that the risks of child and woman abuse are eliminated. Although the evaluation of programs for men who batter is still in its infancy (Saunders, 1996), it is clear that a substantial proportion of women (35%, averaged across a number of studies) report that physical abuse by their partners occurs within 6-12 months after treatment. Psychological abuse is even more prevalent. 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, yet did not specifically focus on parenting issues. Only one description could be found of a special parent training program for men who batter (Mathews, 1995)

Recommendations for Custody and Visitation

Despite the dearth of sound research in this area, some tentative recommendations can be made from practice wisdom and the research that does exist. There is general agreement that joint custody has many advantages when a woman has good financial resources and an ex-partner who is nonabusive and supportive as a co-parent. However, the past and potential behavior of men who batter means that joint custody (or sole custody to him) is rarely the preferred option for these families. In addition to their propensity for violence, these men are likely to abuse alcohol (Tolman & Bennett, 1990) and communicate in a hostile, manipulative manner (Holtzworth-Munroe & Stuart, 1994).

As stated earlier, the model state statute of the National Council of Juvenile and Family Court Judges clearly 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 who is the victim must be primary. The perpetrator's history of causing fear as well as physical harm should be considered. A parent's absence or relocation in an attempt to escape violence by the other parent 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 noncustodial 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.

Visitation guidelines should be based on the following general principles: a) contact between child and parent should be structured in a way that limits the child's exposure to parental conflict; b) transitions should be infrequent in cases of ongoing conflict and the reasonable fear of violence; and c) substantial amounts of time with both parents may not be advisable (Johnston, 1992). Ideally, a court order should detail the conditions of supervised visitation, including the role of the supervisor (NCJFCJ, 1995). Unsupervised visitation should be allowed only after the abuser completes a specialized program for men who batter 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 nonviolent tactics that can harm the children. Rather than rely on official records of recidivism, the best way to establish that the perpetrator is nonviolent is to interview current and past partners.

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.

The model statute (NCJFCJ, 1994) states that visitation should only be awarded to the perpetrator 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 person or agency, completion by the perpetrator of "a program of intervention for perpetrators", and no overnight visitation. If the court allows a family or household member to supervise the visitation, the court can set the conditions to be followed during visitation. For example, an order might specify that the batterer not use alcohol prior to or during a visit and that the child be allowed to call the mother at any time.

Visitation centers are expanding across North America in response to the need for safe access and visitation (Straus, 1995). The approaches of these centers vary. For example, most of them provide some form of observational records of the visit, but the role of these programs in evaluating parents and reporting to courts differs. The experience of the visitation center in Duluth, Minnesota, shows the difficulty of keeping a neutral stance given the traditional biases in our social systems (McMahon & Pence, 1995). The Duluth center found that the traditional over-emphasis on parental rights and child welfare may block from view the harm of domestic violence to both battered women and their children.

In conclusion, although there is a need for further 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 custody or visitation is granted, careful safety planning and conditions attached to the court order are important to help lower the risk of harm to the children and their mothers.

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Daniel G. Saunders

The current enthusiasm for joint child custody and liberal visitation need to be tempered drastically in cases involving domestic violence for the following reasons:

- Men who batter their intimate partners have a high potential for physically and emotionally abusing their children.
- Child custody evaluations often place battered women at a disadvantage because living in an abusive relationship may produce traumatic effects that give the false impression that they are unfit parents.
- Battered women's attempts to protect themselves and their children can also give the false appearance that they are unfit parents.
- Men who batter are likely to have chronic behavioral and emotional problems that may not be easily detected.
- Many states are responding to these concerns by enacting laws that require domestic violence to be considered in child custody determinations and sometimes presume that the abuser should not have joint or sole custody. Other statutes address concerns over visitation, mediation, child abduction, and child abandonment.

Although more research is needed in the field, our current practice wisdom and social science research indicate that:

- Men who batter should rarely have sole or joint custody of their children.
- Divorce, separation and/or treatment of the abuser do not guarantee that the abuse of the women and children will stop.
- Visitation needs to be supervised in many cases or restricted in other ways.
- Battered women need to be allowed exemptions from mandated mediation.
- Battered women should be allowed to relocate with their children at a safe distance from their expartners and not be labelled "uncooperative" if they do not wish to coparent.

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