

## Taneeka Hansen

---

**From:** Allen Bailey <allen@lawofficeamb.com>  
**Sent:** Thursday, March 24, 2016 9:46 AM  
**To:** Rep. Paul Seaton  
**Subject:** House Bill 334  
**Attachments:** Bailey final CLE.bio.docx; FLQ final DV-custody.art.pdf

**Categories:** Taneeka

Representative Seaton,

I plan to testify this afternoon on HB334 at the LIO in Anchorage; I was not able to testify on Tuesday because the HSS Committee had a long schedule and I was the last person in the room before the committee had to switch to a different bill.

Attached are a brief CV from me and a copy of the article I wrote for the 2013 Summer Edition of the Family Law Quarterly, a peer-reviewed journal that has in the past been cited by the Alaska Supreme Court.

Thank you for the time you are giving to issues of child custody and domestic violence. For reasons I will explain in more detail this afternoon, I oppose the bill.

Allen M. Bailey, Esq.

750 West 2nd Ave., Ste. 215

Anchorage, Alaska 99501

Ph. (907) 272-1488

fax (907) 277-9789

allen@lawofficeamb.com .

Allen M. Bailey, J.D., is a family law practitioner and former municipal prosecutor in Anchorage, Alaska. He is a member of the ABA Family Law Section Council and Publications Development Board. He is chair of the section's Domestic Violence Committee and a past chair of the Child Custody Committee. Bailey co-authored Alaska's statute establishing a presumption against awarding custody of a child to a batterer. Bailey is a member and past president of the Abused Women's Aid In Crisis, Inc., Board of Directors and is a member of the Anchorage DV Caucus. He is on the Executive Committee of the Alaska Bar Association's Family Law Section and in 2011 received the Alaska Attorney General's Pro Bono Award. Bailey is a member of the Association of Family and Conciliation Courts. Bailey was on the ABA Commission on Domestic and Sexual Violence 2006-09 and since then has served as a section liaison to the commission. In 2015, he received a 20-20 Vision Award from the ABA Commission on Domestic and Sexual Violence. He authored *APrioritizing Child Safety as the Prime Best-Interest Factor,*<sup>@</sup> in 47 Family Law Quarterly 35 (July 2013); a chapter in *The Impact of Domestic Violence on Your Legal Practice; A Lawyer's Handbook, 2d Ed.,* ABA (2004); and *ARestricting Contact with Toxic Fathers,*<sup>@</sup> 2 Family & Intimate Partner Violence Quarterly, p. 225 (2010).

# Prioritizing Child Safety as the Prime Best-Interest Factor

---

ALLEN M. BAILEY\*

## I. Introduction

In making child custody decisions, family court judges must apply their jurisdiction's "best interests of the child" criteria. Most states have lists of factors that judges should consider. Courts are expected to issue custody orders that are safe for children, but they often have difficulties reconciling competing factors. Child safety (or victim-parent safety) is not listed as a top priority. After Congress adopted a resolution stating that children should not be placed in the custody of parents who have committed domestic violence,<sup>1</sup> all states enacted laws allowing consideration of domestic violence.<sup>2</sup> While almost half of the states contain a presumption against custody to the abuser, most do not offer any guidance as to what triggers the presumption and how the existence of domestic violence is to affect the child custody decision.<sup>3</sup> In addition, domestic violence is almost always defined in terms of physical abuse, rather than psychological.

---

\* Practices family law in Anchorage, Alaska. His expertise is abuse in families, and he has litigated abuse issues in criminal and civil cases. He thanks Margaret Drew for her substantial contributions to introductory material and Linda D. Elrod for her editorial contribution.

1. H.R. Res. 172, 101st Cong. (1990).

2. See Leslie Joan Harris, *Failure to Protect from Exposure to Domestic Violence in Private Custody Contests*, 44 FAM. L. Q. 169 (2010) (noting that twenty-eight states use domestic violence as a factor); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011–2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, Chart Two, Child Custody Criteria, 46 FAM. L. Q. 471, 526 (2013). See, e.g., Boswell v. Boswell, 721 A.2d 662, 668–69 (Md. Ct. Spec. App. 1998).

3. See Harris, *supra* note 2, at 171 (noting twenty-two states have presumptions against custody to the abusive parent). See, e.g., ALASKA STAT. § 25.24.150(h) (one severe incident or two minor ones triggers presumption). Others require a pattern of abuse—ARK. CODE ANN. § 9-13-101(c)(2). Still others require a criminal conviction. FLA. STAT. ANN. § 61.13. Presumptions can be overcome. See Stephanie F. v. George C., 270 P.3d 737 (Alaska 2012). But see Nichols v. Nichols, 74 So. 3d 919 (Miss. Ct. App. 2011) (finding mother did not overcome the presumption against custody to an abuser).

Many family court judges have too little knowledge about the harmful effects on children who are exposed to violence in their homes. While judges usually do not award custody to a parent where evidence shows actual physical abuse of the child, a judge may award sole or joint custody or parenting time to a parent who has abused a spouse. Family court judges often fail to understand that a parent who abuses the child's other parent cannot at the same time be a good parent.<sup>4</sup> The American Judges Association noted that "Studies show that batterers have been able to convince authorities that the victim is unfit or undeserving of sole custody in approximately 70% of challenged cases."<sup>5</sup> Without an understanding of the potential harm to children from witnessing or being in the same home when it occurs, a judge may dismiss the concerns of a hesitant, traumatized, and often nervous parent-victim of abuse. The judge may be more impressed with the perceived better parenting qualities of the often glib, articulate, and manipulative abuser. When safety is compromised, children often suffer profound and long-lasting harm.

This article will explore the issue of domestic violence in the context of child custody proceedings and discuss abusers, victims, and the problems with joint custody. Next it will discuss recent research on the effects of domestic violence on children, including new brain studies. The article will discuss a 2007 Wingspread Conference, which offers a new paradigm of weighting safety above other child custody factors. The article concludes that courts should consider safety as the most important factor in determining best interests of the child and with whom the child will live.

## II. Domestic Violence and Child Custody

Domestic violence is an unfortunate reality. Social science shows that a significant number of all relationships includes violent behavior by one or both partners against the other. Recent studies indicate that one in three women (35.6%) have experienced rape, physical violence, and/or stalking by an intimate partner.<sup>6</sup> While men also are victims of abuse, the rate of sexual assault by male intimate partners is twenty-five times the rate of

---

4. See, e.g., *Knock v. Knock*, 621 A.2d 267 (Conn. 1993); Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 317 (2009).

5. Mike Brigner, *Why Do Judges Do That?*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, 13–6, 13–7 (Therese Hannah & Barry Goldstein eds. 2010) (citing <http://aja.ncsc.dni.us/domviol/page5>).

6. See NATIONAL CENTER FOR INJURY PREVENTION & CONTROL, CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT. See also PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000) (earlier studies showed 22% of women have been physically abused and even more have been sexually assaulted).

assault by female intimates.<sup>7</sup>

Child custody litigation is a minefield for family violence victims because of long-term societal assumptions and religious and legal foundations on which people rely in making decisions about interpersonal relationships. Women who are subject to abuse in their relationships often find it difficult to end the relationship. Societal pressures to maintain an intact family combined with lack of financial and legal support result in an average of five to seven attempts to leave before a woman is finally able to end the relationship.<sup>8</sup> Meanwhile, the danger steadily increases.

A child custody action occurs in one of the most dangerous times for abused women and their children: the two years following separation from the abuser.<sup>9</sup> During that period, the abuser is most likely to abuse, stalk, and harass his former partner and her children. More women victims are murdered by their former partners within two years of separation than at other times; the risk to their attorneys is elevated during this time period as well.<sup>10</sup>

The victim's attorney must conduct an early screening of the client for a history of abuse. In addition, the attorney must screen for current and potential future risk to the client and the likelihood of potentially lethal actions by the abuser.<sup>11</sup> Appropriate and safe results require that every professional involved in the case be educated, trained, and motivated to protect the victim and the children. The attorney seeking a safe result for an abuse victim and her child must know how to interview the client to

---

7. LUNDY BANCROFT, JAY G. SILVERMAN, & DANIEL RITCHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 98, 123 (2d ed. 2012). See also SHANNON CATALANO ET AL., BUREAU OF CRIMINAL STATISTICS, *FEMALE VICTIMS OF VIOLENCE 2-3* (2009) (indicating that 70% of victims killed by an intimate partner in 2007 were women, a number unchanged since 1993); NISVS 2010, *supra* note 6 (showing that one in three women experience multiple forms of rape, stalking, and physical violence; 92.1% of male victims experience only physical violence; 10.7% of women, and only 2.1% of men have been stalked).

8. Kathleen Ferraro, *Battered Women: Strategies for Survival*, in *PUBLIC AND PRIVATE FAMILIES: A READER* 243 (Andrew J. Cherlin ed., 1998).

9. Peter G. Jaffe, Janet Johnston et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 *FAM. CT. REV.* 500, 501-02 (2008) (noting that abuse often escalates after separation). Sometimes the period of danger can last for many years postseparation. See also Daniel G. Saunders & Angela Browne, *Intimate Partner Homicide*, 2 *CASE STUDIES IN FAMILY VIOLENCE* 424 (Ammerman & Hersen eds., 2000); J.L. Hardesty & G.H. Chung, *Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research*, 55 *FAMILY RELATIONS* 200 (2006).

10. Saunders & Browne, *supra* note 9.

11. Pauline Quirion, *Why Attorneys Should Routinely Screen Clients for Domestic Violence*, 42 *BOSTON B.J.* 12 (1998). See also Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing our Clients?*, 39 *FAM. L. Q.* 7 (2005) (suggesting ways lawyers can protect victims of domestic violence).

draw out her history of intimidation, isolation, control, and violence. The attorney must convey those facts to a court that often has little insight into the dynamics of family violence. The lawyer must then convince the judge that neither the victim client nor her children will be safe without the relief the attorney requests.

Social science researchers in the past several years have published results of studies showing that abusive parents drive the majority of contested child-custody cases in the courts of the United States and Canada.<sup>12</sup> Janet Johnston states:

In our studies of custody-litigating families, domestic violence was alleged in the large majority of cases (two thirds to three fourths), and parental abuse of drugs and alcohol was alleged on average in about one half of cases. . . . To date, findings indicate that the majority of domestic violence and substance abuse allegations (one half to three fourths) and a large minority of child neglect and abuse allegations (one fourth to one half) in family law matters can be subsequently substantiated in some manner.<sup>13</sup>

Male batterers are more likely than nonabusive men to seek custody of their children.<sup>14</sup> Because men have controlled most significant segments of societies in which they live, from government to religion and family structures, abusive men have a significant cultural advantage in litigating issues surrounding divorce and child custody, simply by virtue of their maleness. The legal system grants parents rights to custody of their children<sup>15</sup> that often appear to be superior to their children's right to be safe. Abusive

---

12. Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283 (2005); Peter G. Jaffe, Samantha E. Poisson, & Alison Cunningham, *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 192 (Jeffrey L. Edleson & Sandra A. Graham-Bermann eds., 2001) [hereinafter DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN] (finding domestic violence allegations arose in 75% of contested custody cases). See also AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASKFORCE ON VIOLENCE AND THE FAMILY 100 (1996) [hereinafter APA FAMILY VIOLENCE REPORT] (noting that child custody and visitation disputes must be understood in the context of family violence and abuse because allegations appear to occur more frequently when there is a history of domestic violence).

13. JANET JOHNSTON, VIVIENNE ROSEBY, & KATHRYN KUEHNLE, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 308 (2d ed. 2009).

14. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 5. See also Susan L. Miller & Nicole L. Smolter, *Paper Abuse: Documenting New Abuse Tactics*, 17 DOM. VIOL. REP. 65 (2012) (discussing how abusers use legal proceedings to harass their victims, force contact, exert control, and financially burden them); Mary Przekop, Note, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053 (2011).

15. See *Troxel v. Granville*, 530 U.S. 57, 65 (1997) (stating that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court").

men, who are often articulate, manipulative, and persuasive, often prevail over their abuse victims in custody disputes, despite a lack of evidence that the women had parenting faults.<sup>16</sup> More concerning is that some abusive men succeed in obtaining physical custody, even when there is credible evidence of the father's abuse of the mother and the children.<sup>17</sup>

### A. Characteristics of Batterers

Domestic violence research has changed. Early writers on family violence did not even attempt to differentiate the *nature* of violence in relationships,<sup>18</sup> but talked about a “cycle of violence.”<sup>19</sup> Later researchers, Johnston and Campbell, came up with several “typologies” of relationship violence.<sup>20</sup> A recent characterization categorizes interpersonal violence in relationships: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence.<sup>21</sup> The most serious is the coercive controlling violence. One out of eight relationships includes efforts by violent men to control their partners. Recently recast as “coercive control,” the long-term battering process involves intimidation, isolation, control, and physical abuse.<sup>22</sup>

. . . Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship (control). . . .<sup>23</sup>

A primary feature of abusive men is their sense of entitlement to control, coerce, denigrate, and abuse their female partners by virtue of the

---

16. Borchgrevink v. Borchgrevink, 941 P.2d 132 (Alaska 1997).

17. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 142.

18. Murray A. Strauss, *Measuring Intrafamily Conflict and Violence*, 41 J. MARRIAGE & FAM. 75 (1979).

19. LENORE WALKER, *THE BATTERED WOMAN* (1979) (describing the “cycle” of violence as a three-phase process that began with a build-up of tension in the relationship followed by an episode of physical abuse, and then followed by a “honeymoon” phase in which the abuser (or batterer) was apologetic and regretful concerning his conduct. And then the cycle would begin again with a buildup of tension).

20. Janet R. Johnston & Linda E. Campbell, *A Clinical Typology of Interparental Violence in Disputed-Custody Divorces*, 63 AM. J. ORTHOPSYCHIATRY 190 (1993).

21. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 (3) FAM. CT. REV. 476 (2008).

22. EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* 228 (2007) (stating that “woman battering from the standpoint of its survivors is a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control. . . .”).

23. *Id.* at 15. See also Kelly & Johnson, *supra* note 21, at 480.

fact that they are men.<sup>24</sup> This dynamic is characterized by some writers as *intimate terrorism*:

In *intimate terrorism* relationships, the perpetrator engages in a general pattern of coercion and control over his partner—over her finances, social contacts, everyday activities, employment, parenting practices, even the clothes she wears—and uses violence as one means to that end. Even nonviolent control tactics take on a violent meaning through their implicit connection with potential physical harm.<sup>25</sup>

An integral part of the coercive control dynamic is the process by which the batterer makes the rules by which his victim partner must live—and then he changes the rules so that the victim partner can never succeed in following “the rules.” It leaves the partner—usually the woman—not knowing what will happen next or how to do whatever is necessary to keep the abuser from hitting or choking her again. The uncertainty and denigration leave her isolated in her world. The batterer does not make all of the decisions in his relationship, but he *decides who makes the decisions*:

... The hyper-regulation of everyday routines typical of coercive control *works* because the normative constraints already embedded in women’s performance of everyday chores merge with their fear of not doing what is demanded. . . .

... What marks control is not who decides, but who decides who decides; who decides what, whether, and how delegated decisions are monitored; and the consequences of making “mistakes.”<sup>26</sup>

Physical violence, sexual assault, and coercion are the most obvious signs of coercive control, but those behaviors do not have to be frequent or severe in order for the battering male to continue the abusive relationship. As some researchers note:

... the fear generated in the victim is sufficient. The pattern of abusive behavior tends to escalate over time, especially in response to threat of loss of control of or abandonment by the partner. This may explain why the abuser is more likely to use custody litigation to harass and punish and becomes particularly dangerous during the aftermath of the separation, at which time he may stalk, harass or take the victim hostage. [citations omitted.]<sup>27</sup>

Battering partners nearly always have control over the couple’s finances. They are more likely to use the courts to continue to control their partners

---

24. Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBANY L. REV. 973 (1995). See also, Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 (11/12) SEX ROLES 743 (2005).

25. LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 9 (2008).

26. STARK, *supra* note 22, at 230.

27. JOHNSTON ET AL., IN THE NAME OF THE CHILD, *supra* note 13, at 314.



and, in effect, financially and emotionally abuse them as well.<sup>28</sup>

Only a small percentage of male batterers have mental health diagnoses.<sup>29</sup> One researcher found a greater proportion of batterers have a personality disorder—specifically, a form of antisocial personality disorder:

Perpetrators who are psychopaths have a high likelihood of re-offending. While psychopaths represent a relatively small percentage of men who abuse women (15% to 30%) their behavioral traits of superficial charm, need for stimulation, callousness, and manipulation are quite familiar to clinicians who provide service to their victims . . . Psychopaths will have a history of early behavioral problems, impulsivity, antisocial behavior, and callousness.<sup>30</sup>

Most battering men, or coercive controllers, have no psychological diagnosis. These men are socialized to believe that they are entitled to control their female partners and to use intimidation, isolation, control and physical force to maintain that control. While abuse of alcohol or another drug does not *cause* domestic violence, it may exacerbate it and increase the frequency. Coercive control does not have its genesis in abuse of a drug. Cocaine has been shown to increase the incidence of interpersonal violence. About two-thirds of methamphetamine users reported violent behavior as a result of their use.<sup>31</sup>

Some judges, trained to believe that parents have a “right” to parent their children, believe that persons who have committed crimes against their intimate partners will change their behaviors once their transgressions have been noticed. Courts often ignore the danger that abusive parents pose to their partners and children who are placed in their care. Few judges understand or accept the facts that these men who have that sense of entitlement *are highly unlikely to change their behaviors, even after completing a batterer intervention program*. This means that such men are highly likely to use their coercive and abusive tactics to control subsequent partners, which will expose their children to more of the abuse that they witnessed or endured during the abusive parent’s prior intimate

---

28. See PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE; A CALL FOR SAFETY AND ACCOUNTABILITY 32 (2003) (describing the dynamic); Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE; THEORY, RESEARCH, AND APPLIED ISSUES 380–83 (George W. Holden, Robert Geffner & Ernest N. Jouriles eds., 1998); BANCROFT, SILVERMAN & RITCHIE, *supra* note 7, at 5, 15, 98; LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 291–314 (2002).

29. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 24–26.

30. Daniel J. Sheridan et al., *Prediction of Interpersonal Violence: An Introduction*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 12 (2d ed., Jacquelyn C. Campbell ed., 2007).

31. *Id.* at 14 (reporting that in a study of more than 1,000 methamphetamine users, eighty percent of the women reported abuse or violence by a partner).

relationship.<sup>32</sup>

A Quincy, Massachusetts, study of a statistically significant sample of batterers who were arrested demonstrated the basic intractability of abusive and controlling men. In a ten-year study, an examination of 342 men revealed:

[D]ecade-long criminal and abuse careers largely undeterred by arrest, prosecution, probation supervision, incarceration, and batterer treatment. Although only a minority reabused (32%) or were arrested for any crime (43%) within a year of the study court arraignment, over the next decade, the majority (60%) reabused, and almost three fourths were arrested for a domestic abuse or non-domestic abuse crime. The research suggests that short-term cessation of domestic violence achieved after a variety of interventions may not indicate longer-term behavior change.

. . . the majority of abusers reabused, and the majority of reabusers did so more than once. . . although found to be significant, reabuse rates were undoubtedly higher than measured.<sup>33</sup>

Designing research protocols that study recidivism among abusive men convicted of domestic assaults is difficult.<sup>34</sup> Those who have worked in treatment of battering men have had little success in proving these abusers actually change their behaviors. Research has shown that intensive, group-centered treatment programs, long considered the most likely to succeed in this endeavor, have only succeeded in cases that include continued close monitoring by the courts.<sup>35</sup> In a program directed at developing a batterer intervention program centered on educating batterers to see how their violence affects their children, some insights into batterer behaviors are determined:

---

32. Stark, *supra* note 24, at 64 (stating “Reoffending is a near certainty in domestic violence cases.”).

33. Andrew R. Klein & Terri Tobin, *A Longitudinal Study of Arrested Batterers, 1995–2005*; *Career Criminals*, 14 *VIOLENCE AGAINST WOMEN* 136, 144 (2008). See also DONALD G. DUTTON & SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 28 (1995), stating:

We were astonished to find that about 20 percent of our batterers actually showed a decline in heart rate during the course of the nonviolent argument . . . the batterers who showed this heart rate decrease were the most belligerent and contemptuous toward their wives . . . the “disconnected” group showed the highest rates of violence outside the marriage, and were the most likely to have reported violence in their family of origin.

34. Juan Carlos Arean & Lonna Davis, *Working with Fathers in Batterer Intervention Programs: Lessons from the Fathering After Violence Initiative*, in *PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION* 122 (Jeffrey L. Edleson & Oliver J. Williams eds., 2007) [hereinafter *PARENTING BY MEN WHO BATTER*] (noting that batterer intervention programs do not have the tools to assess and select the men who might be ready to start working on healing their relationships with their children).

35. See ANDREW R. KLEIN, NAT’L INSTITUTE OF JUSTICE, *PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES* 73 (2009).

Very few men will be able to take more than the first few steps during their first year of batterer intervention. . . . A percentage of men do not stop their violence after attending a batterer intervention group (the actual number is the subject of great and ongoing debate). Fathers who are actively violent should not be encouraged to pursue this work.<sup>36</sup>

Change is a slow process. A recent period without violence does not mean the abuser has “changed.”<sup>37</sup> Seventy to eighty-five percent of men who batter their partners do not change their abusive and controlling behaviors from one relationship to the next. Why should they change? It works for them!<sup>38</sup> Children in their care will be exposed again to the abuse they witnessed in that parent’s previous relationship.<sup>39</sup> In other words, the children will be at risk of both direct abuse and the “collateral” abuse they receive from their parents’ violence.<sup>40</sup>

Why do these men get sole or joint custody? Family court judges rely on whatever admissible evidence they have concerning the parents’ relative qualities as parents and assess appearance and demeanor of witnesses under circumstances where the judges’ expectations may be erroneous. In a description of courtroom demeanor of the abusive parent, the book for judges of the National Council of Juvenile and Family Court Judges states the following:

[T]here is no one pattern of behavior that you will observe in either the abusive parent or the at-risk parent. There are some behaviors, however, that indicate disrespect toward the other parent. These behaviors should raise red flags for you to determine whether they result from a pattern of control.

Often abusive parents present well, as they are skilled at maintaining control. An abusive parent might:

- Believe or claim that the other parent is stupid, unsophisticated or inflexible;
- Anger easily;
- Behave in an arrogant or superior manner;
- Attempt to present as the true victim in the relationship;

---

36. *Id.* at 129.

37. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 224, citing Scott L. Feld & Murray A. Straus, *Escalating and Desistance of Wife Assault in Marriage*, PHYSICAL VIOLENCE IN AMERICAN FAMILIES (Murray A. Straus & Richard J. Gelles eds., 1990) (noting that although the average batterer assaults three times a year, some batterers went twelve months or even two years, and that batterers tend to carry their abusive behavior from relationship to relationship).

38. Lundy Bancroft, Address at Alaska Women’s Resource Center Seminar (Oct. 2003). Bancroft, who worked for many years in batterer intervention programs in Massachusetts, is the author of *Batterers as Parents in THE EFFECT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK* (2d ed. 2004).

39. BANCROFT, SILVERMAN, & RITCHIE, *supra*, note 7, at 22, 224.

40. Jeffrey L. Edleson, *Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 91. See also Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71(2) J. COUNSELING & CLINICAL PSYCH. 339–52 (2003).

- Appear vulnerable or otherwise engender empathy with the court or with third parties;
- Be unwilling to understand another's perspective;
- Expect the child to meet the parent's needs;
- Advocate or adhere to strict gender roles;
- Patronize the other party, counsel, and even the court;
- Attempt to create an alliance with you;
- Minimize, deny, blame others for, or excuse inappropriate behavior.

This controlled courtroom presence of the abusive parent may contrast with the at-risk parent's behavior.<sup>41</sup>

### *B. Why Victims Sometimes Do Not Look Like Good Parents*

Fitting into male-developed credibility norms is difficult for a victim, particularly abused women. Women who have been traumatized and terrorized by physical abuse and intimidation by their intimate partners may find it difficult to communicate with the court—especially while sitting at a courtroom table ten feet from their abuser. Trauma affects people in predictable ways. The effects of exposure to trauma can interfere with a person's ability to concentrate on questions, formulate answers in a cogent manner and recall past traumatic events.<sup>42</sup> This disabling effect stems from the power imbalance and “persuasion imbalance” that begins in the intimate moments when men assert their physical power and attempt to control their partners with infliction of traumatic (mental and/or physical) injuries.<sup>43</sup> Post Traumatic Stress Disorder (PTSD) can result. At trial, the battering partner may manipulate a judge into believing that the abuser is the better parent. This perception is enhanced because of the inability of the abused parent to effectively communicate, because of the effects of the intimate terrorism inflicted by the abuser and the added stress of having him or her sitting in the same courtroom during court hearings. In testifying about how she was abused, the victim is likely to re-experience the terror, fear, and pain she felt during the abuse, and her PTSD symptoms may interfere with her ability to recall or willingness to talk about it.<sup>44</sup> The judge is often convinced that the child is more appropriately placed in the

---

41. JERRY J. BOWLES ET AL., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 9 (2008).

42. JUDITH HERMAN, TRAUMA AND RECOVERY at 42–43, 116, 122 (1997); MARY MALEFYT SEIGHMAN, ERIKA SUSSMAN & OLGA TRUJILLO, REPRESENTING DOMESTIC VIOLENCE SURVIVORS WHO ARE EXPERIENCING TRAUMA AND OTHER MENTAL HEALTH CHALLENGES: A HANDBOOK FOR ATTORNEYS, NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH 41–43 (2011). The DSM-IV-TR 468, 476, describes the behaviors, which can include the victim's mind going blank on the witness stand, her failure to remember details of the crimes against her, and becoming flooded with emotion as she recalls the fear she felt when she was assaulted.

43. HERMAN, *supra* note 42, at 28, 34, 42, 77, 122.

44. *Id.* at 42, 46.

custody of the abuser.<sup>45</sup> One judge's guide describes why the at-risk parent may not present as well and might:

- Have difficulty presenting evidence for any number of reasons: cognitive impairments resulting from abuse, fear, or a conviction that she [footnote omitted] will not be believed.
- Demonstrate inappropriate affect resulting from fear, depression, post-traumatic stress disorder, or other response to abuse.
- Be extremely anxious and unfocused in the presence of the abusive parent.
- Be aggressive or angry when testifying.
- Show signs of distress when listening to the other parent's testimony.
- Appear numb, unaffected, or disinterested.<sup>46</sup>

In fact, a victim with posttraumatic stress disorder (PTSD) or generalized anxiety disorder caused by a perpetrator's abuse may at times be unable to testify about the abuse because PTSD or generalized anxiety disorder.<sup>47</sup> A person with generalized anxiety disorder or PTSD could have her thoughts go completely blank when asked a question. Counsel for battered victims must be prepared to deal with the behaviors of clients having PTSD.

PTSD symptoms include *intrusive symptoms* (reliving the traumatic experience as if it were continually recurring in the present, through nightmares and flashbacks), *avoidant symptoms* (emotional numbing, withdrawal, or the repression of memories of violent incidents), and *hyperarousal* (being in a constant state of alertness for and expectation of danger, which often leads to irritability and angry outbursts . . . . One analysis of a large set of existing studies found that almost 64% of battered women displayed symptoms that could be diagnosed as PTSD. . . . Other studies showed that approximately half of the women who experienced PTSD remained symptomatic even after they had been out of a violent relationship for 6 to 9 years.<sup>48</sup>

### C. Problems with Joint Custody

While statutory or case law requires all child custody decisions in the United States and Canada to be based on the best interests of the child, a major custody litigation pitfall for victims of violence is the legal or de facto presumption in favor of joint legal and/or physical custody.<sup>49</sup> Judith

---

45. Evan Stark, *Reframing Child Custody Decisions in the Context of Coercive Control*, 11–6, 11–23, 11–25, 11–29, 11–31, in *DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY*, 13–6, 13–7 (Therese Hannah & Barry Goldstein eds., 2010); Brigner, *supra* note 5.

46. *Id.* at 10.

47. See DSM-IV-TR, *supra* note 42 at 463. See also LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 71 (3d ed. 2009) (explaining that battered woman syndrome is not a mental disorder but a psychological reaction of a normal person when exposed to traumatic events and characterizing battered woman syndrome as a component of posttraumatic stress disorder).

48. GOODMAN & EPSTEIN, *supra* note 25, at 55.

49. *E.g.*, FLA. STAT. ANN. § 61.13 (West 2012).

Wallerstein and Joan Kelly originally thought that children whose parents shared custody after their divorce fared nearly as well as children whose parents remained in unified families.<sup>50</sup> Shared custody, legal and physical, was promoted as the preferred child placement after divorces, irrespective of the level of conflict between the former spouses. In the 1980s, research began to reveal that children who were exposed to battering behavior in their homes tended to develop negative behaviors.<sup>51</sup> In a ten-year follow-up study, Wallerstein and Blakeslee reported that a re-analysis of shared custody data from the earlier research, together with interviews with many of the original participants, revealed that the children who fared well in shared custody were only those whose parents had *agreed* to share custody.<sup>52</sup> Those children who had one parent who objected to sharing custody after divorce, often because of allegations of abuse, fared *much worse* than children in unified families and children in the other shared-custody group. They explain:

Children raised in joint custody arrangements that result from a court order in the wake of bitterly contested divorces seem to fare much worse than children raised in traditional sole custody families also torn by bitter fighting. . . . there is no evidence that joint custody is best for all, or even for most, families.<sup>53</sup>

Judges, trained to be impartial and unbiased fact-finders, consider only the admissible evidence presented in court when considering the best interest of the children. Many are unaware of the social science data on the harm to children from being in the middle of high conflict. Court custody practices and philosophy have not changed to accommodate the new information. Judges, and some state legislatures, continue to see shared custody as the favored mode, despite numerous research statistics that call that presumption into question. One recent study of divorce outcomes after the enactment of a joint custody presumption in one state reports an increase in the amount of child abuse allegations as well as lengthier, more costly, and more contentious custody proceedings.<sup>54</sup> Many commentators now recognize that where there has been domestic violence, joint custody is inappropriate. As one scholar noted:

Unfortunately, cases that get to litigation (or even to judicial intervention short

---

50. JUDITH WALLERSTEIN & JOAN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

51. See, e.g., David Wolfe et al., *Children of Battered Women: the Relation of Child Behavior to Family Violence and Maternal Stress*, 53 *J. CONSULTING & CLINICAL PSYCHOL.* 657 (1985).

52. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES; MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1996).

53. *Id.* at 273.

54. Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference*, 8 *J. EMPIRICAL LEGAL STUD.* 304, 307 (2011).

of litigation) are exactly those most likely to involve domestic violence. Recent research shows that approximately seventy-five percent of the contested custody cases that require judicial intervention are cases in which there is a history of domestic violence. . . . Presumptions in favor of shared custody then do not make sense given that so many of the cases in which the parties cannot resolve the children's custody without judicial intervention are cases involving domestic violence.<sup>55</sup>

Parents who have been victims of violence and who seek to protect their children from further abuse by the former partner find the courts are biased against sole custody.<sup>56</sup> Joint legal or physical custody have forced thousands of victims into the nightmare of having to coparent after divorce with an abusive ex-partner and doomed many children to continued exposure to the harms detailed.<sup>57</sup> As two prominent researchers have indicated:

[The best innovations of the late 1900's, such as mediation and joint custody, are not appropriate solutions to child-custody disputes involving domestic violence because these remedies require two parents who have some basic respect and trust in each other, as opposed to fear and hesitancy to even be in the same room. . . . Legal and mental-health professionals who ignore warning signs of domestic violence can endanger children and parents by minimizing, denying, or excusing the reality of domestic violence.<sup>58</sup>

The National Council of Juvenile and Family Court Judges published a judicial guide, which indicates that ensuring the child's physical, emotional and psychological safety are always in his or her best interest and notes:

Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in the sole custody, joint legal custody, or joint physical custody with the abusive parent. . . Providing for the physical, mental, and emotional safety of the child will include providing safe visitation by the abusive parent, if truly safe visitation can be arranged. You should award visitation to an abusive parent only if you find that adequate provisions for the child's and the abused parent's safety can be made, assuming that contact with the abusive parent is advised at all.<sup>59</sup>

---

55. Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 411–13 (2005). See also Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 J. DUKE J. GENDER L. & POL'Y 223 (2011).

56. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003).

57. REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT HEAL THRIVE 1 (2012) [hereinafter DEFENDING CHILDHOOD].

58. Peter G. Jaffe & Claire V. Crooks, *Assessing the Best Interests of the Child; Visitation and Custody in Cases of Domestic Violence*, in PARENTING BY MEN WHO BATTER, *supra* note 34, at 49.

59. BOWLES ET AL., *supra* note 41, at 5 (citing the NCJFCJ's Family Violence: A Model State Code § 401 (1994)).

### III. Effects of Domestic Violence on Children

Many judges who adjudicate child custody cases do not make the connection between the abuse of the mother and the abuse of her children.<sup>60</sup> Family court judges do not acknowledge the connection between a parent who intimidates, isolates, denigrates and physically abuses his child's mother *and the harm likely to befall a child who is placed in that parent's custody*. Children in homes where men believe they are entitled to use force on their female partners in order to maintain control are much more likely to be physically abused themselves. These children are also about six times more likely to be sexually abused in those homes.<sup>61</sup>

Within the past few decades, research has shown that children are harmed by high conflict. As some researchers have noted:

[I]f parental conflict is high, and if the nature of that conflict is such that it harms children . . . then frequent contact with both parents is likely to be more harmful than beneficial to children. In the face of high conflict, therefore, children would do better living primarily in one household with an authoritative mother or father and having more limited contact with the other parent.<sup>62</sup>

Domestic violence cases are high-conflict cases.<sup>63</sup> In recent years, research has established the existence of a wide range of possible adverse effects on children who have been exposed to domestic violence in their families.<sup>64</sup> Researcher Janet Johnston has noted that:

Children of such primary abusers are more likely to be abused directly, to witness one of their sibling's abuse, and to be exposed to continuing scenes of intimate-partner abuse when their abusive father or mother cohabits or remarries. More commonly, they are subjected to emotional abuse such as name-calling, cruel put-downs, and distortion of their reality by telling false and frightening stories. At times they are made the favorite at the expense of siblings who are isolated or outrightly rejected. At other times, they may be encouraged in morally corrupt and criminal behavior. . . . Boundary violations between adult domestic violence abusers and children are more likely especially where substance abuse is also involved, with a greater incidence of child sexual abuse being reported. . . .

After the separation, abusive ex-spouses often make exaggerated claims about their good relationship with their children and can use family litigation as a new forum to continue their coercive controlling behavior and to harass their former

---

60. STARK, COERCIVE CONTROL, *supra* note 22, at 42.

61. See Meier, *supra* note 56, at 700–01.

62. Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. IN THE PUB. INT. 1, 16 (2005).

63. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings: Critical Assessment of Child Custody Evaluations*, 42 FAM. L. Q. 381, 395 (2008).

64. See, e.g., Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, Ch. 18 TEXTBOOK OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY 221 (D. Schetky & E.P. Benedek eds., 2001).



partner. . . Upon closer scrutiny, however, in a range of obvious and more insidious ways they try to alienate the children from the other parent's affection (by asserting blame for the dissolution of the family and telling negative stories), sabotage family plans (by continuing criticism or competitive bribes), and undermine parental authority (by explicitly instructing the children not to listen or obey).<sup>65</sup>

Recent research has shown that about half of children who are exposed to violence in their homes are left with long-lasting negative effects. Evidence of such violence is usually used by one parent against the other—typically, but not always, the dad abusing their mother. Interpersonal violence also occurs in same-sex relationships at an approximately equal rate, with the same impact on the children. Often, but not always, the family violence includes direct physical or sexual abuse of the child.<sup>66</sup>

Each year in the United States, millions of children are exposed to violence as victims of physical or sexual abuse, witnesses to intimate partner violence, or witnesses to violence that occurs in their neighborhoods. Exposure to violence causes major disruptions of the basic cognitive, emotional, and brain functioning that are essential for optimal development and leaves children traumatized. When their trauma goes unrecognized and untreated, these children are at significantly greater risk than their peers for aggressive, disruptive behaviors; school failure; posttraumatic stress disorder (PTSD); anxiety and depressive disorders; alcohol and drug abuse; risky sexual behavior; delinquency; and repeated victimization. When left unaddressed, these consequences of violence exposure and the impact of psychological trauma can persist well beyond childhood, affecting adult health and productivity. They also significantly increase the risk that, as adults, these children will engage in violence themselves. Exposure to violence constitutes a major threat to the health and well-being of . . . children, ages 0 to 21 years. . . .

For far too many children, exposure to violence is a matter of life and death. Eighty percent of child fatalities due to abuse or neglect occur within the first 3 years of life and almost always at the hands of adults responsible for their care. . . [footnotes omitted.]<sup>67</sup>

Research in recent years has confirmed that children in homes marked by domestic violence can be harmed in direct and indirect ways.

[Even when direct child abuse is not a factor, children are put at increased risk of various kinds of harm by living in a home where violence occurs . . . . Regardless of a child's individual experience, the risks of physical, behavioral, and emotional injury are substantially higher than for children who do not suf-

---

65. JOHNSTON ET AL., *supra* note 13, at 36 (citations omitted).

66. Jeffrey L. Edleson, *Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 91 (. . . "approximately 30–60% of children whose mothers are being abused are themselves likely to be abused.").

67. DEFENDING CHILDHOOD, *supra* note 57, at 1.

fer exposure to domestic violence.<sup>68</sup>

Research into how children from homes marked by coercive and controlling violence has evolved over the past decades from observation of their behaviors to focusing on the physiological changes in children's brains that results from their exposure to violence. A striking image of how such children lived is this:

Children growing up in spouse abusive families live in a type of war zone. Sometimes they feel they can predict the "attacks" and sometimes the aggression is unexpected. This leaves them with a sense of danger and uncertainty.<sup>69</sup>

The National Task Force describes the harms that may befall a child who has been exposed to the repeated violent acts of a father assaulting the child's mother:

When children are exposed to violence, the convergence between real life events and their worst fears—about physical injury and loss of life, loved ones, and control of their actions and feelings—is an "experience of overwhelming and often unanticipated danger [that] triggers a traumatic disruption of biological, cognitive, social and emotional regulation that has different behavioral manifestations depending on the child's developmental stage." These traumatic disruptions of brain functioning, healthy development, relationships, and subjective experience often lead to symptoms of distress, including difficulties with sleeping and eating, irritability, attention and concentration problems, aggression, depressed mood and withdrawal, relationship problems, anxiety and intrusive thoughts, and impulsivity (such as dangerous risk-taking, alcohol and drug abuse, delinquency, or promiscuous sexual behavior.)

These symptoms result from abrupt changes in brain activity and altered perceptions of self, others, and the environment, leaving the child "stuck" or "frozen" without a way to escape the state of fear (and also often shock, anger, grief, betrayal, and guilt or shame) from the original violent experience. Children traumatized by exposure to violence cannot move forward in their lives. When parents, caregivers, and others identify the impact of the violence exposure and provide adequate support and treatment, affected children are able to heal and recover. However, when violence is chronic or sources of support are inadequate, the result can be a severe and lasting impact on every aspect of the child's development.

In these situations, exposure to violence may "substantially alter a child's biological makeup through long-lasting changes in brain anatomy and physiology. These children are at high risk of suffering chronic and severe symptoms of traumatic stress, including long-term psychiatric problems and lifelong limita-

---

68. Billie Lee Dunford Jackson, *The Role of Family Courts in Domestic Violence*, PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 189 (Peter Jaffe, Linda Baker, & Alison Cunningham eds., 2004) [hereinafter PROTECTING CHILDREN FROM DOMESTIC VIOLENCE].

69. B. B. Robbie Rossmann & Joyce Ho, *Posttraumatic Response and Children Exposed to Parental Violence*, CHILDREN EXPOSED TO DOMESTIC VIOLENCE 85 (Geffner, Jaffe, & Marlies Sudermann eds., 2002).

tions on health, well-being, relationships, and personal success. These risks are especially high when exposure to violence involves a fundamental loss of trust and security, which happens when children are exposed to sexual and physical abuse, witness intimate partner violence, or are severely victimized or witness extreme violence outside the home.<sup>70</sup>

The last paragraph is particularly important. Neuroscientists have found that very young children who are traumatized by seeing or hearing their father assaulting their mother may undergo physiological changes that can have lifelong effects on their behavior. These changes, caused by repeated traumatic events experienced by very young children, involve repeated activation of neural threat-response systems activated by stress in children exposed to violent events, particularly in the family setting. One of the threat-response systems that is particularly open to modification by experience during early life is the limbic hypothalamic pituitary adrenal axis:

Not surprisingly, alterations in pituitary and adrenal function have been associated with illnesses common among previously abused individuals, including depression, anxiety, post-traumatic stress disorder (PTSD), fibromyalgia, hypertension, and immune system suppression.<sup>71</sup>

The fate of a sizeable portion of children exposed to serious family violence (i.e., a sample found in shelter populations) is to be so traumatized by violence between their parents that they develop conditions such as posttraumatic stress disorder:

More than half of the school-age children in domestic violence shelters show clinical levels of anxiety or posttraumatic stress disorder. . . . Without treatment, these children are at significant risk for delinquency, substance abuse, school drop-out, and difficulties in their own relationships.

Children may exhibit a wide range of reactions to exposure to violence in their home. Younger children (e.g., preschool and kindergarten) oftentimes, do not understand the meaning of the abuse they observe and tend to believe that they “must have done something wrong.” Self-blame can precipitate feelings of guilt, worry, and anxiety. It is important to consider that children, especially younger children, typically do not have the ability to adequately express their feelings verbally. Consequently, the manifestations of these emotions are often behavioral. Children may become withdrawn, non-verbal, and exhibit regressed behaviors such as clinging and whining. Eating and sleeping difficulty, concentration problems, generalized anxiety, and physical complaints (e.g., headaches) are all common.

---

70. DEFENDING CHILDHOOD, *supra* note 57, at 2–3.

71. Seth D. Pollak, *Mechanisms Linking Early Experience and the Emergence of Emotions; Illustrations From the State of Maltreated Children*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCIENCE 370, 372 (2008). See also National Scientific Council on the Developing Child, *Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development*, Working Paper No. 9 (2010), available at [www.developingchild.harvard.edu](http://www.developingchild.harvard.edu).

. . . the pre-adolescent child typically has greater ability to externalize negative emotions (i.e., to verbalize). In addition to symptoms commonly seen with childhood anxiety (e.g., sleep problems, eating disturbance, nightmares), victims within this age group may show a loss of interest in social activities, low self-concept, withdrawal or avoidance of peer relations, rebelliousness and oppositional-defiant behavior in the school setting. It is also common to observe temper tantrums, irritability, frequent fighting at school or between siblings, lashing out at objects, treating pets cruelly or abusively, threatening of peers or siblings with violence (e.g., “give me a pen or I will smack you”), and attempts to gain attention through hitting, kicking, or choking peers and/or family members. Incidentally, girls are more likely to exhibit withdrawal and unfortunately, run the risk of being “missed” as a child in need of support.

Adolescents are at risk of academic failure, school drop-out, delinquency, and substance abuse. Some investigators have suggested that a history of family violence or abuse is the most significant difference between delinquent and non-delinquent youth. An estimated 1/5 to 1/3 of all teenagers who are involved in dating relationships are regularly abusing or being abused by their partners verbally, mentally, emotionally, sexually, and/or physically. . . . Between 30% and 50% of dating relationships can exhibit the same cycle of escalating violence as marital relationships . . .<sup>72</sup>

A number of resilience factors minimize the adverse consequences for about half of the children.<sup>73</sup> “Only” about half of children who have been exposed to domestic violence are known to develop the adverse physiological, psychological, emotional or behavioral changes that result from being abused by a parent figure. One study that analyzed data from 118 studies of children exposed to conflict and violence, some of whom were themselves abused directly, found the rate was sixty-three percent. Others have found the ratio of children adversely affected to be “only” about forty percent. Those are, quite simply, horrible odds for the children of divorce or separation. Although children may be exposed to violence that is not coercive control, a high percentage of those involved in child custody contests are exposed to battering behavior.

---

72. JOSEPH S. VOLPE, EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN AND ADOLESCENTS: AN OVERVIEW (1996). See also Steve Stride et al., *The Physiological and Traumatic Effects of Childhood Exposure to Intimate Partner Violence in CHILDREN EXPOSED TO DOMESTIC VIOLENCE; CURRENT ISSUES, INTERVENTIONS, AND RESEARCH* 8–97 (Robert A. Geffner et al. eds., 2009). A reduced IQ may also result. See Kathryn H. Howell and Sandra A. Graham-Besmann, *The Multiple Impacts of Intimate Partner Violence on Preschool Children in HOW INTIMATE PARTNER VIOLENCE AFFECTS CHILDREN: DEVELOPMENTAL RESEARCH, CASE STUDIES, AND EVIDENCE-BASED INTERVENTION* 92–93 (Sandra A. Graham & Alytia A. Levendosky eds., 2011).

73. DENISE A. HINES & KATHLEEN MALLEY-MORRISON, FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING AND COMBATING ABUSE 95 (Bill Bowers ed., 2005) (resiliency factors for children exposed to violence in their homes include a relationship with a supportive, nonabusive caregiver, a high IQ and certain genetic factors).

The Alaska Supreme Court clearly has recognized the adverse effects visited on children by an abusive parent:

Although the children had not witnessed any physical violence between Rob and Kimberly since their parents separated, the deleterious impact on children of witnessing domestic violence is widely recognized. \* \* \* (citing *Custody of Vaughn* . . . “It is well documented that witnessing domestic violence . . . has a profound impact on children. There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages.”) \* \* \* Furthermore, social science studies have noted that even if the physical violence between the parties has ceased, the abusive ex-spouse may continue to engage in controlling behaviors that adversely affect the children. In one such study, researchers found:

Perpetrators of . . . [ongoing or episodic] domestic violence tend to have a very poor ability to differentiate their needs from those of their children, or to appreciate the impact of their violent behavior upon their children. Because of their need to control others, their low stress tolerance and willingness to rely upon physical coercion, these perpetrators are at elevated risk of eventually generalizing their violence and control to their children. Following a separation, they are at elevated risk of using the children to validate their own view of the separated partner and the relationship, or using the children as a method of exerting control over or punishing the separated partner. \* \* \*

The trial court did not impermissibly punish Rob for past domestic violence, but appropriately considered Rob’s proven past domestic violence and his current behavior in the context of the present impact on the children and their relationships with their parents.<sup>74</sup>

#### IV. Wingspread Conference on Domestic Violence

Most statutory schemes describing the best interest standard leave flexibility for the courts to incorporate safety and other considerations not explicitly enumerated in the statute. Many judges consider safety as a significant factor in custody and visitation decisions. Other judges, however, refuse to consider factors not specifically enumerated in their jurisdiction’s best-interest statute.

In an effort to promote the development of legal systems more protective of the children, a group of international experts in psychology, law and domestic violence met at the Wingspread Center in 2007 to examine interpersonal violence in families and its relationship to children’s well-being during and after parental separation.

---

74. See *Borchgrevink v. Borchgrevink*, 941 P.2d 132, 140 (Alaska 1997) (citing Phyllis E. Federico & Dr. Robert Kinscherff, *Custody of Vaughn: Impact of Domestic Violence on Child Custody: Children Are No Longer the Forgotten Victims*, 40 BOSTON L. J. 8, 22 (1996)).

*A. Wingspread White Paper*

Convened by the National Council of Juvenile and Family Court Judges (NCJFCJ) and the Association of Family and Conciliation Courts (AFCC), the gathering of judges, mental health professionals, attorneys, legal educators, and advocates for victims of family violence developed a new paradigm for deciding child custody cases that involve family violence allegations. The paradigm proposes that the safety of the child and safety of the victim parent should be the paramount factors, even at the expense of the abusive parent's usual "right" to continued frequent contact with the children.<sup>75</sup>

The resulting "white paper" summarized the debates and some surprising agreements among the experts who comprised the group. Most importantly, the report gave context in which judges may incorporate child safety when considering the best interest of the child.

. . . [C]ourts are faced with important but often conflicting priorities. In cases in which domestic violence is proven or credibly alleged, for example, the initial focus of the court system must necessarily be on safety. Yet Judges must simultaneously remain cognizant of the importance of children's healthy relationships with parents or other family members and the costs of disrupting those relationships.

. . . Janet Johnston suggested a specific method for analyzing conflicting interests. The initial goal . . . should be to meet five guiding principles or priorities:

- Priority 1: Protect children.
- Priority 2: Protect the safety and well-being of the victim parent.
- Priority 3: Respect the right of adult victims to direct their own lives.
- Priority 4: Hold perpetrators accountable for their abusive behavior.
- Priority 5: Allow child access to both parents [footnote omitted].

However, where simultaneous achievement of all five priorities is not possible, priorities lower on the list should be successively relinquished until the conflict is resolved. Thus, in a situation where visitation cannot safely occur, for example, Priority 5 (access) may be sacrificed in favor of the other four priorities.<sup>76</sup>

That report signaled a consensus for a proposed paradigm shift in the U.S. legal system: ***the safety of children trumps the "custodial rights" of abusive parents.*** The significance of the Wingspread Report is that a critical mass of interdisciplinary professionals recognized the failings of a judicial system that has largely ignored child and victim safety in making child access decisions in cases where one parent has abused the other.

Contemporaneously, other researchers wrote about the need to place safety first when judges determine child access:

---

75. Nancy Ver Steegh & Claire Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008).

76. *Id.* at 464.

. . . What is needed is a risk-benefit analysis of different kinds of parenting plans that are in the best interests of the particular child and family. . . . the goals of any plan should be prioritized in the following order:

1. Protect children directly from violent, abusive, and neglectful environments;
2. Provide for the safety and support and well-being of parents who are victims of abuse (with the assumption that they will then be better able to protect their child);
3. Respect and empower victim parents to make their own decisions and direct their own lives (thereby recognizing the state's limitations in the role of *loco parentis*);
4. Hold perpetrators accountable for their past and future actions (i.e., in the context of family proceedings, have them acknowledge the problem and take measures to correct abusive behavior);
5. Allow and promote the least restrictive plan for parent-child access *that benefits the child*, along with parents' reciprocal rights.

Premised on the notion that the goal of protecting children must never be compromised, the strategy is to begin with the aim of achieving all five goals and to resolve conflicts by abandoning the lower priorities. . . . For example, in principle, if a parent denies engaging in his or her substantiated violence and does not comply with court-ordered treatment, Priority 5 should be dropped or modified by suspending or supervising access. Furthermore, the victims should be allowed to relocate upon request (forgoing Priorities 4 and 5).<sup>77</sup>

The adoption of a presumption against placing a child in the custody of an abusive parent is in effect an election that the presence of domestic violence should be the most important criterion. This changes the view of courts, which hold that when a legislature has prescribed a list of criteria to use in finding the best interests of a child without prioritizing them no one criterion should be elevated above the others in the court's calculus of the child's best interests.<sup>78</sup> This is not totally revolutionary, however, as early as 1994, the NCJFCJ Family Violence Model Code noted:

In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence . . . The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.<sup>79</sup>

---

77. Jaffe, Johnston et al., *supra* note 9 (citations omitted).

78. See, e.g., *Holmes v. Wooley*, 788 A.2d 131 (Del. 2002) (“[t]he clear intent of the legislature in passing the best interest standards was that each factor listed in the statute be independently considered and then given its due weight and importance relative to the other factors”); *accord Pierron v. Pierron*, 765 N.W.2d 345, 363 (Mich. Ct. App. 2009).

79. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402 1(a), 33 (1994).

Other national organizations similarly recommended the presumption against awarding custody to abusers, including the American Medical Association.<sup>80</sup> The American Psychological Association also stated:

In matters of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent.<sup>81</sup>

The American Bar Association has recommended:

Even if your state statute does not have a rebuttable presumption against custody, there are three reasons to support a finding that a batterer is an unfit custodian: First, the abuser has ignored the child's interests by harming the child's other parent. Second, the pattern of control and domination common to abusers often continues after the physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.<sup>82</sup>

Installation of a custody presumption of this type has in at least one state placed domestic violence at the top of the list of best-interest criteria, and failure to consider and analyze it is reversible error.<sup>83</sup>

### *B. Why Domestic Violence Should Top the List of Factors*

The obvious reason to place domestic violence at the top of the list is the need to protect children. As noted in section III, children are abused when placed in the care of an abusive parent. An influential educator and psychologist summarizes research results of effects of domestic violence on children:

Domestic violence does not occur as a singular traumatic life event for children . . . Child witnesses to domestic abuse are likely to have a history of multiple stressors that include separation, high-conflict divorce, loss, and disruptions of their care-taking. . . . A plethora of research findings confirm that exposure to high-conflict and violent family environments is seriously damaging to infants, children, and youth. In fact, to varying degrees, children from violent homes have substantially the same kinds of problems as those who are directly abused by their caretakers. . . . The long-term prognosis for the children of violent families is at best guarded: there is evidence that as adults they have problems with anxiety and depression, and tend to make poor choices in selecting mates. . . . [T]hese children as adults, especially the boys, are more likely to repeat the

---

80. APA FAMILY VIOLENCE REPORT, *supra* note 12.

81. *Id.* at 99.

82. AMERICAN BAR ASSOCIATION, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 132 (2008).

83. *Wee v. Eggener*, 225 P.3d 1120, 1125 (Alaska 2010); *Williams v. Barbee*, 243 P.3d 995, 1004 (Alaska 2010).



cycle of victimization in the next generation.<sup>84</sup>

Some researchers have offered a list of common-sense reasons why courts should place domestic violence at the top of its list of family characteristics to consider in child custody cases.<sup>85</sup> Those reasons are as follows:

1. Separation seldom ends the domestic violence. Stalking, physical abuse, and harassment often continue beyond separation, and they may escalate. Frequent contact between the batterer and his child, child exchanges, and visitation provide an ideal opportunity for continued abuse and manipulation.
2. Children in homes where there is domestic violence are subjected to a much higher likelihood of being physically abused themselves.
3. Children of battering men are likely to be exposed to continued demonstrations of coercion and control in family relationships, which may socialize them to believe they are entitled to use the same behaviors in their own interpersonal relationships.
4. Men who batter may undermine their former partners' parenting. They may tell their children that their mother was at fault for the break-up or urge their children not to follow their mother's directions.
5. Male batterers often use the court as a tool of abuse. They attempt to continue their control by seeking custody of their children and causing the victim great financial expenses. These men are often articulate, persuasive and manipulative men who present well in court.
6. Domestic violence perpetrators in some extreme cases may use lethal force on their victims after separation. Women are in more danger of homicide after separation. Visitation exchanges provide opportunities that may result in the children witnessing homicidal violence or being victimized directly.
7. The trauma of the violence may have left the victim with depression, substance abuse, or posttraumatic stress disorder.<sup>86</sup>

Research has helped to identify the kinds of adjustment problems to which such children are most vulnerable. These include a variety of both internalizing and externalizing symptoms such as depression, including shame, self-deprecation, hopelessness, helplessness; anxiety, including distress over the violence, worry about themselves and their families; and

---

84. Janet R. Johnston, *Group Interventions for Children At-Risk from Family Abuse and Exposure to Violence: A Report of a Study*, in *THE EFFECTS OF INTIMATE PARTNER VIOLENCE ON CHILDREN* 204–05 (Robert Geffner, Robyn Spurling Igelman & Jennifer Zellner eds., 2003).

85. Peter G. Jaffe, Claire V. Crooks & Nicholas Bala, *A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes*, 6 *J. CHILD CUSTODY* 169, 171 (2009).

86. *Id.*

aggression and oppositionality toward parents, teachers, and peers. One way to protect these children is to ensure their safety and the safety of the abuse victim postseparation.

### *C. Effect of “Friendly Parent” Provisions*

About thirty states have statutes that include the “friendly parent” concept among the best-interest factors. The judge should consider which parent is more likely to foster a close and loving relationship between the child and the other parent.<sup>87</sup> As one might expect, a batterer uses this law to try to win a custody battle against his victim. The victim, who is unlikely to want to continue to have open communication with her abuser and may have a well-founded fear that she and the children are endangered by frequent contact with him, will *not* be willing to foster significant contact between the child and the abusive father. The mother’s attorney will have to rely on the evidence of the batterer’s assaults, destruction of property, threats, and other abusive and coercive behaviors to establish good reasons why the victim wants to minimize the children’s contact with their abusive father. Counsel for the victim spouse also can use the batterer’s past actions against him, since they often are an insidious continuation of his predivorce abusive behaviors.<sup>88</sup> Some states prohibit the use of this factor in cases where one parent has engaged in domestic violence.<sup>89</sup>

The former director of the National Council of Juvenile and Family Court Judges, who for many years presented trainings for family court judges, summarizes the issue:

The interplay of the domestic violence factor with the “friendly parent” factor seems to give the courts the most difficulty. The typical statute tells them to look with favor on the parent more likely to cooperate with the other in decision making concerning the children and in making them accessible for visitation. Where there has been domestic violence, the perpetrator is likely to favor custody arrangements that offer the parents the fewest restrictions on access to the children and to each other. By contrast, the victim parent will naturally favor any arrangement that calls for the least possible contact between the two adults and that best protects the children from the opportunity for the abuser to manipulate or harm them further. Given the demands of their dockets and the complicated nature of these cases, it is often difficult for courts, particularly without considerable training and experience in domestic violence, to sort all of

87. See, e.g., ARIZ. REV. STAT. ANN. § 25-403(A)(6); KAN. STAT. ANN. § 23-3203 (f) (2012); FLA. STAT. ANN. § 61.13(3)(a); UTAH CODE ANN. § 30-3-10.2(2)(c).

88. BANCROFT, SILVERMAN & RITCHIE, *supra*, note 7, at 33–42 (describing batterer’s behaviors and parenting techniques) and 57–66 (describing the dynamic); Jaffe & Geffner, *supra* note 28, at 378.

89. See, e.g., ALASKA STAT. § 25.24.150(c)(6); IOWA CODE ANN. § 598.41( ); MINN. STAT. § 518.17; MONT. CODE ANN. § 40-4-212; N.J. STAT. § 9:2-4(c); OR. REV. STAT. § 107.137(a)(f); VA. STAT. § 20-124.3(6).

this out. *The risk is that judges may see the abuser's manipulative behavior as cooperation and the victim's protective behavior as hostility.*<sup>90</sup>

## V. Implementing Safety First

For many years, most mental-health professionals have told lawyers and judges involved in child custody litigation that children must have postdivorce relationships with even the most abusive fathers.<sup>91</sup> They do so despite research that has shown, to an increasing degree over the past thirty years, that children are harmed by exposure to violence between their parents and that children in violent homes are often themselves physically abused.<sup>92</sup> These men, who use coercive control as their dynamic, perpetrate the majority of domestic violence in the United States and are likely to carry the abusive pattern into new relationships.<sup>93</sup> The atmosphere in their homes is aptly described as the following:

Children growing up in spouse abusive families live in a type of war zone. Sometimes they feel they can predict the “attacks” and sometimes the aggression is unexpected. This leaves them with a sense of danger and uncertainty.<sup>94</sup>

Changing the view that both parents should have continuing contact with the child in all situations is the first step. As one psychologist stated:

It is safer for the child to be placed in the custody of a parent who may be exaggerating a violence allegation than to be placed in the custody of a potentially abusive parent.<sup>95</sup>

Family judges should memorize that statement. Among the options the judge can consider in dealing with a violent parent are no contact, supervised visitation, and other less restrictive forms of contact between father and child.<sup>96</sup> Some commentators have recommended supervised visitation for some of those cases.<sup>97</sup> Research has shown that some children so victimized are better off having no contact at all with fathers who abused

---

90. Dunford Jackson, *supra* note 68, at 190.

91. Jaffe & Crooks, *Assessing the Best Interests*, *supra* note 58, at 59, 65.

92. BANCROFT, SILVERMAN, & RITCHIE, *supra* note 7; see also George W. Holden, Joshua D. Stein et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 289 (1998).

93. *Id.*

94. Rossman & Ho, *supra* note 69.

95. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCL. CTS. REV. 462 (2005).

96. Jaffe, Crooks & Bala, *Framework*, *supra* note 85 (recommending less restrictive options for cases in which the violence was not of the coercive control variety).

97. See Jennifer L. Hardesty & Jacquelyn C. Campbell, *Safety Planning for Abused Women and Their Children*, in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE; STRATEGIES FOR COMMUNITY INTERVENTION 89 (2004).

them.<sup>98</sup> Even those who do not advocate a no-contact option list it as one available to courts dealing with violent parents.<sup>99</sup>

Another option is to award primary physical custody to the nonabusive parent and less time to the abusive parent. While this results in the children's spending less time with the abusive parent, it does not eliminate some significant safety concerns.<sup>100</sup> Will either of those methods protect the most vulnerable members of separating families? As discussed earlier, male batterers are unlikely to change their coercive and abusive behaviors simply because their relationships end. Such men are also much more likely than other men to directly inflict physical and sexual abuse on children in their care.<sup>101</sup>

Some researchers contend that "children benefit from less, rather than more," contact with abusive fathers.<sup>102</sup> Research published in the last two decades has provided the factual basis to enable the court to decide on appropriate rulings where intractable and severely abusive fathers are involved. Psychologists are beginning to research the outcomes of particular visitation arrangements in the context of domestic violence:

For example, a recent study looking at behavioral and emotional outcomes with preschool-aged children following separation in the context of domestic violence identified a potential catch-22. On the one hand, children who did not see their fathers at all were more likely to have internalizing problems independent of the extent of the violence they had witnessed. On the other hand, children who did see their fathers exhibited externalizing behavior problems, predicted in part by the extent of the violence experienced by their mothers. *Overall, the effect size of children's problems if they had been exposed to severe violence was larger than the negative effects of being deprived of contact with their father.*<sup>103</sup>

Experience shows that psychologists, custody evaluators, judges and custody lawyers may be choosing the more harmful alternative for children of an abusive father:

---

98. A. M. Bailey, *Restricting Contact with Toxic Fathers*, 2 (3) FAM. & INTIMATE PARTNER VIOLENCE Q. 225 (Win. 2010).

99. Jaffe & Crooks, *supra* note 58.

100. Peter G. Jaffe, Samatha E. Poisson, & Alison Cunningham, *Domestic Violence and High-Conflict Divorce: Developing a New Generation of Research for Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 190.

101. Melanie Shepard, *Child-Visiting and Domestic Abuse*, 71 CHILD WELFARE 357 (1992); Oliver J. Williams, Jacquelyn L. Boggess, & Janet Carter, *Fatherhood and Domestic Violence: Exploring the Role of Men Who Batter in the Lives of Their Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 12, at 157, 176; Jaffe, Crooks & Bala, *supra* note 85, at 192.

102. Carolyn Y. Tubbs & Oliver J. Williams, *Shared Parenting After Abuse*, in PARENTING BY MEN WHO BATTER, *supra* note 34, at 41.

103. Jaffe & Crooks, *supra* note 58, at 59 (emphasis added).

A recent review of the literature on father visitation examined 38 studies published since 1990 . . . [this review] did not yield strong support for the relationship between father visitation and child well-being. Only 42% of the studies reviewed showed that father contact predicted any aspect of child well-being.

Some studies indicate that despite the feelings of loss and anger children experience over the termination of contact with their fathers, this may be the appropriate decision when considering the overall outcomes for the children.<sup>104</sup>

The authors discuss a study that found (based on mothers' reports) that frequent contact with fathers did not benefit children more than infrequent contact.<sup>105</sup> Children who had frequent visits with their fathers, but whose mothers were dissatisfied with the visitation scheme, were *less well-adjusted and had lower indices of global well-being*. Another study involving a statistically significant sample of children stated:

It is apparent that these results provide little, if any, support for the hypothesis that paternal contact is beneficial to the child. . . . an examination of the coefficients . . . revealed an implausible pattern: *children who had not seen their father in five years did significantly better than those who spent between 0 and 13 days with their father in the previous year*. . . . In sum, we find that paternal contact is unrelated to a variety of well-being measures in the 1981 data. . . . *Apparently, children in maritally disrupted families were not doing better if they saw their fathers more regularly than if they saw them occasionally or not at all*.<sup>106</sup>

The authors also state that their data indicated that children's relationships with their mothers *are* important to the children's well-being. The sample did not focus on children whose parents had experienced domestic violence:

The general absence of effects of paternal participation on children's well-being is surprising in view of the widespread belief that children benefit from maintaining contact with their fathers. In addition, the effects of father's participation did not depend on the sex of the child or the presence of a stepfather.

The policy implications of findings reported here are unsettling because they clash with prevailing practice that attempts to increase paternal involvement. On the basis of our study, we see no strong evidence that children will benefit from the judicial or legislative interventions that have been designed to promote paternal participation, apart from providing economic support.<sup>107</sup>

---

104. Carla Stover et al., *The Effects of Father Visitation on Preschool-Aged Witnesses of Domestic Violence*, 18 J. INTERPERSONAL VIOLENCE 1149 (2003).

105. Valarie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385 (1999).

106. Frank F. Furstenberg Jr., S. Phillip Morgan, & Paul D. Allison, *Paternal Participation and Children's Well-Being after Marital Dissolution*, 52 AM. SOC. REV. 695 (1987) (emphasis added).

107. *Id.*

Although the authors speculate that mothers may benefit from fathers' sharing of child care duties and that fathers themselves might receive emotional benefit from contact, the data only suggested that continued contact with fathers *does not result in uniformly positive outcomes for children*. Their conclusion, published *two decades ago*:

This topic surely merits more careful attention by researchers and policy makers. It is disconcerting to discover weak evidence for an almost commonplace assumption in popular and professional thinking—that children in disrupted families will do better when they maintain frequent contact with their fathers. In the absence of better and more convincing evidence, policy makers rely on conventional wisdom that is, unfortunately, an unreliable guide for social reform.<sup>108</sup>

Unfortunately, this topic has received little attention in the intervening years. One study dealt with the interrelationship of father visitation, mothers' satisfaction with the visitation schedule, and how those matters affected children's well-being. They reported overall satisfaction with father-child contacts, *except in those cases where the mother was unhappy with continued involvement by the father*. As previous research based on national surveys had found, these researchers concluded that not only was father visitation not positively associated with child well-being, but also that in families in which mothers are dissatisfied with high levels of father contact, children appear to be the worst off.<sup>109</sup>

The study found that the presence of conflict did not alter those results. The portion of these cases involving "conflict" was a small minority of cases. It is likely, however, that a substantial portion of them involved abuse, since there is only limited knowledge and skill on the part of many professionals who try to detect the battering dynamic by interviewing victims.<sup>110</sup> In fact, women are often traumatized by the physical abuse they encounter in their relationships, leaving them reluctant to disclose to others the facts of the abuse. One could therefore speculate that *many* cases that the authors believed were nonviolent actually did involve coercive control.<sup>111</sup>

The adverse effects some researchers wrote about before 1987 were bland compared to what is now known about how exposure to domestic violence affects children. Children are affected directly and indirectly.<sup>112</sup>

---

108. *Id.*

109. King & Heard, *supra* note 105.

110. Jaffe & Crooks, *Assessing the Best Interests*, *supra* note 58, at 50, 50–51.

111. Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment Under the Law?* in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE, *supra* note 68, at 15.

112. George W. Holden, *Introduction: The Development of Research into Another Consequence of Family Violence*, in CHILDREN EXPOSED TO MARITAL VIOLENCE, *supra* note 28, at 6–10; Jaffe & Geffner, *supra* note 28, at 374–75.

As noted earlier in Section II, neuroscientists have found that very young children who are traumatized by seeing their father assaulting their mother may undergo *physiological changes* that can have lifelong effects on their behavior.<sup>113</sup>

Women tend to be at a higher risk for more extreme abuse following separation, especially in connection with visitation, so the harm to children does not end with divorce or separation of the parents. The severity of abuse during the relationship is related to the adverse effects the children experience after separation, and exposure of the mother to continuing physical or mental abuse resulted in *increased* behavioral problems in the children.<sup>114</sup>

Because professionals who deal with child custody disputes have often failed to make safe decisions regarding placement, particularly placement of the children of controlling and abusive men, an entire new generation of children who were exposed to domestic violence in their families has been sentenced to years of further mental abuse and, in many cases, physical abuse, *where a safer alternative was known all along*: that is, the elimination of most, if not all, contact between the battering parent, often the father, and his child.

If lawyers educate the judges who make child custody decisions about the dangers awaiting children of controlling and abusive men, as well as the fact that children *may not even be further harmed by removing the abusive parent from their lives entirely*, those judges would truly be free to focus on *the safest* alternatives (if there are any) for children after parents end a violent relationship.<sup>115</sup> That safe solution for children could even include potential elimination of all contact between father and child in extreme cases where it is appropriate.

## VI. Conclusion

Many courts appropriately see stability in children's lives as being in their best interests, yet readily destroy the stable relationship a child has with a primary caregiver for the purpose of trying to turn an inattentive father into a parent who will be a good parent only half of the time. One advocate has stated:

The entire family court system lags far behind the rest of the justice and service system in its understanding of and response to abuse, clinging to attitudes and practices that have been discredited in policy, child welfare, medical, crim-

---

113. NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, EXCESSIVE STRESS DISRUPTS THE ARCHITECTURE OF THE DEVELOPING BRAIN: WORKING PAPER No. 3 (2005).

114. Stover et al., *supra* note 104, at 1160.

115. Meier, *supra* note 56, at 716.

inal justice, mental health, and social welfare settings.<sup>116</sup>

It is time for family courts that are charged with meeting the best interests of children to accept and implement the research that demonstrates that the *primary* interest of all children is to live a safe existence in the care of a loving and nonviolent parent. The judges doing this work need not wait for legislative action (in nearly all states) to change the list of criteria, as they can, by judicial decision, find that all children's needs will always involve being safe. The bottom line is that "Children benefit less, rather than more, from contact with abusive or neglectful parents."<sup>117</sup> Adoption of the process proposed by the experts at the Wingspread 2007 conference will provide a positive benefit to society by reducing the number of adults who have adopted violent behaviors in response to their childhood exposure to abuse.

---

116. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 315 (2009).

117. Carolyn Y. Tubbs & Oliver J. Williams, *Shared Parenting After Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship*, in PARENTING BY MEN WHO BATTER, *supra* note 34, at 41 (citations omitted).