

# 2020 Custody Guardian *ad Litem* Training Manual

## 7. Understanding Domestic Violence

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# Fifty Obstacles to Leaving, *a.k.a.*, Why Abuse Victims Stay

by Sarah M. Buel

*It is when my head makes contact with the wall that I freeze, though his fist is coming toward me again. I have not yet taken behavior psychology and do not know that some animals flee when attacked. It would take me yet another year of planning, forgiving, calling, reaching for help, before I could leave. The Legal Aid Office told me there was a three-year wait, even for a divorce when you were getting hit. All the private attorneys wanted at least \$10,000 for a retainer since he threatened to contest custody. The judge told me I needed to keep the family together. The priest told me to diversify the menu and stop cooking so much Italian food. Only the older, male marriage counselor told me that it was dangerous for me to stay. So, now I'm a single Mom, without child support and trying to go to night school and keep my job. But with minimum wage, I*

*can't seem to pay both day care and the rent, so sometimes I think about going back, just to make sure my son has enough to eat. It hurts more to watch him eat macaroni with ketchup for the third night, than it ever did to get beaten.<sup>1</sup>*

That abuse victims make many courageous efforts to flee the violence is too often overlooked in the process of judging them for *now* being with the batterer. Regardless of whether I am providing training to legal, law enforcement, medical, mental health, or social service professionals, when people find out I also have been a victim of abuse, some inevitably ask, "How is it you could get a full scholarship to Harvard Law School, but you stayed with a violent husband for three years?" This question has been fueled by those who believe that remaining with a batterer indicates stupidity, masochism,

or codependence. Far from being accurate, such labels prove dangerous to victims because they tend to absolve batterers of responsibility for their crimes.

Domestic violence<sup>2</sup> represents serious violent crime: this is *not* codependence, for there is nothing the victim can do to stop the violence,<sup>3</sup> nor is there anything she<sup>4</sup> does to deserve the abuse. Domestic violence victims stay for many valid reasons that must be understood by lawyers, judges, and the legal community if they are to stem the tide of homicides, assaults, and other abusive behavior.<sup>5</sup> The following represents a much-abbreviated, alphabetical list of some reasons I have either witnessed among the thousands of victims with whom I have had the honor of working over the past twenty-two years—or that reflect my own experiences.

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## FIFTY OBSTACLES TO LEAVING

**1. Advocate:** When the victim lacks a tenacious advocate, she often feels intimidated, discouraged, and, ultimately, hopeless about being able to navigate the complex legal and social service systems needed to escape the batterer. Some well-intentioned advocates engage in dangerous victim-blaming with the assumption that there is *something* about the victim's behavior or past that precipitates the violence. Attorney Barbara Hart explains:

Empowerment advocacy believes that battering is not something that happens to a woman because of her characteristics, her family background, her psychological "profile," her family of origin, dysfunction, or her unconscious search for a certain type of a man. Battering can happen to anyone who has

the misfortune to become involved with a person who wants power and control enough to be violent to get it.<sup>6</sup>

**2. Batterer:** If the batterer is wealthy, a politician, famous, a popular athlete, or otherwise a powerful player in his community, he can generally afford to hire private counsel and pressure the decision-makers to view his case with leniency. Some wealthy abusers not only hire private detectives to stalk, terrorize, and frivolously sue their partners, but the advocates who assist them as well.<sup>7</sup>

**3. Believes Threats:** The victim believes the batterer's threats to kill her and the children if she attempts to leave. It is estimated that a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she

stays.<sup>8</sup> Thus, it is dangerous for counsel to advise a victim to simply leave without ensuring that a trained advocate or attorney has worked with her to conduct extensive safety planning.<sup>9</sup>

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**4. Children's Best Interest:** Some victims believe it is in the children's best interest to have both parents in the home, particularly if the abuser does not physically assault the children. The victims—as well as their counsel and the judge—may be unaware of the deleterious impact on children witnessing domestic violence, *whether or not they have been beaten by the abuser*.<sup>10</sup>

**5. Children's Pressure:** Children's pressure on the abused parent can be quite compelling, especially with those batterers capable of manipulating the children into begging the victim to "just let Daddy come home!" Children are often torn, for they want the violence to stop, but they also want the family to stay together.<sup>11</sup>

**6. Cultural and Racial Defenses:** Cultural defenses may be cited by offenders, victims, and other community members who may not be cognizant that, while domestic violence occurs among all races, no excuse, save self-defense, ever justifies the abuse. Some believe stereotypes about their own or other cultures, but the bottom line is that domestic violence is against the law, regardless of what behavior is permitted in the "home" country or what is tolerated here in various communities.<sup>12</sup>

Issues of race and culture can impact the victim's decision because she may be more worried about how the police will treat a man of color than she is about her safety. Victims of color report being forced to choose between gender and race in deciding whether to use the criminal justice system for relief. Most feel that their survival dictates siding with race, for the white-controlled criminal justice system has not attempted to address the race-based inequities reflected in the disproportionate number of men of color arrested, prosecuted, and incarcerated. In addition, too many battered women's shelters and batterers intervention programs' staffs fail to reflect the diversity of the communities they serve. This is true in spite of the knowledge that when services are race- and culture-specific, such services report both greater use and success rates.<sup>13</sup>

**7. Denial:** Some victims are in denial about the danger, instead believing that if they could be better partners, the abuse would stop. Victims, family members, and professionals are clear that violence perpetrated by strangers is wrong and dangerous, yet they seem to adopt a double standard when that same level of abuse is

inflicted by an intimate partner. As long as those closest to the victim minimize and deny the level of the victim's danger, we should not be surprised that the victim also adopts an attitude of disbelief about her own degree of harm.

**8. Disabled:** Victims who are disabled or physically challenged face great obstacles, not only in gaining access to the court and social services, but because they also are more likely to be isolated from basic information about existing resources.<sup>14</sup>

**9. Elderly:** Elderly domestic violence victims tend to hold traditional beliefs about marriage. They believe they must stay, even in the face of physical abuse. Others are dependent on the batterer for care, and are more afraid of being placed in a nursing home than of remaining with a perpetrator whose abusive patterns they can more readily predict.<sup>15</sup>

**10. Excuses:** The victim may believe the abuser's excuses to justify the violence, often blaming job stress or substance abuse, in part because she sees no one holding the offender responsible for his crimes. Domestic violence is *not caused* by stress or substance abuse, although they can exacerbate the problem. They should not be used as excuses for violent behavior. In fact, most men when under stress *do not* batter their partners.<sup>16</sup>

**11. Family Pressure:** Family pressure is exerted by those who either believe that there is no excuse for leaving a marriage or have been duped into denial by the batterer's charismatic behavior.<sup>17</sup>

**12. Fear of Retaliation:** Victims cite fear of retaliation as a key obstacle to leaving. The acute trauma to which battered women are exposed induces a terror justified by the abuser's behavior. The batterer has already shown his willingness to carry out threats; thus, the wise victim takes seriously the batterer's promises of harming the victim or the children if the victim seeks help or attempts to flee.<sup>18</sup>

**13. Fear of Losing Child Custody:** Fear of losing child custody can immobilize even the most determined abuse victim. Since batterers know that nothing will devastate the victim more than seeing her children endangered, they frequently use the threat of obtaining custody to exact agreements to their liking. Custody litigation becomes yet another weapon for the abuser, heightening his power and control tactics to further terrify the victim.<sup>19</sup> Moreover, counsel should not provide false assurance to victims regarding the likelihood of the court awarding custody to the nonviolent parent. A Mass-

achusetts gender bias study found that in 70 percent of the cases in which a father requested some form of custody, he was successful.<sup>20</sup>

**14. Financial Abuse:** Financial abuse is a common tactic of abusers, although it may take different forms, depending on the couple's socio-economic status. The batterer may control estate planning and access to all financial records, as well as make all money decisions. Victims report being forced to sign false tax returns or take part in other unlawful financial transactions.<sup>21</sup> Victims also may be convinced that they are incapable of managing their finances or that they will face prison terms for their part in perpetrating a fraud if they tell someone.

**15. Financial Despair:** Financial despair quickly takes hold when the victim realizes that she cannot provide for her children without the batterer's assistance. Given that welfare (officially now called Temporary Assistance for Needy Families or TANF) is the primary safety net for fleeing abuse victims, it is embarrassing that the majority of states pay less than \$400 per month for a family of three, with Colorado providing just \$421 per month.<sup>22</sup> A comprehensive Texas study found that 85 percent of the victims calling hotlines, emergency rooms, and shelters had left their abusers a minimum of five times previously, with the number one reason cited for returning to the batterer being financial despair.<sup>23</sup> These victims were simply unable to provide for themselves and their children without emergency assistance, and many who had such assistance were still in financial trouble. Moreover, such victims had no idea how to access emergency assistance.<sup>24</sup>

For those battered women sufficiently compensated by their employment, they are too often harassed or terrorized on the job by the batterer. The employer usually expects the victim to control the batterer's behavior because it is disruptive to the workplace, and, if the victim does not, she is sometimes fired or forced to quit.<sup>25</sup>

**16. Gratitude:** The victim may feel gratitude toward the batterer because he has helped support and raise her children from a previous relationship. Additionally, a victim who is overweight or has mental health, medical, or other serious problems often appreciates that the abuser professes his love, despite the victim's perceived faults. Many batterers tell a victim, "You are so lucky I put up with you; certainly nobody else would," fueling the victim's low self-esteem and reinforcing her



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belief that she deserves no better than an abusive partner.

**17. Guilt:** Guilt is common among victims whose batterers have convinced them that, but for the victims' incompetent and faulty behavior, the violence would not occur. Since too many victims rarely encounter anyone who holds the abusers responsible for their actions, they mistakenly assume that the *something* to stop the abuse lies in their hands.

**18. Homelessness:** Homeless abuse victims face increased danger, as they must find ways of meeting basic survival needs of shelter, food, and clothing while attempting to elude their batterers. They may be unaware of the availability of domestic violence shelters or may be unable to access them due to lack of a phone, substance abuse, mental health, or other debilitating problems.<sup>26</sup>

**19. Hope for the Violence to Cease:** A victim's hope for the violence to cease is typically fueled by the batterer's promises of change; pleas from the children; clergy members' admonishments to pray more; the family's advice to save the relationship; and other well-intentioned, but dangerously misguided counsel. Many victims are hopeful because they want so desperately to believe that *this* time the batterer really has seen the error of his ways and intends to change, not realizing that, without serious interventions, chances are slim that the abuse will stop.<sup>27</sup>

**20. Isolation:** Victim isolation is typical, although the process of cutting the victim off from family, friends, and colleagues usually happens gradually, as the batterer uses manipulation to assure compliance. Isolating the victim increases the likelihood that she will stay, for without safety plans and reality checks, it will be more difficult for her to assess her level of danger.

**21. Keeping the Family Together:** Wanting to keep the family together motivates many abuse victims to stay, believing that it is in their children's best interest to have their father or a male role model in the family. As they have not been educated about the adverse impact on children of witnessing abuse, victims often cite their desire to make a good home as a key factor in their decision to stay.

**22. Illiterate Victims:** Illiterate victims may be forced to rely on the literate batterer for everyday survival. A victim often finds that the batterer has forged her signature or forced her to sign for an array of consumer debts. Without the ability to read job applications, notices regard-

ing rights, and other important correspondence, illiterate victims are more likely to remain unaware of resources.

**23. Incarcerated or Newly Released Abuse Victims:** Such victims often have few, if any, support systems to assist them with re-entry to the community. Parole officers may require that they return home if that appears to be a stable environment, without determining whether a batterer is present. For those incarcerated women who took the fall for the batterer, returning home carries the added danger that he will, once again, demand that she perform illegal activities if she wants to stay alive.<sup>28</sup>

**24. Law Enforcement Officer:** If the perpetrator is a law enforcement officer, the victim may fear, or may have had past experiences of, other officers refusing to assist her. The victim also may be aware of the Lautenberg Amendment, which prohibits the possession of a firearm or ammunition by any individual convicted of a misdemeanor domestic violence offense.<sup>29</sup> Thus, if the batterer-officer is contributing to the family's financial stability, the victim must choose between safety with impoverishment (if the batterer loses his job) and continuing abuse (with the children receiving adequate support).

**25. Lesbian and Gay Victims:** Such victims may feel silenced if disclosing their sexual orientation (to qualify for the protective order) could result in their losing job, family, and home. Others do not report the abuse for fear of reinforcing negative stereotypes and increasing homophobia, or because the abuser threatens to spread lies (or truth) that the victim has AIDS. Some may have had prior negative interactions with the court system or do not want to air the "dirty laundry" of the gay community.<sup>30</sup>

**26. Low Self-Esteem:** Victims with low self-esteem may believe they deserve no better than the abuse they receive, especially if they have grown up in families with domestic violence. Many batterers inflict high levels of verbal abuse preceding and accompanying the violence, contributing to the victim's declining sense of worthiness.

**27. Love:** A victim may say she still loves the perpetrator, although she definitely wants the violence to stop. Most people will be in an abusive relationship at some point in their lives, be it with a boss or family member who mistreats them. However, most do not immediately leave the job or stop loving the family member when treated badly; they tend to

try harder to please the abuser, whether because they need or love the job or the person, or hope that renewed effort and loyalty will result in cessation of the abuse. Since many batterers are charismatic and charming during the courtship stage, victims fall in love and may have difficulty in immediately altering their feelings with the first sign of a problem.

**28. Mediation:** Mediation, required in some jurisdictions even with evidence of domestic violence, puts the victim in the dangerous position of incurring the batterer's wrath for simply disclosing the extent of the violence. Given the power imbalance, it is puzzling that anyone could assume an equitable resolution would result.<sup>31</sup> Since batterers will almost never negotiate in good faith, the very underpinning of mediation is sabotaged. Generally, mediation is not the appropriate mechanism by which to resolve family violence matters,<sup>32</sup> in part because many mediators have not received adequate training on the complicated dynamics of domestic violence. The entire process can leave the victim feeling that the batterer has controlled yet another facet of the court system, through which she may lose everything, from custody of the children to marital assets.<sup>33</sup> For similar reasons, "couples" counseling is also contraindicated.<sup>34</sup>

**29. Medical Problems:** Medical problems, including being HIV- or AIDS-positive, may mean that the victim must remain with the batterer to obtain medical services. If the abuser's insurance covers the family or he is the victim's primary caretaker, the victim knows that without adequate care, her *life* also is imperiled. Past attempts to elicit help from medical providers may have proved fruitless, in part because they often lack adequate training in identification and treatment of domestic violence victims.<sup>35</sup>

**30. Mentally Ill Victims:** Such victims face negative societal stereotypes in addition to the batterer's taunts that the victim is crazy and nobody will believe anything she says. Such discrimination is compounded if the victim has ever been institutionalized or is currently on a high-dose regime of anti-depressants, even if these interventions have been necessary in no small part due to the batterer's tormenting and unlawful behavior.

**31. Mentally Retarded or Developmentally Delayed Victims:** These victims are particularly vulnerable to the batterer's manipulation and are likely to be dependent on him for basic survival. Service providers may lack training in

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how to adapt safety planning for such a victim's comprehension level and often do not contact those in their community with such expertise to provide the needed assistance.

**32. Military:** If the victim or the perpetrator is in the military, an effective intervention is largely dependent on the commander's response, regardless of the Uniform Code of Military Justice ("UCMJ"), its provisions for a military protective order,<sup>36</sup> and the availability of assistance from the Family Advocacy Programs. Many commanders believe that it is more important to salvage the soldier's military career than to ensure the victim's safety. Other victims are unaware that they are entitled to a short-term stipend if they report the abuse and lose the soldier's financial support as a result.<sup>37</sup>

**33. No Place to Go:** Victims with no place to go understand the bleak reality that affordable housing is at a premium in virtually every community in this country, including our Tribal Nations. Often, there is *no shelter space*, particularly for victims with children, or the shelter policy dictates that victims must quit their jobs to be admitted. Such misguided policies are based on the premise that abusers will follow victims from their place of employment to the shelter, thus endangering not only the victim, but other residents and staff as well.<sup>38</sup> Instead of financially crippling the victims, intensive safety planning should be conducted with the victim and children, including notice to employers and law enforcement to ensure the perpetrator's arrest if any problems ensue.

**34. No Job Skills:** Victims with no job skills usually have no choice but to work for employers paying minimum wage, with few, if any, medical and other benefits. Thus, any medical emergency or need for prolonged care (e.g., asthma, diabetes, car accident, or problems resulting from the violence) often forces the victim to return to welfare to obtain Medicaid coverage—or to return to the batterer.

**35. No Knowledge of Options:** Victims with no knowledge of the options and resources logically assume that none exist. Few communities use posters, brochures, radio and television public service announcements, and other public education campaigns to apprise victims of available resources. It is no wonder that many victims are surprised to learn that help may be available. Given the array of free and low-cost domestic violence community education materials available, every

bar and civic association needs to prioritize their dispensation.<sup>39</sup>

**36. Past Criminal Record:** Victims with a past criminal record are often still on probation or parole, making them vulnerable to the batterer's threats to comply with all of his demands or be sent back to prison. The vast majority of convicted domestic violence victims did time for crimes related to property, drugs, or prostitution, yet are denied access to protection order assistance by some prosecutor's offices and shelters. Protection order assistance offers the victim help in filling out the necessary forms and presenting the case to the judge. Given the complexity of many state forms and the intimidation victims feel in court, such assistance can be invaluable.

**37. Previously Abused Victims:** Sometimes previously abused victims believe the batterer's accusation, "See, this is what you drive your men to do!" If the victim truly believes this, she will find it easier to blame herself for the abuse.

**38. Prior Negative Court Experiences:** Those victims with prior negative experiences with the court system may have no reason to believe that they will be accorded the respect and safety considerations so desperately needed.

**39. Promises of Change:** The batterer's promises of change may be easy to believe because he sounds so sincere, swearing that he will never drink or hit the victim again. In part because she wants so desperately to give credence to such assertions, the victim may give him another chance, even if such promises have been made repeatedly in the past. Victims are socialized to be forgiving and do not want their marriages or important relationships to fail because they refuse to forgive what has been portrayed as an inconsequential incident.

**40. Religious Beliefs and Misguided Teachings:** Such beliefs may lead victims to think they have to tolerate the abuse to show their adherence to the faith. Particularly if the batterer is a priest, rabbi, minister, or other high-level member of the faith community, the victim can feel intimidated by the status of the batterer and the likelihood that the congregation will support the perpetrator.<sup>40</sup>

**41. Rural Victims:** Such victims may be more isolated and simply unable to access services due to lack of transportation, or the needed programs are distant and unable to provide outreach. In smaller communities, where most people know each other and have frequent contact, victims

may be reluctant to reveal the abuse because such heightened scrutiny can cause them great embarrassment among their family and friends.

**42. Safer to Stay:** Assessing that it is safer to stay may be accurate when the victim can keep an eye on the batterer, sensing when he is about to become violent and, to the extent possible, taking action to protect herself and her children. Particularly if the abuser has previously engaged in stalking and deadly threats, the victim understands that the abuser is more than capable of finding her and the children if she moves away.

**43. Students:** Students in junior or senior high school, college, or graduate university studies may fear that not only may their requests for help be stymied by untrained administrators, but worse, that their student records would reflect their involvement with unsavory criminals. If the perpetrator is also a student, the victim often does not want him to be expelled from school, nor does she want to be viewed as a "rat" for disclosing the abuse to officials.

**44. Shame and Embarrassment:** Shame and embarrassment about the abuse may prevent the victim from disclosing it or may cause her to deny that any problem exists when questioned by well-intentioned friends, family, co-workers, or professionals.

**45. Stockholm Syndrome:** The victim may experience the Stockholm Syndrome<sup>41</sup> and bond with the abuser, making her more sympathetic to the batterer's claims of needing her to help him.

**46. Substance Abuse or Alcohol:** Either the victim's or offender's substance abuse or alcoholism may inhibit seeking help, often for fear that the children will be removed, in spite of efforts to get treatment. To make matters worse, it is only the exceptional shelter—such as Tulsa's Domestic Abuse Intervention Program Shelter<sup>42</sup>—that will accept addicted abuse victims.

**47. Teens:** Teens, especially those pregnant and who are already parents, are at greater risk for abuse in their relationships than any other age group, yet are the least likely to either report or seek adult intervention.<sup>43</sup> Some teens are fleeing abusive homes, becoming homeless and more vulnerable to dating violent, much older men. It is not uncommon to hear teen girls say that they believe it is better to have a boyfriend who hits you than no boyfriend at all. Peer pressure, in combination with immaturity, no knowl-

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edge of resources, and low self-esteem, factors into the teen victim's decision to stay with an abuser.<sup>44</sup>

**48. Transportation:** For many victims, a lack of transportation condemns them to a choice between welfare and returning to their abusers. Without a car to access child care and a job, such victims may express hopelessness about avoiding further harm or dire poverty.<sup>45</sup> Most communities fail to address this critical issue. One successful venture is run by used car salesman Brian Menzies of Sanford, Florida. His "Charity Cars," or reduced-cost vehicles, help welfare recipients obtain and keep jobs.<sup>46</sup>

**49. Unaware that Abuse is a Criminal Offense:** The victim may be unaware that the abuse constitutes a criminal offense, often because family, friends, and community professionals minimize the crimes. They apply the double standard of downplaying domestic violence offenses, while taking seriously the same crimes committed against strangers.

**50. Undocumented Victims:** Undocumented victims facing complex immigration problems if they leave are often forced to stay with the batterers who may control their Immigration and Naturalization Service ("INS") status. Misguided INS regulations afford too many abusers the power to determine if a victim will be deported. Victims must come up with substantial fees to petition for residency status. Sometimes, because of a victim's lack of financial resources, only the abuser can access an immigration attorney to navigate the convoluted laws; otherwise, the victim could lose custody of her children. Even those abusers without such power are often able to convince foreign-born victims that their residency status lies in the abusers' control.<sup>47</sup>

## Conclusion

As attorneys and judges, we should be celebrating that domestic violence victims are increasingly turning to the courts for protection from abuse, for they offer us the opportunity to use the law to save lives. We must acknowledge that many obstacles exist for the victims fleeing such terror. Additionally, we can interrupt the intergenerational cycle of learned abuse by teaching our children that the community will not tolerate the violence. "We have a choice," a Virginia juvenile and family court judge says. "Will our children have homes they can run to or homes they must run away from?"<sup>48</sup>

For the adult and child victims, a competent legal system means the difference between escalating abuse and life without terror. Most of us who have done this work for decades are tremendously heartened by the interest of lawyers and judges in improving interventions with victims and offenders. It is through humility that learning takes place: a willingness to acknowledge that advocates, abuse victims, and offenders have much to teach us, just as we have much to teach them.

Many courts and communities have effective systems in place to respond to domestic violence. These must be replicated by attorneys and judges committed to enforcing our laws by making victim safety a priority and, in the process, creating peaceful communities. We have the ability to set a tone of intolerance for domestic violence in our communities; the victims, children, and batterers deserve nothing less.

Colorado Bar Association members should be proud of the leadership role the Bar has taken in addressing the role of lawyers in domestic violence matters, particularly the efforts of President-Elect Dale Harris. For more information about how you can help, please contact Kathleen Schoen, CBA Family Violence Program Director, at (303) 860-1115.

## NOTES

1. From the author's personal journal, 1977.
2. Colorado law defines domestic violence as: an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. Domestic violence also includes any other crime against a person or against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been in an intimate relationship.  
CRS § 18-6-800.3.
3. See Beattie, *Codependent No More*, 31 (San Francisco, Cal.: Harper/Hazelden, 1987) (defining a codependent person as "one who has let another person's behavior affect . . . her, and who is obsessed with controlling that person's behavior"). The codependence label is contraindicated in domestic abuse cases, as the batterer's behavior is serious, violent crime. Although both parties may need to improve their communication or other relationship issues, battered women do not behave in a manner that perpetrates the violence. See *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995) (observing that domestic violence is not caused by a victim's propensity to push a perpetrator's buttons). For literature regarding codependence in the context of domestic violence, contact the

National Domestic Violence Resource Center at (800) 537-2238.

4. It is estimated that 95 percent of domestic violence is perpetrated by men against women. See Federal Bureau of Investigation, *Uniform Crime Report* (1990); Nat'l Inst. of Justice, U.S. Dept. of Justice, *Domestic Violence, Stalking and Antistalking Legislation: An Annual Report to Congress Under the Violence Against Women Act*, 3 (1996).

5. See Harris, "The CBA Addresses Family Violence," 26 *The Colorado Lawyer* 1-3 (July 1997).

6. Hart, *Seeking Justice: Legal Advocacy Principles and Practice* (Pennsylvania Coalition Against Domestic Violence, 1996).

7. Based on reports of domestic violence victim advocates from around the country, including Sandy Miller (April 29, 1999, interview in San Diego, CA) and a Houston advocate (who requested anonymity) (Oct. 12, 1998, interview in Houston, TX), reporting that her domestic violence intervention agency was forced to stop assisting a victim whose wealthy batterer repeatedly sued the agency and the advocates, forcing them to spend much-needed resources on legal counsel.

8. Hart, "National Estimates and Facts About Domestic Violence," *NCADV Voice* 12 (Winter 1989).

9. Safety plans are an essential component of representing any abused person. A safety plan constitutes an action plan for staying alive and should cover such topics as safety in an emergency, how to protect yourself at home, how to make your children safer, how to protect yourself outside the home, how to make yourself safer at work, using the law to help you, criminal proceedings, and how to be safe at the courthouse. See *Domestic Violence, Safety Tips for You and Your Family*, available from the American Bar Association Commission on Domestic Violence and the Torts and Insurance Practice Section at: <http://www.abanet.org/domviol>.

10. See the article by Dr. John Burrington on the effects of domestic violence on children in this issue at page 29. See generally Jaffee et al., *Children of Battered Women*, 55 (Newbury, Cal.: Sage Pubs., 1990) (stating that children who are exposed to domestic violence are at a greater risk of developing adjustment problems); Lehmann, "The Development of Post-traumatic Stress Disorder (PTSD) in a Sample of Child Witnesses to Mother Assault," 12 *J. Fam. Violence* 241 (1997) (examining the relationship between the development of post-traumatic stress disorder and a number of coping variables in child witnesses to mother assaults); Daley Pagelow, "Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements," 7 *Mediation Q.* 347, 348-53 (1990) (reviewing research regarding the effects of domestic violence on children); Rabin, "Violence Against Mothers Equals Violence Against Children: Understanding the Connections," 58 *Alb. L.Rev.* 1109, 1112-13 (1995) (indicating that "children who wit-

ness domestic violence demonstrate the same symptoms as physically or sexually abused children").

11. Adams, "Identifying the Assaultive Husband in Court: You Be the Judge," *Boston Bar J.* 23 (July/August 1989).

12. See generally Volpp, "(Mis)identifying Culture: Asian Women and the 'Cultural Defense,'" *Harv. W.L.J.* 57 (1994); Siu Chung and Orloff, "Cultural Issues and Diversity" in *The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook (hereafter, "A Lawyer's Handbook")* at 11-10 to 11-13 (Washington, D.C.: ABA Commission on Domestic Violence, 1996); Rivera, "Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials," 14 *Boston C. Third World J.* 231 (1994); Agtuca, *A Community Secret: For the Filipina in an Abusive Relationship* (Seattle, WA: Seal Press, 1992); Marsh, "Sexual Assault and Domestic Violence in the African-American Community," 17 *The W. J. of Black Studies* 149-55 (1993).

13. See Ammons, "Rules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome," *Wis. L.Rev.* 1003, 1021 (1995) (stating that "African American women hesitate to seek help from shelters because they believe that shelters are for white women"); Rivera, *supra*, note 12 at 234-35 (emphasizing that "[r]acial and cultural differences are critical considerations in analyzing and responding to the crisis of domestic violence" and further concluding that women of Latin descent "experience and respond to domestic violence differently than other women").

14. See generally Guidry Tyiska, "Working With Victims of Crime With Disabilities," *Office for Victims of Crime Bulletin* at 1 (Sept. 1998); *Technical Assistance Manual for Domestic Violence Service Providers on Domestic Violence Among Women With Disabilities*, available from the National Coalition Against Domestic Violence (303) 839-1852; Haight-Liotta, "Disabled Women Rate Caregiver Abuse and Domestic Violence Number One Issue," (Sept. 24, 1996), available by calling (800) 897-0272 [(v)TDD], accessible for the hearing impaired].

15. See "Abused Elders or Older Battered Women?," Report on the *AARP Forum* (Oct. 29-30, 1992), documenting that more elders are abused by a partner than by caretakers or children.

16. Adams, *supra*, note 11 at 26.

17. *Id.* at 23; Harris, "For Better or Worse: Spouse Abuse Grown Old," 8 *J. Elder Abuse & Neglect* 1 (1996).

18. See Herman, "Chapter 2 Terror," in *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* 33-50 (New York, N.Y.: BasicBooks, 1992).

19. See Hart, "Family Violence and Custody Orders," 43(4) *Juv. & Fam. Ct. J.* 29, 33-34 (1992); Saunders, "Child Custody Decisions in Families Experiencing Woman Abuse," 39 *Social Work* 51, 53 (1994), as cited in Hart and

Hofford, "Child Custody," in *A Lawyer's Handbook, supra*, note 12 at 5-1; Cahn, "Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions," 44 *Vanderbilt L.Rev.* 1041 (1991).

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21. Drew, *Recognizing Financial Control as Abuse: An Introduction for Practitioners*, Presentation at the ABA Annual Meeting, Atlanta, Ga. (Aug. 8, 1999).

22. Kilborn, "Welfare All Over the Map," *New York Times* (Dec. 8, 1996) at E3, col.1.

23. See Estroff Marano, "Why They Stay: A Saga of Spouse Abuse," *Psychology Today* (May-June 1996) at 56, 59.

24. One study found that 51 percent of battered women lacked access to charge accounts, while 34 percent could not access checking accounts and 21 percent had no way of obtaining cash. Follingstad, 5 *J. of Family Violence* 113 (1990).

25. See Shepherd, "Working to Curb Abuse: ABA Project Draws Employers into Effort to Combat Domestic Violence," *ABA J.* 80 (Sept. 1998); Isaac, "Corporate Sector Response to Domestic Violence," in *Legal Interventions in Family Violence Research Findings and Policy Implications* 76-77 (1998); Hardeman, "Employee Assistance Programs," in *A Lawyer's Handbook, supra*, note 12 at 10-1 to 10-5.

26. See generally Zorza, "Woman Battering: A Major Cause of Homelessness," 24 *Clearinghouse Rev.* 16 (*special issue*, 1991); Judica Vigue, "For Homeless Women, No Defenses," *The Boston Globe* (Feb. 23, 1996) at 1, col. 1; Higgins, "Domestic Violence Leading Cause of Homelessness for Women," 19 *Lifeline* 1 (Fall 1998).

27. Adams, *supra*, note 11.

28. See Dutton, "Understanding Women's Response to Domestic Violence in the Context of Criminal Self-Defense," 21 *Hofstra L.Rev.* 1 (1993); Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals," 140 *U. Pa. L.Rev.* 379 (1991); Ammons, "Parole: Post-Conviction Relief for Battered Women Who Kill Their Abusers," *Defending Battered Women in Criminal Cases* (ABA National Inst. Manual, 1993).

29. 10 U.S.C. § 1058 (1988).

30. See generally Letellier, "Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence," 9 *Victims and Violence* 95 (1994); Lobel, ed., *Naming the Violence: Speaking Out About Lesbian Battering* (Seattle, Wash.: Seal Press, 1986); Robson, "Lavender Bruises: Intra-Lesbian Violence: Law and Lesbian Legal Theory," 20 *Golden Gate U. L.Rev.* 567 (1990).

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32. Adams, *supra*, note 11.

33. Fischer, Vidmar, and Ellis, "The Culture of Battering and the Role of Mediation in Domestic Violence Cases," 46 *SMU L.Rev.* 2117, 2131-32 (1993).

34. Yellott, "Mediation and Domestic Violence: A Call for Collaboration," 8 *Mediation Q.* 39, 44 (1990).

35. See generally Buel, "Family Violence and the Health Care System: Recommendations for More Effective Interventions," 35 *Houston L.Rev.* 109 (1998).

36. 10 U.S.C. § 801-946.

37. See Eltringham, "The Military and Domestic Violence," in *The Lawyer's Handbook, supra*, note 12 at 14-1.

38. See Raphael, "Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency," 19 *Harvard W.L.J.* 201, 223 (1996) (stating that "some shelters require women to quit their jobs once they enter a shelter so that the abuser cannot follow them from work to the shelter").

39. The National Domestic Violence Hotline, at (800) 799-SAFE, has available free posters, brochures, lists of warning signs, and phone and bumper stickers, among other things. The Family Violence Prevention Fund has similar materials available at low cost by calling (800) END-ABUSE. For example, one Florida bar association ordered bumper stickers reading, "Florida Trial Lawyers Say: There's No Excuse for Domestic Violence."

40. For comprehensive listing of excellent faith-based resources (newsletters, books, brochures, and videos), contact the Center for the Prevention of Sexual and Domestic Violence at (206) 634-1903.

41. Dutton, *supra*, note 28 at 17. The Stockholm Syndrome refers to the phenomenon that occurred when a Stockholm bank was robbed and several hostages were taken. After several days in captivity with the robbers, all of the hostages—both men and women—had bonded with their captors, sympathizing with their cause and fully excusing their crimes.

42. Interview with Felicia Collins Correa, Executive Director, Domestic Violence Intervention Program, Tulsa, Okla. (May 24, 1999). DVIP accepts any substance-abusing victims unless they require hospitalization. Their local Mobile Outreach Crisis Services stop at the shelter to assist victims, and the shelter has certified alcohol and drug counselors ("CADC") on staff to address the inherent issues.

43. Parker and McFarlane *et al.*, "Physical and Emotional Abuse in Pregnancy: A Comparison of Adult and Teenage Women," 42 *Nursing Research* 173 (May/June 1993); Gaxmararian, Lazorick *et al.*, "Prevalence of Violence Against Pregnant Women," 275 *JAMA* 1915 (June 26, 1996).

44. See generally Levy, ed., *Dating Violence: Young Women in Danger* (Seattle, Wash.: Seal Press, 1991); Sousa, "Teen Dating Violence: The

Hidden Epidemic," 37 *Fam. & Consil. Cts. Rev.* 356 (July 1999).

45. See, e.g., Gross, "Getting to Jobs in Suburbs is Hard for Walking Poor," *The New York Times* (Nov. 18, 1997) at A1 (reporting that UCLA studies "show that car owners work more regularly, make more money, and have more job choices").

46. Mr. Menzies donates used cars from his business (sometimes having to spend up to

\$1,000 to bring them to driving condition), obtains the license and insurance, then offers three months of free maintenance. See "The Osgood File: Used Car Salesman Helps Get People Off Welfare by Giving Away Cars" (CBS radio broadcast, Sept. 22, 1997) at <http://www.cbsradio.com/osgood/archives/0922c1997.html>.

47. See Orloff, Jang, and Klein, "With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women," 29 *Fam. L.Q.*

313 (Summer 1995); Kelly, "Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act," 92 *Northwestern U.L.Rev.* 665 (Winter 1998).

48. Judge Dale Harris presides over the Juvenile and Family Court in Lynchburg, Va.



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### National Children's Law Conference to be Held in Portland: October 8-11

The National Association of Counsel for Children ("NACC"), headquartered in Denver, will present its twenty-second annual National Children's Law Conference in Portland, Oregon, on October 8-11. This year's theme is "Kids, Courts, and Community: Providing Children Access to Justice."

The conference is designed for professionals from the fields of law, mental health, medicine, social work, and education. The program focus is the practice of children's law and advocacy through interdisciplinary training and education. This year's keynote speaker is Robin Karr-Morse, author of *Ghosts from the Nursery: Tracing the Roots of Violence*.

Several states, including Colorado, have approved the conference for CLE credit. For a conference brochure or further information, call the NACC in Denver at (303) 864-5320 or (888) 828-NACC.

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## Domestic Violence in the District of Columbia

### 2017 Statistical Snapshot

- During their lifetime, **50%** of women living in D.C. have experienced psychological aggression perpetrated by an intimate partner.
- During their lifetime, **39%** of women living D.C. have experienced sexual violence, physical violence, and/or stalking perpetrated by an intimate partner.

Source: S.G. Smith, et al., *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017)*

### In One Day in 2017...

- 616 survivors were served by local domestic violence programs, with 418 receiving emergency shelter or transitional housing and 198 receiving non-residential assistance and services, including counseling, legal advocacy, and children's support groups.
- Service providers were unable to meet 77 requests; **43%** of unmet requests were requests for housing.

Source: *The National Network to End Domestic Violence, National Census of Domestic Violence Services (2017)*

### Lack of Safe Housing Options for Domestic Violence Survivors

- **Nearly one-third** of unaccompanied homeless women in D.C. indicate that violence is the cause of their current homelessness or housing instability, and **63%** of unaccompanied homeless women with past experiences of violence and trauma report at least one act of violence against them during their current period of homelessness or housing instability.

Source: *2017 D.C. Women's Needs Assessment Report*

- **26%** of homeless adults in families in D.C. reported a history of domestic violence.

Source: *2017 D.C. Point-in-Time Count*

- **28%** of survivors in D.C. who called the National Domestic Violence Hotline between January and June 2017 cited shelter as their principal need, the top need mentioned.

Source: *National Domestic Violence Hotline, January - June 2017 Washington D.C. Report*

### The Implementation of Domestic Violence Prevention in DC Schools is Past Due

- In D.C., there are currently significantly more domestic violence and sexual assault intervention programs in place than prevention programs.

Source: *Nkiru Nnawulezi, Ph.D., Surviving DC: A research synthesis of survivors experiences (2017)*

- 24% of youth in middle and high school reported experiencing physical or sexual dating violence in 2017. This represents a 4% increase in reports of dating violence among middle and high school students from 2015.
- Lesbian, gay or bisexual (LGB) high school students were more than 2 times more likely to report physical dating violence by the person they were dating compared to heterosexual youth.

*Citation: Office of the State Superintendent of Education (OSSE). (2017). 2017 Youth Risk Behavior Study Survey Results: District of Columbia (Including Charter Schools) High School Survey. OSSE: Washington, DC.*

## The Need for Culturally Specific Services

- Black/African American women make up **75%** of unaccompanied homeless women in D.C. although they are only **52%** of adult women.

*Source: 2017 D.C. Women's Needs Assessment Report*

- Community-focused intervention and prevention efforts directly contribute to survivors' safety, empowerment, and overall well-being.

*Source: Nkiru Nnawulezi, Ph.D., Surviving DC: A research synthesis of survivors experiences (2017)*

- In FY 2017, Culturally specific domestic violence service providers served 1,423 survivors.

*Source: OVSJG Performance Hearing Questions, Submitted February 5, 2018*

## Court Data

- 5,973 petitions for new Civil Protection Orders were filed in D.C. Superior Court in 2017. This is a 7% increase from 2016.
  - 1,995 Civil Protection Orders were granted.

*Source: D.C. Superior Court*

## Law Enforcement Data

- The Metropolitan Police Department received 35,909 domestic violence-related calls for service in 2017.
  - While this is a 2% decrease from 2016, it is a 9% increase over 2013.

Approximate breakdown by ward:

|                                                                 |                                                                     |                                                                     |                                                           |
|-----------------------------------------------------------------|---------------------------------------------------------------------|---------------------------------------------------------------------|-----------------------------------------------------------|
| <b>Ward 1:</b> 1,988 calls<br>*Some overlap with Ward 2.        | <b>Ward 2:</b> 1,550 calls<br>*Some overlap with Wards 1 and 6.     | <b>Ward 3:</b> 509 calls<br>*Some overlap with Ward 4.              | <b>Ward 4:</b> 2,725 calls<br>*Some overlap with Ward 3.  |
| <b>Ward 5:</b> 4,423 calls<br>*Some overlap with Wards 6 and 7. | <b>Ward 6:</b> 2,097 calls<br>*Some overlap with Wards 2, 5, and 7. | <b>Ward 7:</b> 8,835 calls<br>*Some overlap with Wards 5, 6, and 8. | <b>Ward 8:</b> 10,112 calls<br>*Some overlap with Ward 7. |

*Source: Metropolitan Police Department, Geocoded Computer Aided Dispatch (CAD) domestic violence related data as of 2/6/2018*

- Between 2015 and 2017, there was an overall 12.5 % decrease in 911 calls made in D.C.

*Source: Testimony of Karima Holmes, Director, Office of Unified Communications at 2018 Performance Oversight Hearing, March 8, 2018.*

**Navigating  
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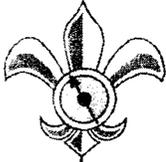
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This document was developed under grant number SJI-03-N-103 from the State Justice Institute. Reprints for this publication were made possible under Grant No. 90EV0378/06, awarded by the U.S. Department of Health and Human Services. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute or the U.S. Department of Health and Human Services.



## **Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide**

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was originally published in 2004.

Special thanks to Martha Wade Steketee, National Center for State Courts, for her contributions to the evaluation of this project.



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While there are rules of evidence to direct judges in determining who qualifies as an expert, practical resources are lacking to help judges critically review the expert testimony of child custody evaluators, determine whether the evaluator's testing methods were accurate and reliable, or tease out the biases of individual clinicians, particularly when domestic violence is involved. This publication is designed to be a practical tool for judges on how to order, interpret, and act upon child custody evaluations and includes bench cards and supplementary materials.

### **Acknowledgements**

This project would not have been possible without the generous support of the State Justice Institute and its continuing leadership in seeking to improve the quality of justice in state courts and the outcomes for families in crisis. The Family Violence Department of the National Council of Juvenile and Family Court Judges (NCJFCJ) is indebted to all of the people who helped make this publication possible. Special thanks go to the authors, Clare Dalton, Leslie Drozd and Judge Frances Wong, for their dedication; to the Advisory Committee members for their guidance; to our consultants, Shelia Hankins and Judge William Jones, for their enthusiasm and expertise; to Larry Winkler for his graphic design; to the judges and other professionals involved in the Child Victims Act Model Courts Project for serving as reviewers of the document; to the staff of the NCJFCJ Permanency Planning for Children Department for their contributions to this project; and to the many experts across the country and internationally who reviewed the document for their insightful feedback.

The Family Violence Department would also like to thank the U.S. Department of Health and Human Services (HHS) for helping to support this important endeavor. Much of the groundwork for this tool was done through the Resource Center on Domestic Violence: Child Protection and Custody, a project of NCJFCJ and funded by HHS.



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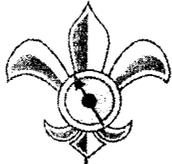


# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

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# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

Not every case will require or need an evaluation. This tool is written primarily to help judges determine whether ordering an evaluation is appropriate and, if so, to ensure that the evaluations they order are of high quality and properly attentive to the issues raised by domestic violence. However, a pressing concern for many judges is obtaining independent information to facilitate decision making when neither the parties nor the courts can afford an evaluation or investigation.<sup>1</sup> This tool can still be helpful, enabling judges to form partial solutions in specific cases and providing ideas for system change.

## Introduction

### Why a Tool with a Domestic Violence Focus?



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

It is more likely than not, according to current research,<sup>2</sup> that judges presiding over contested custody cases will have to grapple with two related questions:

- whether one parent has been physically violent or otherwise abusive to the other, and, if so,
- how that violence or abuse should affect the court's decisions about ongoing custody and visitation arrangements.

In at least some cases, you may decide to use formal custody evaluations to assist you in answering those two questions: to frame the issues; gather the relevant evidence, analyze and synthesize it; and offer it to you in a format that will facilitate your decision making. The primary function of this tool is to help you determine whether ordering an evaluation in such a case is appropriate and, if so, how to become a more critical consumer of the evaluation—not just in cases in which there is a record of domestic violence, but also in cases in which domestic violence is alleged, or where the presence of other “red flags” raises a suspicion of domestic violence.

The quality of custody evaluations, therefore, is of critical importance. Yet, not all the experts on whom courts rely have the training and experience needed to collect the evidence adequately, evaluate it competently, or make well-supported recommendations.<sup>3</sup> This is particularly true when a case involves domestic violence.<sup>4</sup> Although it may be your experience that certain custody evaluators with whom you have worked in the past are good, it remains imperative that you critically examine *all* custody evaluation reports.

This tool will help you:

- determine whether the case is one that requires an evaluation;
- determine what the content of the evaluation should be;
- select the right person to conduct the evaluation;
- tailor the evaluation to your needs;
- critique it carefully; and
- know, at the end, whether or to what extent you can rely on the evaluator's report.

<sup>1</sup> The functions of “evaluation” and “investigation” are discussed *infra*, beginning at p. 16.

<sup>2</sup> Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. & Fam. Ct. J. 57, 58 (2003) (citing several studies that highlight the prevalence of custody cases with a history of domestic violence); see also, AM. PSYCHOL. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 100 (1994) (stating that custody and visitation disputes appear to occur more often in cases in which there is a history of domestic violence).

<sup>3</sup> For purposes of this Guide, “evaluation” refers only to the work product of those professionals qualified to evaluate the data and form an opinion about the parties in a contested custody case based upon their training and experience. Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that judges, not evaluators, make the ultimate best-interests determination.

<sup>4</sup> See, e.g., TK Logan et al., *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE AND VICTIMS 719, 735 (Dec. 2002) (the authors state that “...this study suggests that evaluators do not appear to investigate the nature or extent of domestic violence...and more specifically, do not explore domestic violence as a way of attending to the child's safety interests”).



By becoming a more demanding consumer, you will also assist the evaluators on whom you rely to increase their expertise in this difficult work.

## Organization

In the bench cards provided here, as well as in these supplementary materials, we guide you chronologically through the process, asking with you:

- I. Is this a case that would benefit from an evaluation that includes a domestic violence focus?
- II. What should the scope of the evaluation be, and whom should I ask to conduct it?
- III. How should the final report itself be evaluated? How should I use it?

The cards and the supplemental text use an identical format, allowing you to refer easily from one to the other. **The text expands upon the information found on the cards. In order to make full use of this tool, you should read the cards first or read the supplemental text alongside the cards.**

At the end of these materials, you will also find a list of additional resources, many of them available on the Internet. The remainder of this introduction offers a context for the tool, by defining domestic violence and highlighting critical aspects of the legal and ethical framework governing any case in which domestic violence is known to be, or may be, an issue.

## How to Define Domestic Violence<sup>5</sup>

Domestic violence is complex.<sup>6</sup> For purposes of this tool, we are defining it as a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—that perpetrators use against their intimate partners.<sup>7</sup> The pattern of behaviors is neither impulsive nor “out of control,” but is purposeful and instrumental in order to gain compliance from or control over the victim.<sup>8</sup> The presence of domestic violence, as well as any violent or abusive behavior that does not fit this description, will always be relevant to the question of what custody or visitation arrangement will serve the best interests of any children shared by the adult parties.<sup>9</sup>

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<sup>5</sup> For purposes of this tool, we use neutral language when referring to the abusive parent and the non-abusive parent. However, research shows that men abuse women at far higher rates than women abuse men. See BUREAU JUST. STAT., U.S. DEP'T JUST., FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES I (2005) at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (last visited Aug. 25, 2005) (finding that females were 84 percent of spouse abuse victims, 86 percent of victims of abuse by a boyfriend or girlfriend, and 58 percent of family murder victims). See also PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii – 61, iv (November 2000) (finding that women (64 percent) were significantly more likely than men (16.2 percent) to report being raped, physically assaulted, and/or stalked by a current or former intimate partner and that women who were raped or physically assaulted by a current or former intimate partner were significantly more likely to sustain injuries than men who were raped or physically assaulted by a current or former intimate partner).

<sup>6</sup> See Loretta Frederick, Battered Women's Just. Project, *Context Is Everything* (2001) at <http://www.bwjp.org/documents/context%20is%20everything.htm> (last visited Dec. 6, 2005) (examining how people use violence in their relationships and highlighting that “[i]n order to intervene effectively in these cases, it is important to understand the complex issues of violence within intimate relationships, including the intent of the offender, the meaning of the act to the victim and the effect of the violence on the victim; the context within which any given act of violence occurred. Other relevant factors include the particulars of the incident, and how much violence, coercion, or intimidation accompanied the violent event.”)

<sup>7</sup> This definition is derived from Anne L. Ganley, *Understanding Domestic Violence: Preparatory Reading for Trainers* in ANNE L. GANLEY & SUSAN SCHECHTER, DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR CHILD PROTECTIVE SERVICES 1-32 (Janet Carter, et al. Ed., 1996) (pointing out that, unlike stranger-to-stranger violence, domestic violence abusers have ongoing access to the victim, especially when they share children, and can continue to exercise a great deal of physical and emotional control over the victim's daily life).

<sup>8</sup> Ganley, *id.* at 5.

<sup>9</sup> See, e.g., SUSAN L. KEILITZ ET AL., NAT'L CENT. FOR ST. CTS., DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 3 (1997) (providing that by identifying domestic violence in cases, courts can help victims protect themselves through safety planning and referral to support services; ensure victims are not compelled to participate in court proceedings that may place them in further danger; and prevent abusers from manipulating their victims and the judicial process by crafting specific court orders).



In some cases, there will be a public record of violence or abuse (police reports; 911 calls; criminal, civil, or protection order case information) and private records (from medical, mental health, substance abuse, shelter, and other service providers); in many others there will be explicit allegations, including allegations of child sexual abuse,<sup>10</sup> and often counter-allegations; in still others there will be indications of disturbance in the family that may or may not, upon further investigation, be related to violence or abuse. There also exist many other collateral issues that could obscure the fact that domestic violence is present in the case. We have called these the "red flag" issues that should prompt further inquiry into the presence or absence of domestic violence. See Card I, Side 2, and accompanying supplemental material.

Domestic violence may not be easily detectible in relationships where the violence is hidden, or where most of the abuse is not physical in nature. Abusive partners can often appear charming, "in charge," and sincere in their commitment to their families even when their behavior, if we knew it, would tell another story; partners who have suffered abuse may appear to be unreliable witnesses, often seeming to be unappealing, disorganized or emotionally unstable. The parties are likely to hold radically different perceptions of their relationship and of one another; and abusers are often motivated to deny or minimize their abusive behavior.<sup>11</sup> It is particularly important in these cases to test what the parties say against other available evidence, including patterns of assaultive and coercive behaviors in past relationships, in relationships with other family members, or in relationships outside the family. Even if none of the collateral contacts has ever witnessed the abuse or violence, the absence of witnesses to the violence or its aftermath does not conclusively prove that it did not take place. Furthermore, an absence of convictions for domestic violence or violations of restraining/protection orders does not mean that a parent is not abusive.<sup>12</sup>

## The Legal Context

In cases involving known or suspected domestic violence, as in most contested custody cases,<sup>13</sup> the court's fundamental task is to determine specifically how and to what extent each child has been affected by what has gone on inside the family; the quality of the child's relationship with each parent (both historically and at the present time); each parent's capacity to meet the child's needs; and how best to assure the child's ongoing physical, psychological and emotional well-being.

Even when they are not themselves physically or sexually abused,<sup>14</sup> when there is violence at home children are aware of and affected by it, although often parents would prefer to think, and may say, that they are not. As a significant and growing body of research attests, exposure to physical violence at home hurts children, although the extent of that injury differs from child to child,<sup>15</sup> even within the same home. We are using the term "exposure" to signal that children are affected not only when they are present at the violent incident, but also when they hear it, see it, or see

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10 See Lundy Bancroft & Jay Silverman, *Assessing Abuser's Risks to Children in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION* 107 (Peter Jaffe, Linda Baker & Alison Cunningham eds., 2004) (discussing the substantial overlap between domestic violence and child sexual abuse); and Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 *CHILD ABUSE AND NEGLECT* 151-163 (1990) (underscoring the need to take child sexual abuse allegations seriously).

11 See AM. PSYCHOL. ASS'N., *supra* note 2, at 40 (stating that custody and visitation provide domestic violence abusers with an opportunity to continue their abuse, and that such abusers are twice as likely to seek sole physical custody of their children and more likely to dispute custody if there are sons involved).

12 See Etiony Aldarondo & Fernando Mederos, *Common Practitioners' Concerns About Abusive Men*, in *PROGRAMS FOR MEN WHO BATTER: INTERVENTION AND PREVENTION STRATEGIES IN A DIVERSE SOCIETY* 2-4 (Etiony Aldarondo & Fernando Mederos eds., 2002) (hereinafter *PROGRAMS FOR MEN WHO BATTER*) (stating that many physically abusive men are never arrested or brought to trial even though they have a long history of violence toward a partner).

13 When we use "custody" in this tool, we include *both* sole or joint physical custody *and* sole or joint legal custody. See also Bancroft & Silverman, *supra* note 10.

14 *But see* Red Flag Cases, *infra* p. 14 (regarding the significant overlap of child maltreatment and domestic violence). See also Bancroft & Silverman, *supra* note 10.

15 See PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* 21-28 (2003); see also, Jeffrey L. Edleson, *Problems Associated with Children's Witnessing of Domestic Violence* (April 1997, revised April 1999) at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_wit-ncss.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_wit-ncss.pdf) (last visited Dec. 6, 2005).



or feel the aftermath—such as a parent injured or in distress, furniture knocked over, things broken, blood on the wall or floor. They are affected, too, when they are forced to live in an atmosphere of threat and fear created by violence. And they are affected by a parent's use of abusive behaviors that stop short of physical violence, whether those behaviors are directed primarily toward a partner, or characterize the abusive parent's relationships with partner and children alike.<sup>16</sup>

This is why judges are now almost universally under a statutory obligation to consider domestic violence as a factor when determining the best interests of children. It is why many judges are under a statutory obligation to presume that a perpetrator of domestic violence is not someone who should be given either joint or sole physical or legal custody of a child or be given unrestricted visitation with the child.<sup>17</sup> The definitions of "domestic violence" underlying these specific statutory obligations may be narrower, and more focused on physical violence, than the broader definition we have proposed. But because domestic violence in the broader sense hurts children, it is incumbent on judges in custody or visitation decisions based on the best interests of a child, regardless of particular statutory obligations, to have an accurate picture of the violence or abuse perpetrated by one parent against the other or against a child, *and* to consider its implications for the child after the parents separate. It is also important to understand that the impact of domestic violence on children may be mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent.<sup>18</sup>

## The Ethical Context: Safety First<sup>19</sup>

When you make a determination or approve a parental agreement about custody and visitation, you are trying to create an environment in which children are more likely to flourish, both physically and emotionally. The emotional and physical safety of the children and an abused parent must be a paramount consideration. Children do not flourish if they are not, or do not perceive themselves to be, safe or if they perceive a parent to be at risk. Abused parents must be assured of their own safety, to the greatest extent possible, so that they in turn can provide a safe and secure environment for their children.

Cases involving domestic violence can create acute risks for an abused parent and his or her children; and we cannot determine with any certainty, especially at the outset, exactly which case, or which circumstances, contain or create those risks. Contrary to earlier thinking, in many cases, separation increases, rather than reduces, the risks of harm to an abused parent or to the children.<sup>20</sup> Physical, sexual, or emotional abuse or threats of abuse of the children post-separation may be a powerful tool in the abuser's continuing control over the other parent. Lethal violence occurs more

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16 See, e.g., JAFFE, LEMON, & POISSON, *id.* at 30-31 (discussing batterers as role models and how they often undermine the non-abusive parent's authority); see also LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

17 See, e.g., LA. REV. STAT. ANN. § 9:364 (creating a rebuttable presumption against awarding sole or joint custody to a parent who has a history of perpetrating family violence; identifying factors to overcome presumption; and restricting visitation to only supervised if such a finding is made) and TEX. FAM. CODE ANN. § 153.004 (creating a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child). See also, NAT'L COUNCIL JUV. & FAM. CT. JUDGES, *MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE* §§ 401-403 (1994) [hereinafter *MODEL CODE*] (creating a rebuttable presumption against sole or joint physical or legal custody to an abusive parent (401), requiring the safety and well-being of the child and the victim be a primary consideration for the court (402), and creating a rebuttable presumption that it is in the best interest of the child to reside with the non-violent parent in a location of that parent's choice, within or outside the state (403)). For a list of those states that have enacted a rebuttable presumption against custody or visitation to an abusive parent, contact the Resource Center on Domestic Violence: Child Protection and Custody at (800) 527-3223.

18 See JAFFE, LEMON, & POISSON, *supra* note 15, at 27-28 (providing a table that identifies risk and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).

19 When we speak of safety, we are including both physical and emotional safety.

20 Walter S. DeKeseredy, McKenzie Rogness & Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 *AGGRESSION & VIOLENT BEHAV.* 675 (2004), available at <http://www.ncdsv.org/images/Separationdivorcesexualassault.pdf> (last visited Dec. 6, 2005).



often during and after separation than when the couple is still together,<sup>21</sup> and children often become the targets of or witnesses to this violence.

**It may be helpful to think about three contexts in which concerns about safety can be addressed:**

- At the outset of the case, if an existing record or allegations of violence prompt immediate concern about the safety of one or both of the parties or their children. This is addressed on Card I.
- During the litigation and evaluation process, which can (a) create its own risks, and (b) uncover information that triggers immediate concern about the safety of a party or the children. This is addressed on Cards II and IIA.
- In framing final custody and visitation orders, which must ensure the ongoing safety of the parties and their children. This is addressed on Card III.

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<sup>21</sup> See Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089-97 (2003); see also DeKeseredy, Rogness & Schwartz, *id.* at 676 and JAFFE, LEMON, & POISSON, *supra* note 15, at 8.

# I

## Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

### What If There Are No Resources for an Evaluation?

As Card I suggests, this tool offers you a checklist of information that will be important to your decision making in any case in which domestic violence is known, alleged, or suspected. If you determine that an evaluation is necessary and if neither the parties nor the court has the resources to provide for one, or if a qualified evaluator for a domestic violence case is not available, it may still be possible for you to request that information from the parties' attorneys, from the parties themselves if they are unrepresented, and sometimes directly from the source. Child abuse/protection reports, criminal records, and records of other relevant court activity may fall into the latter category.

The tool may also help you determine which avenues of inquiry are the most crucial, and how to maximize the productivity of an inquiry, so that if you have resources for a limited evaluation, you can allocate those resources effectively. Even this limited evaluation, assuming it is informed by the appropriate domestic violence expertise, can add critical information, supplementing that which is available from the parents and enabling you to make a more appropriate decision with limited resources.

If you order a limited inquiry, it will be important to ensure that the evaluator's conclusions or recommendations do not presume more knowledge than the limited inquiry has in fact produced. For example, children might be "well behaved" in the presence of the abusive parent and "act out" in the presence of the non-abusive parent for a number of reasons not readily apparent to or understood by the evaluator. The opposite could also be true if the children feel safe with a third party present. Therefore, it is critical that evaluators understand the context within which their inquiry takes place and for you to frame the inquiry carefully and to use your authority to make relevant collateral resources available to the evaluator. This may be especially crucial in cases where the parties are unrepresented and have a limited capacity to address effectively any negative conclusions drawn by the evaluator. Exercising critical judgment in your reading of an evaluator's report is a topic addressed extensively on Card III and the accompanying supplemental material.

### Is There a Need for an Emergency/Interim Assessment?

If a case seems dangerous from the outset, and if the situation has not already been stabilized, you may need to take immediate action.

In framing temporary orders, you may want to draw on an interim safety assessment performed by a qualified expert—in other words, an interim evaluation with a limited and specific focus on safety. The expert asked to conduct this type of evaluation must be someone with specific expertise and experience in domestic violence and risk assessment.<sup>22</sup>

Research into domestic violence homicides underscores the fact that our ability to measure risk is still quite imperfect. This in itself suggests that caution is advisable. However, the research does provide some valuable guidance, and suggests the following areas of inquiry as most important for an emergency/interim safety assessment:

- the abusive partner's employment status, paying particular attention to voluntary unemployment or underemployment as well as involuntary unemployment (unemployment is the most significant socio-demographic risk factor);
- whether the abusive partner has access to firearms, has made previous threats with a weapon, or has previously threatened to kill;

- whether the abusive partner has threatened or attempted suicide;
- whether the abusive partner has a history of alcohol/drug abuse;
- the level of control exercised by the abusive partner: the more controlling a partner has been in the relationship, the greater the risk created by a separation;
- whether there is a child in the home who is not the abusive partner's biological child;
- whether the abusive parent is excessively jealous of the non-abusive parent, including being jealous of any new relationships of the non-abusive parent; and/or
- whether there have been incidents of violence or threatening behavior since the separation.<sup>23</sup>

## Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

### The Clearest Cases

There will be cases in which the evidence is clear, and no further evaluation is necessary to determine that a child's best interests will be served by granting custody to the non-abusive parent. That determination may be driven by a statutory presumption against granting custody or visitation to the abusive parent under such circumstances, or by the court's own judgment after a broader examination of any violence or abusive behavior.

There will be many cases in which a parent who has perpetrated acts of violence or abuse against the child or other parent nonetheless seeks visitation. The potential for harm, and the need for extreme caution in these circumstances, suggests that if the court is inclined to consider such a request, it may be necessary to determine (a) the motivation for the request; (b) the impact ongoing contact will have on the children or on their relationship with the abused parent; and (c) whether visitation should occur and, if so, how it might be structured to assure the safety of the children and abused parent, sometimes limiting access to strictly supervised visitation.

There will be still other cases involving a limited record of domestic violence in which one of the parties will contest the legitimacy of that record or its relevance to custody and visitation determinations. And there will be cases involving allegations, and perhaps counter-allegations, of domestic violence in which there are no public records to serve as substantiation.<sup>24</sup> These cases may benefit from a careful investigation, or evaluation under limited circumstances, conducted within specific parameters established by you. In order to understand fully the impact of a party's assaultive and coercive behavior on the other party or the children, it may be important that an investigation or evaluation carefully examine the existence of such behavior in the allegedly abusive party's prior or current relationships.<sup>25</sup>

### A History of Physical Violence

Concerns are frequently raised that neither the laws governing the issuance of civil restraining/protection orders, nor the laws governing criminal domestic assault cases, sufficiently distinguish between the primary perpetrator of violence in an abusive relationship, and a partner who may be using violence defensively.

In the civil restraining/protection order and criminal contexts, the focus is on specific acts or threats of violence, stalking, or sexual assault. The family court system has both the luxury and the obligation to look more broadly at the dynamics within the family, and to ask whether one partner is abusing the other as a means of coercive control and what the implications of that abuse are for each member of the family. In cases with this profile, a careful examination may reveal that although both parents have a record of violence,

<sup>23</sup> For a more complete discussion on risk factors, see Campbell et al., *supra* note 21, and Jacquelyn C. Campbell, *Danger Assessment* (2004) at <http://www.dangerassessment.org> (last visited Dec. 6, 2005).

<sup>24</sup> For information on why there may be no documentation of the abuse, see Sarah M. Buel, *Fifty Obstacles to Leaving a.k.a. Why Abuse Victims Stay*, 28 COL. BAR J. 19 (October 1999).

<sup>25</sup> However, exploring the context of other relationships may not be possible because of lack of funding, or the evidence derived from such evaluation or investigation may be irrelevant and inadmissible.

only one of the parents poses any ongoing risk to the children or the other parent, or that the parent with a record of violence is actually the victimized partner, not the abuser.

### The Red Flag Cases

Perhaps the most difficult and important case is the “red flag” case (see Card I, Side 2). This is the case in which no record or allegation of domestic violence surfaces when the parties first come to court, and yet the children may have been exposed to domestic violence and/or abused themselves, and may be at risk in the future unless further inquiry is made to inform your best-interests analysis properly.

- Substance abuse, while it does not cause or excuse domestic violence, often co-occurs with it, and can certainly precipitate particular incidents. Substance abuse on the part of an abused partner may or may not be a form of self-medication.
- Mental illness can produce violence, but it can also be the product of exposure to violence or abuse.
- Child abuse, according to current research, may occur in 30 percent to 60 percent of households (depending on the study) in which the mother is also being abused.<sup>26</sup> In cases in which mothers are assaulted by the father, daughters are 6.51 times more at risk of sexual abuse than daughters in homes without domestic violence.<sup>27</sup>
- Post-traumatic stress disorder symptoms (which include those listed on Card I: sleep disturbances, bedwetting, excessive separation anxiety, hyperactivity, withdrawal, aggression or other behavioral problems; depression or anxiety; or regressive behaviors) are important, and it should be determined whether those symptoms result from the abuse of the children or from their exposure to parental violence.
- A lop-sided agreement in an uncontested case, particularly when both parties, or the party who seems to be giving most away, are unrepresented, raises the concern that the “losing” party may not be able to assert his or her own interests and that the agreement may not be in the best interests of the children, perhaps because of patterns of violent or coercive and controlling behavior by the abusive parent.
- Estrangement<sup>28</sup> of children is alleged in many custody disputes; however, when determining the credibility of such allegations, it is important to keep in mind that children who appear estranged from a parent may have legitimate and substantial reasons for being angry, distrustful, or fearful.<sup>29</sup> How to understand issues of estrangement and protection in cases involving domestic violence is treated more fully in the supplementary materials to Card III (p. 24). Perpetrators of domestic violence often accuse their partners of turning the children against them, or may turn the children against their partners, while denying their own behavior—highlighting the importance of determining whether domestic violence is present in cases in which that accusation is made.
- Each parent’s capacity to meet the children’s emotional needs is impacted by the presence of domestic violence. In examining a parent’s capacity to meet the children’s needs, it is important to recognize and understand the impact of an abusive parent’s assaultive and coercive behaviors on the children and the vulnerable parent; as well

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<sup>26</sup> See, Nat’l Clearinghouse on Child Abuse & Neglect Info., *In Harm’s Way: Domestic Violence and Child Maltreatment* 1 (1999). See also JEFFREY L. EDLESON & SUSAN SCHECHTER, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999) (citing NAT’L RES. COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993)).

<sup>27</sup> Barbara J. Hart, *Children of Domestic Violence: Risks and remedies*, at <http://www.mincava.umn.edu/documents/hart/hart.html> (last visited July 15, 2005) (citing Lee H. Bowker, Michelle Arbitell & J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse in FEMINIST PERSPECTIVES ON WIFE ABUSE* (Kersti Yllo and Michele Bograd Eds., 1988)).

<sup>28</sup> We refer to cases in which the children may express fear of, be concerned about, have distaste for, or be angry at one of their parents as being estranged from that parent. We do not use the labels of “parental alienation”, “alienation”, or “parental alienation syndrome” to describe this behavior because to do so would give credibility to a “theory” that has been discredited by the scientific community. See AM. PSYCHOL. ASS’N, *supra* note 2, at 40; see also Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children – getting it wrong in child custody cases*, 14 CHILD & FAM. L. Q. 381 (2002) and Kathleen Coulbourn Faller, *The Parental Alienation Syndrome: What Is It and What Data Support It?*, 3 CHILD MALTREATMENT 100 (May 1998). For a more complete discussion on “alienation”, “parental alienation” or “parental alienation syndrome”, see *infra* p. 24-25 (Determine Whether to Admit the Report into Evidence).

<sup>29</sup> See Leslie M. Drozd & Nancy W. Olesen, *It is Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY 65-106 (Nov. 2004).

as understand that a vulnerable parent is often able to meet the children's needs more effectively once safe from further violence or abuse.

### **Relocation Cases**

One party may request permission to relocate with the children, and the other may resist that relocation, for a number of reasons, more or less persuasive. In at least some cases, the request to move is motivated by self-protection or a desire to protect the children. If there is a hint that the case may involve domestic violence, or the case is one in which a clear motivation for the relocation appears to be missing, it is essential to explore the possibility that safety concerns may be an underlying reason for the request.<sup>30</sup>

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<sup>30</sup> In the MODEL CODE, *supra* note 17, the NCJFCJ recognized that abused parents may flee or seek to leave their abuser in order to protect themselves and their children when it set forth two provisions addressing relocation: § 402 (2) prohibits a judge from using a parent's absence or relocation based upon an act of domestic or family violence by the other parent as a factor that weighs against the parent in determining custody or visitation, and § 403 creates a rebuttable presumption that it is in the best interest of the child to reside with the non-abusive parent. See also Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 U. KAN. L. REV. 433 (1998) (addressing the question of "why doesn't she just leave" and highlighting how the abusive parent often uses relocation to continue the pattern of coercion and control).



## What Do I Need to Know, from Whom, and How Do I Ask?

If you decide to order a custody evaluation, everyone affected by that order—the parties to the case, their children, the expert who is to conduct the inquiry, and you as the ultimate recipient of the expert's report—is best served when you articulate clearly what you need to know, when there is a match between the scope of the inquiry and the qualifications of the person assigned to conduct it, and when the process to be followed is well defined and managed by you.

### Frame the Inquiry

#### Investigation, Evaluation, Recommendation

For purposes of this publication, we sweep under the general rubric of “custody evaluation” many different kinds of information gathering. In some cases, you may need only information gathering and a report on what was found. Any of a variety of lay witnesses can perform that function, and we refer to that process in this document as investigation. In other cases, you may need the witness not only to collect and provide information, but also to offer expert opinion testimony about it. We refer to that process as evaluation.

We ask custody evaluators to investigate, process the information they collect, interpret it and draw conclusions from it, which requires that they be qualified as experts if their conclusions and opinions are to be admissible. And we often ask evaluators for recommendations, while appreciating that making custody and visitation determinations is a judicial function, and not one that can be delegated. The guidelines on the cards accompanying these materials offer assistance in negotiating this treacherous terrain.

**All custody evaluators investigate.** The core function of investigators is to gather and interpret information and report their findings to the court. Professionals with varying backgrounds—child protection workers, law enforcement officers, probation officers, domestic violence advocates—may make good investigators. However, different skill sets will be useful in different investigatory contexts. A lawyer's familiarity with the legal process and with fact-finding may ease his or her access to police, court or child abuse/protection records, and the task of compiling and reporting on the information contained in them. Both lawyers and mental health professionals are likely to be competent in interviewing adults and older children, and synthesizing and reporting what is said. Obtaining information from younger children, and understanding the limits of its reliability, is a task that a mental health clinician with expertise in child development and up-to-date training on appropriate interviewing techniques will be better qualified to perform than someone without that expertise—even though the task is investigatory, it requires specialized skills.

The line between “investigation” and “evaluation” (in its technical sense) is clearest when the evaluative task requires specific mental health expertise. Suppose a child, or a parent talking about a child, reports that the child is suffering from nightmares, has had trouble concentrating on school work (reflected in poor grades), complains of frequent stomach pain, and has been in trouble for aggressive behavior on the playground. Any competent investigator could collect and report that information, but only a mental health professional would be qualified to conclude from that information that the child is, or might be, suffering from post-traumatic stress disorder. A *diagnosis* of a party's or a child's mental health status, in other words, requires particular expertise.

By the same token, it would be appropriate for either an investigator or an evaluator to report that a party or a child was slumped in the chair, did not make eye contact, jumped

when the door closed, spoke so softly as to be barely audible, or was argumentative during the interview. Those are "lay" opinions within the competence of any responsible professional. It would, however, be inappropriate for someone without mental health expertise to say that a party appeared clinically depressed, or to be suffering from borderline personality disorder. Those opinions are conclusions that must be reserved for experts. What investigative and evaluative reports have in common, however, is that they should both be factually based and should include a showing of sufficient time spent with all parties as well as a thorough research of supplemental information from public and private records or third-party interviews. The facts provide you, as the judge, with a basis for weighing the merit of each parent's contentions and, in the case of a qualified expert, determining whether that expert's opinion is sufficiently grounded factually.

Some custody evaluators may use evaluations as a means to facilitate resolution of a case, and may not undertake a thorough fact-finding process. However, as the ultimate fact-finder, you are entitled to and need all relevant information. That information should be unfiltered and straightforward. The evaluator should demonstrate how any violence or other abusive behavior was considered in arriving at conclusions or opinions and in making any proposed recommendations. Minimizing domestic violence undermines the validity of the report.

### **Recommendations to the Court**

Many judges and courts feel that even asking a custody evaluator to offer recommendations at the conclusion of his or her report is an inappropriate delegation of judicial authority. Others fear that it will encourage too heavy a reliance on the evaluator, and will discourage judges from their own careful assessment of the child's best interests. Some require evaluators to offer recommendations, and feel that a report's utility is significantly reduced if it does not include them. Given the sharp division of opinion on this issue, we offer suggestions for how a judge can review and work with an evaluator's recommendations, without inappropriately ceding decision-making authority.<sup>31</sup>

## **Choose the Expert**

Family courts use a variety of mechanisms to identify the pool of experts available for appointment as custody evaluators and to select an evaluator in each case. Your practice will, therefore, be dependent on the mechanisms available to you; you will have more or less flexibility depending on how those mechanisms are structured. Within those constraints, as well as the constraints imposed by limited resources, your goal remains finding a person who has the qualifications best suited to the particular inquiry. In some cases, for example, you might need a specific cultural expertise or expertise in a specialty such as substance abuse. Familiarity with a certain custody evaluator should not substitute for a careful assessment of his or her qualifications to evaluate the present case. Even otherwise good custody evaluators who lack the expertise to recognize domestic violence and appropriately factor it into their evaluations can make serious mistakes in how they report on such cases. It is, therefore, important to choose an evaluator who has training and experience in the issues related to domestic violence, including the dangers associated with separation.<sup>32</sup>

### **First and Foremost, Training and Experience in Domestic Violence**

Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are

31 In a recent issue of *Family Court Review*, mental health professionals, judges, and attorneys discuss the issues related to the efficacy of evaluators who provide courts with custody recommendations. See 43 FAM. CT. REV. 187 (2005), available at <http://www.blackwell-synergy.com/toc/fcre/43/2> (last visited Dec. 6, 2005).

32 See, e.g., Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); and DeKeseredy, Rogness & Schwartz, *supra* note 20.

now requiring custody evaluators to take a minimum amount of training in domestic violence, that "basic training" by itself is unlikely to qualify an evaluator as an expert, or even assure basic competence, in such cases.

Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator's level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:

- whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization, if such certification is available. If certification is available, the court should inquire into the criteria for "certification", and determine if it involved a bona fide course of study or practice;
- what courses or training (over what period of time) the evaluator has taken focused on domestic violence;
- the number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed, remembering, however, that such experience may *simply* reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise; and
- the number of cases in which the evaluator has been qualified as an expert in domestic violence.

## Be Specific about the Information You Need

- **The exposure of children:** As explained in the introductory materials, exposure includes more than directly witnessing violence because children are affected by what they hear as well as by what they see, by the aftermath of violence, and by the atmosphere of fear and threat that characterizes an abusive household.
- **Impact of abusive behaviors on each parent, each child, and each parent/child relationship:** A list of common symptoms of trauma in children is identified in the introduction to these materials. See page 14, *The Red Flag Cases*. What has not yet been said is that these symptoms can interfere with cognitive and emotional development in children, affect their relationships with adults and peers, impact their school performance, and negatively affect their physical health. The impact of abuse on children's relationships with both their abusive parent and their non-abusive parent is complex and requires careful exploration. The impact on each child should be evaluated separately. Children are affected differently by the trauma they experience, depending on age, maturity, resiliency, and external supports. While abusive parents frequently allege that their partners have turned the children against them, they often take no responsibility for the fact that their own behaviors have left the children fearful, angry, or distanced, and may have prompted the other parent to try to shield the children from those behaviors. Abusive parents also commonly seek to sabotage the children's relationship with the other parent, and undermine that parent's authority, as a means to maintain their own control.<sup>33</sup> These issues are explored further in the supplement to Card III, beginning at page 24, in the discussion of the discredited "parental alienation syndrome."
- **Short- and long-term safety concerns for children and/or a parent:** The evaluator can glean this information from what has happened in the past, and by talking with the parties and, as appropriate, the children about explicit threats that have been made and threatening behaviors. It is also important to know what the parties and children fear, both because they may be in the best position to predict what will happen, and because even if their fears may appear to be exaggerated or minimized under the circumstances, those fears and the actions taken to address them are relevant to the inquiry into short- and long-term safety concerns for the children and/or a parent.

The most crucial point here is that reports based solely on interviewing and/or observing the parties and their children will rarely, if ever, produce an adequate evaluation in a case known or suspected to involve domestic violence.

## Articulate Expected Sources of Information

Since abusive partners may deny and minimize their use of violence and other controlling behaviors, even to themselves, they may present as sincere and caring partners and parents.<sup>34</sup> Their expressed concerns about the parenting capacity of their abused partners may be consistent with a longstanding habit of relentless criticism.<sup>35</sup> Alternatively, the abused partner may indeed present as a less than competent parent; but his or her deficiencies may result from the emotional and physical toll the abuse has taken, and may to that extent be temporary in nature.<sup>36</sup> Children may, in self-protection, have identified with their abusive parent rather than the parent who appears unable to offer protection, and may, in the form of rejection or blame of the victim, express their anger at being unprotected.<sup>37</sup>

In this complex and confusing environment, an evaluation that reaches conclusions based on the "he said/she said" of conflicting accounts without recourse to other corroborating sources may be inherently unreliable.

### Helpful collateral sources may include:

- other family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not have been disclosed to others yet;
- professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors;
- professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.

### Pertinent records may include:

- police reports;
- child abuse/child protection reports;
- court files in the present case and any relevant prior civil or criminal cases involving either party;
- medical, mental health, and dental records; and
- school records.

### In all cases, the relevant questions are:

- Have there been incidents of physical violence or other forms of abuse perpetrated by one parent against the other?
- What impact has the violence or abuse had on the parties and their parenting?
- What impact has the violence or abuse had on each of the children?
- What does the abusive parent's past behavior indicate about his or her future propensity to undermine the other parent's authority or damage that parent's relationship with the children?

<sup>34</sup> The custody evaluator who is unaware of the frequency with which abusers seek custody as a means to continue their control over the abused parent may inappropriately assume that an abusive parent is instead seeking custody because he or she is caring and concerned. See JAFFE, LEMON, & POISSON, *supra* note 15, at 32 (discussing how the family court can be exploited by the perpetrator of domestic violence as a means of continuing their abusive behavior).

<sup>35</sup> See BANCROFT & SILVERMAN, *supra* note 16.

<sup>36</sup> See e.g., Cris M. Sullivan et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51-71 (2000) (finding that assailants' abuse of mothers had more of a direct impact on children's behavioral adjustment, highlighting the need to focus on mothers' strengths and assets).

<sup>37</sup> Clare Dalton, Judge Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 Juv. & FAM. Ct. J. 11, 20 (2003).

- What risks will continued exposure to the abusive parent pose to the children or abused parent?

The important questions raised by requests for parties to provide the evaluator access to privileged information are dealt with *infra*, in the context of the obligations of the parties. We also discuss the value of and risks associated with psychological testing for custody and visitation determinations.

### **The Role of Psychological Testing**

In the rare case in which it is a relevant and necessary aspect of an evaluation, you may decide, or the expert may determine, that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.<sup>38</sup> If psychological tests are used, the test(s) should be administered and interpreted by a psychologist who has expertise in the use of psychological testing in the context of contested child custody cases with allegations or evidence of domestic violence. Generally, however, psychological testing is not appropriate in domestic violence situations. Such testing may misdiagnose the non-abusive parent's normal response to the abuse or violence as demonstrating mental illness,<sup>39</sup> effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent.

#### **The relevant questions to ask are the following:**

- What is the test being used to measure?
- How is the test relevant to issues of custody and visitation?<sup>40</sup>
- Is the test valid for the purposes for which it is being used, and is the expense justifiable given the test's limitations?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

#### **In determining the relevance and reliability of psychological testing, consider the following:**

- Research literature indicates that "there are no psychological tests that have been validated to assess parenting directly."<sup>41</sup>
- No psychological test can determine whether or not a person has been an abuser or abused.<sup>42</sup> There is no single profile of a victim or a perpetrator of abuse.
- The more tailored tests, developed in the past decade to address the questions most relevant in the custody context, such as the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been

38 See Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgement*, 36 FAM. L.Q. 135 (2002) (stating that "[a]s a matter of law and as a matter of science, a test should be both relevant and reliable before its use is sanctioned in a particular setting").

39 See Nancy S. Erickson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*, 39 FAM. L.Q. 87 (Spring 2005). The author emphasizes the need for child custody evaluators who use the MMPI-2 psychological test to consider the context of the individual's history and current situation in their clinical interpretations. Such context includes a person's age, intelligence, social or ethnic class, educational level, health status, medication influences, prior life traumas, and current situational difficulties (p. 94, citing ALAN F. FRIEDMAN ET AL., *PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2* (2001)). If taken out of context, the MMPI scores of battered women could lead mental health evaluators to misdiagnose them as severely mentally ill, even though they may actually be suffering from the trauma of the violence (p. 102).

40 See, Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Child Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 204 (2005) (stating that "there is no evidence in the empirical literature that current interview protocols, traditional psychological tests, or custody-specific tests are in any way able to reliably predict child adjustment to different access plans...").

41 Shuman, *supra* note 38, at 144 (citing Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29, FAM. L.Q. 97, 105 (1995)).

42 See e.g., Aldarondo & Mederos, *supra* note 12, at 2-11 (stating that it is impossible to diagnose battering in the same manner that one diagnoses medical conditions such as cancer and anxiety disorders; expounding further that a determination as to whether someone is a batterer is not a clinical decision, but rather "a determination based on reviewing information provided by collateral sources, the alleged abuser, and victims"). Because psychological testing cannot identify an abusive parent, such testing may instead allow an abusive parent to use the absence of domestic violence findings in the test results to argue that the test proved that the abuse did not take place.

evaluated with enough rigor to establish their validity or reliability. These tests do not provide answers. At best, they raise hypotheses in the mind of the evaluator to be validated or invalidated in subsequent explorations.<sup>43</sup>

- The standard psychological tests measuring personality, psychopathology, intelligence or achievement, including the Minnesota Multiphasic Personality Inventory (MMPI-2), Million Clinical Multiaxial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most children, or parents' child-rearing attitudes and capacities.<sup>44</sup> In a particular case, a standard test may offer information that is related to parent-child interactions, parent functioning or child functioning; but that information should be included in the evaluation *only if* the examiner makes clear the connection between the test results and the issue that is legally relevant in the custody context, and *only if* the test results are empirically supported and integrated with other data about real-life behavior.<sup>45</sup>
- Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated.<sup>46</sup>
- Specific tests to assess for trauma (Trauma Symptom Inventory (TSI), Draw-a-Person Test (DAP) and others) may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children, but they are not appropriate to determine whether traumatic incident(s) occurred.

## Communicate Expectations about Information-Gathering Procedures and Safe Practices

In cases of known or suspected domestic violence, the information-gathering procedures identified on Card IIA, Side 1, can protect the abused parent and children from additional harm and increase the integrity of the information obtained. Adults or children who have experienced or been exposed to violence are unlikely to talk openly about it if they are fearful that the perpetrator will have opportunities for retaliation,<sup>47</sup> or if they are too ashamed to disclose the violence or abuse.

With care, the evaluator will be able to shield the parties from any contact or unsafe communication with one another during the evaluation process. In many cases, the evaluator will also be able to seek corroboration of negative information disclosed by one party about the other without disclosing the source of that information. It is important, however, to ensure that the parties understand the lack of confidentiality in the evaluation process.

43 Shuman, *supra* note 36, at 144-154.

44 See Jonathan W. Gould & Hon. Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product*, 51 JUV. & FAM. CT. J. 21, 24 (2000) (stating that no personality test directly measures parenting or parenting competencies. The authors also recommend the use of traditional psychological tests only when specific problems or issues that these tests are designed to measure are relevant to the cases, citing GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2d ed. 1997)).

45 See Gould & Bell, *id.* See also Jonathan W. Gould & David A. Martindale, *A Second Call for Clinical Humility and Judicial Vigilance: Comments on Tippins and Wittmann*, 43 FAM. CT. REV. 253 (2005) (stating that psychological assessment tools are often not valid for custody evaluation, are often not empirically derived, and are "often more educated guesses than truth"—cautioning that mental health professionals need to be careful in presenting their data and opinions so as not to mislead the court).

46 See AM. PSYCHOL. ASS'N, *supra* note 2, at 100 (1994) (cautioning that psychological evaluators who are not trained in domestic violence may ignore or minimize the violence and attach inappropriate pathological labels to women's responses to chronic victimization); see also Erickson, *supra* note 39.

47 See Logan, *supra* note 4, at 734-735 (citing a study, which found that abused women were more likely than non-abused women to report that the abuser may impact their ability to communicate openly during the court process because of possible future harm).

## Alternative available corroboration strategies for information gathering include:

- seeking corroboration from third-party sources, where available; and
- inviting the other party to give an open-ended account of a particular incident and asking follow-up questions, without revealing details shared by the first party.

👤 If it becomes clear that information must be disclosed that may put one of the parties at risk, the evaluator should alert that party to the disclosure in advance, so that he or she may take whatever safety precautions are warranted and available. Evaluators may need to provide the abused party with information on safety planning, or assist in developing a safety plan—which may include referring the abused party to a domestic violence program or shelter.<sup>48</sup>

Special considerations apply to interviews of children and the use of information obtained from them. First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the evaluator must build into his or her report the understanding that, while children may provide accurate information, their answers may also involve misinterpretations (or developmentally appropriate but immature interpretations) of events, statements or dynamics, or be influenced by input from one or both parents. From a safety perspective, it is also critical that the evaluator not attribute direct quotes to children, in order to reduce the risk that a parent will use the children's words against them or against the other parent.

An evaluator who does not respect the safety-driven procedures listed on the cards accompanying these materials is not qualified to conduct an evaluation in a domestic violence case. An evaluation that has been conducted without following those procedures will not yield reliable information or opinions and may be dangerous.

## Define the Obligations of the Participants

### The Obligations of the Parties

By stressing the need for the parties to assist the evaluator in accessing relevant information, we do not mean to discount the sensitivity of the decision whether or not to waive a privilege attaching to information that might be obtained from a collateral source, or might be gleaned from a written record. It is the responsibility of the parties' attorneys, if they are represented, and of the evaluator, particularly if they are not represented, to ensure that the parties fully understand the implications of both choosing and declining to waive a privilege, and are able to make an informed decision. It may also be important to determine whether a parent can waive the privilege attaching to a child's relationship with a therapist; in some jurisdictions, only the child's own representative or the therapist can take that step.<sup>49</sup> Verbal or written information given to the parties should be in their language, or the parties' attorneys or the evaluator should ensure the availability of a translator or a determination of literacy.<sup>50</sup>

👤 Any party who fears that disclosure of information will place him or her at risk of retaliation or who believes that vital privacy interests may be compromised by the investigation should be able to inform the court of his or her concerns *before* communicating the information.

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48 For more information on safety plans, see National Coalition Against Domestic Violence, *Protect Yourself*, at [http://www.ncadv.org/protectyourself/SafetyPlan\\_130.html](http://www.ncadv.org/protectyourself/SafetyPlan_130.html) (last visited Dec. 6, 2005). See also Barbara J. Hart, *Personalized Safety Plan* (1992), at <http://www.mincava.umn.edu/documents/hart/hart.html#id2305464> (last visited Dec. 6, 2005).

49 See e.g., *Hughes v. Schatzberg*, 872 So.2d 996 (Fla. App. 4 Dist., 2004) (holding that mother did not have standing to assert the patient-psychotherapist privilege on behalf of the child where she is involved in litigation over the child's welfare); *McCormack v. Board of Education*, 158 Md.App. 292, 857 A.2d 159 (2004) (holding that the trial court should have determined whether there was a conflict of interest between parents and child before ruling that parents could neither assert nor waive child's psychotherapist-patient privilege).

50 See Deean Jang, *Linguistic Accessibility and Cultural Competency Issues Affecting Battered Women of Color in Family Court*, SYNERGY (NCJFC, Reno, NV), Summer 1999, at 4 (stating that "[t]he experiences, frustrations, and concerns of battered women of color cannot be discounted or trivialized by assuming the justice system addresses their needs without further consideration of their linguistic or cultural characteristics").

## **The Obligations of the Evaluator**

In regard to the obligations identified on Card IIA, side 2 (fourth bullet), the question of when, if ever, it would be appropriate for a mental health professional to enter a therapeutic, counseling, or other professional relationship with a party or a child, subsequent to providing a custody evaluation in a case involving those individuals, is a vexed one. Because no custody case is truly "closed," at least until the children reach the age of majority, and because the evaluator may be asked to return to court to assist in subsequent proceedings, the safest course of action is for the evaluator to avoid any subsequent professional contact, along with the conflict of interest it inevitably creates. If, in a small community, that guideline is too restrictive, then it may be appropriate to adopt a less restrictive but clear "waiting period" to discourage the creation of conflict at least during the period when re-litigation is most likely.

## **Court Initiative**

We also recommend that, at the time of appointment of the evaluator, the court take the initiative when possible in ordering any records available to the court, such as criminal records, court activity records and child abuse/child protection reports. All these steps will facilitate the evaluation process and prevent the delays that follow when the evaluator and/or the parties are forced to return to court to clarify the terms of the appointment.



## Reading the Report

### Safety First

Consistent with the emphasis on safety throughout these materials, we suggest that the judge, once the evaluator's report is admitted into evidence, make an immediate determination whether the report identifies risks that should be promptly addressed, or whether disclosure of the report to the parties may create risks that should be promptly guarded against. The responses suggested on Card III are meant to be illustrative only; there may be additional steps available to you depending on the rules governing your court.

### Determine Whether to Admit the Report into Evidence

Unless admissibility is stipulated by counsel for each party, the Court must subject both the evaluation report and the expert testimony derived from the evaluation to critical scrutiny, assessing carefully the validity and reliability of each before determining whether they are admissible as evidence.<sup>51</sup>

#### Parental Alienation and the *Daubert* Standard: on Syndromes and Behaviors

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS".<sup>52</sup> Under relevant evidentiary standards, the court should not accept this testimony.

The theory positing the existence of "PAS" has been discredited by the scientific community.<sup>53</sup> In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that even expert testimony based in the "soft sciences" must meet the standard set in the *Daubert*<sup>54</sup> case. *Daubert*, in which the Court re-examined the standard it had earlier articulated in the *Frye*<sup>55</sup> case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance. "Parental Alienation Syndrome" does not pass this test. Any testimony that a party to a custody case suffers from the syndrome or "parental alienation" should therefore be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.<sup>56</sup>

The discredited "diagnosis" of "PAS" (or allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children's behaviors and attitudes toward the parent who claims to be "alienated" have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent. The task for the court is to distinguish between situations in which children are critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which children have their own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not

<sup>51</sup> See e.g., Shuman, *supra* note 38, at 150, 160 (asking "How can the law be a critical consumer of mental health practitioner expertise if it ignores the scientific community's critiques of proffered expert testimony and fails to apply discriminating threshold standards of admissibility of expert evidence derived from these tests?"; further arguing that qualifications alone do not provide any guarantees that expert opinions are based on reliable methods and procedures).

<sup>52</sup> "Parental alienation syndrome" was introduced by Richard Gardner and was primarily associated with child sexual abuse allegations in the context of contested child custody cases. For more information, see Bruch, *supra* note 28.

<sup>53</sup> According to the American Psychological Association, "... there are no data to support the phenomenon called parental alienation syndrome ..." AM. PSYCHOL. ASS'N., *supra* note 2, at 40.

<sup>54</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>55</sup> *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

<sup>56</sup> These are federal standards, but many states adhere to them at least generally and should still exclude any proffered evidence of "PAS".

become less legitimate because the abused parent shares them, and seeks to advocate for the children by voicing their concerns.

### **Cases known or suspected to involve domestic violence pose particular challenges because:**

- It is appropriate for parents to try to protect themselves or their children from exposure to violence, even when it means limiting the other parent's contact with the children;<sup>57</sup>
- Abusive partners commonly sabotage their respective partner's parental authority over, and relationship with, the children;<sup>58</sup>
- Abusive parents rarely take responsibility for the consequences of their behaviors, but instead blame their partners for turning the children against them;<sup>59</sup> and
- Children in abusive households may feel safer identifying with the abusive and more powerful parent.<sup>60</sup>

If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable.<sup>61</sup> Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimizes the impact on children of violence against a parent or pathologizes the abused parent's responses to the violence.<sup>62</sup>

Custody evaluators, therefore, should be advised to listen carefully to children's concerns about each of their parents, and follow up with a careful investigation as to whether those concerns are grounded in fact, what role each parent has played in shaping the children's perceptions of the other parent, and each parent's apparent motivation. This careful fact-based inquiry, unlike applying the "PAS" label, is likely to yield testimony that is more accurate and relevant.

### **Read the Report Critically**

The checklist provided on Card III offers a recap of much of the material included on Cards I and II, offering you a final opportunity to assess how well the evaluation has been performed, and the extent to which you can feel comfortable relying on its conclusions.<sup>63</sup>

**One common flaw in reports** prepared by custody evaluators that deserves special mention is "**confirmatory bias.**" It appears when the evaluator develops a hypothesis—forms an opinion about some issue in the case—early in his or her process, finds data to support it, confirms the hypothesis, and then stops testing it against new or different data that might undermine the hypothesis or effect a change of mind.

#### **As the judge, you can test for the presence of this "confirmatory bias" by:**

- looking at the extent to which the evaluator has made use of collateral sources and available documentation to corroborate important findings of fact on which his or her conclusions and recommendations are based;
- looking at whether the evaluator has made available to you all the relevant data gleaned in the course of the inquiry: both the data that support the evaluator's conclusions and recommendations, *and* the data that might have led to competing conclusions or recommendations. If the report seems suspiciously one-sided, you might conclude that

57 See Drozd & Olesen, *supra* note 29.

58 See BANCROFT & SILVERMAN, *supra* note 16, at 57-64.

59 See *id.* at 29-53.

60 See Dalton, Carbon & Olesen, *supra* note 37.

61 Am. Psychol. Ass'n, *Issues and Dilemmas in Family Violence: Issue 5*, at <http://www.apa.org/pi/pii/issues/issue5.html> (last visited Dec. 6, 2005).

62 *Id.*

63 See Shuman, *supra* note 38, at 19 ("relying on experts without testing the reliability of their methods and procedures cloaks experts' value judgments under the veil of science and risks that their personal and professional characteristics bias the evaluation and the importance of information learned", citing Robert Henley Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. FAM. & MARRIAGE COUNS. 11 (1977)).

the evaluator has left out data that did not support his or her conclusions and recommendations;

- looking at whether the evaluator has identified areas where he or she has been unable to obtain information or to reconcile or choose between competing accounts; and
- looking at whether the evaluator appears to use myths or stereotypes regarding domestic violence, such as assuming that an angry mistrustful parent is most likely making a false allegation to gain leverage in the custody case or assuming that a child would not be happy to see the abusive parent at a supervised or unsupervised visitation.

## Assess the Recommendations

A final test of the evaluator's expertise is whether his or her recommendations take into account the need to protect the physical and emotional safety of the abused parent and children involved in the case, and whether the recommendations offered make full use of the range of alternatives available in the case, such as:

- granting sole physical and legal custody to the abused parent;
-  postponing visitation until the abused parent and the children have had an opportunity to establish their safety and heal from any trauma associated with violence or abuse;<sup>64</sup>
- postponing visitation until the violent or abusive parent has successfully completed appropriate treatment, including a batterers intervention program. If your jurisdiction provides guidelines and certification for programs, use only sanctioned programs. Anger management, pastoral counseling, couples counseling,<sup>65</sup> and parenting programs are not appropriate forms of intervention in cases with domestic violence and can heighten danger for the abused parent and/or children. It is also important to understand that completing a batterers intervention program does not guarantee that the abusive parent will change his or her behavior;<sup>66</sup>
- allowing relocation to a confidential address (or, if that has already occurred, making sure that the address is kept confidential from the violent or abusive parent);
- restraining the violent or abusive parent's communication with or proximity to the other parent;
- restraining the violent or abusive parent's communication with or proximity to the children, except in the context of authorized visitation;
- structuring visitation with specific levels of restriction as seems appropriate:
  - visits in a formally structured supervised setting;
  - visits informally supervised by appropriate family members—provided the court establishes clear guidelines to be followed during visitation related to the supervisor's responsibilities and his or her authority during supervision, and provided both parents have consented to the choice of supervisor;
  - denial of overnight visits;
  - visits limited as to duration (with gradual increases in time allotted if safe to do so) and limited to a specific location or locations;
  - restrictions on the presence of specific persons other than the parent while the parent is with the children;
  - prohibition of the violent or abusive parent's use of alcohol or drugs during or within a specified time period prior to visits;
  - any other conditions that are deemed necessary to provide for the safety of the child, the abused parent, or other family or household members;

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64 Jaffe, Crooks & Poisson, *supra* note 2, at 61 (finding in their study that time appeared to be a healing factor for children when it was associated with an end to the violence; stating that "the longer the children had gone without seeing their [abusive] father, the greater the improvement in their overall adjustment").

65 See Aldarondo & Mederos, *supra* note 12, at 2-13 (stating that traditional couples counseling does not address well the issues of oppression, coercion, and violence in intimate relationships; and that there are no studies that have explored the safety of women when couples counseling is used in domestic violence cases).

66 See "easing visitation restrictions" in this list, *infra*. Also, for more information about program effectiveness, see Etiony Aldarondo, *Evaluating the Efficacy of Interventions with Men Who Batter*, in PROGRAMS FOR MEN WHO BATTER (Etiony Aldarondo & Fernando Mederos eds., 2002), *supra* note 12, at 3-1; and see EDWARD GONDOLF, BATTERER INTERVENTION SYSTEMS: ISSUES, OUTCOMES, AND RECOMMENDATIONS (2002).

- easing visitation restrictions over time if the violent or abusive parent has remained in strict compliance with the court orders and/or treatment plans, provided that parent has shown observable and measurable improvements regarding domestic violence and parenting, and provided that safety concerns for both the children and the abused parent have realistically decreased;<sup>67</sup>
- exchanging children through an intermediary, or in a protected setting; and/or
- securing each child's passport and requiring a violent or abusive parent to post a bond to secure the return of children after a visit, or to secure any other performance on which visitation is conditioned.<sup>68</sup>

**Finally, there will be occasional cases where the only way to serve the children's best interests will be to deny the violent or abusive parent any future contact with the children because it seems that less restrictive alternatives will not secure their safety or that of the other parent.**

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<sup>67</sup> See Peter Jaffe, Claire Crooks & Hon. Frances Wong, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interests*, 6 J. CTR. FOR FAM., CHILD. & CT. 95 (2005) (addressing the role of the family court and its court-related services in determining parental contact following allegations of domestic violence).

<sup>68</sup> This list draws heavily on the list of "appropriate measures" contained in § 2.11(2) in AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS: ANALYSIS AND RECOMMENDATIONS (2002) and § 405 in MODEL CODE, *supra* note 18. See also, AM. PSYCHOL. ASS'N, *supra* note 2, at 99 ("In a matter 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. Visitation should be supervised by an appropriate neutral party who will advocate for the child.").



## Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

### Additional Resources

#### Reading Material

#### Books

AM. PSYCHOL. ASSOC'N (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001). *DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY*. Washington, DC: Am. Psychol. Assoc'n.

MARY M. LOVIK (3rd ed. 2004). *DOMESTIC VIOLENCE BENCHBOOK: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS*. Lansing, MI: Mich. Jud. Inst.

JAMES PTACEK (1999). *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES*. Boston: Northeastern U. Press.

MARIA D. RAMOS & MICHAEL W. RUNNER (1999). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCH BOOK*. San Francisco: Fam. Violence Prevention Fund.

MICHAEL RUNNER & SUJATA WARRIOR (2001). *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDICIAL EDUCATION CURRICULUM*. San Francisco: Fam. Violence Prevention Fund.

NEIL WEBSDALE (1999). *UNDERSTANDING DOMESTIC HOMICIDE*. Boston: Northeastern U. Press.

#### Articles

Am. Judges Assoc'n, *Domestic Violence & The Courtroom Understanding The Problem... Knowing The Victim*, available at [http://aja.ncsc.dni.us/domviol/publications\\_domviobooklet.htm](http://aja.ncsc.dni.us/domviol/publications_domviobooklet.htm) (last visited Dec. 6, 2005).

Assoc'n of Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluations*, available at [http://www.afccnet.org/pdfs/Child\\_Model\\_Standards.pdf](http://www.afccnet.org/pdfs/Child_Model_Standards.pdf) (last visited Dec. 6, 2005).

Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265 (2002).

Janet M. Bowermaster, "Relocation Restrictions: An Opportunity for Custody Abuse", 4 *Synergy* 4 (Winter 1999/2000).

Comm'n on Domestic Violence, Am. Bar Assoc'n, *Tool for Attorneys to Screen for Domestic Violence*, available at <http://www.abanet.org/domviol/screening%20tool%20final%20version%20sept.%202005.pdf> (last visited Dec. 6, 2005).

Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273 (July 1999) [Journal is now called *Family Court Review*].



Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 JUV. & FAM. CT. J. 1 (1999).

Jeffrey L. Edleson, Lyungai F. Mbilinyi & Sudha Shetty, *Parenting in the Context of Domestic Violence* (March 2003), at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/fullReport.pdf> (last visited Dec. 6, 2005).

Andrea C. Farney & Roberta L. Valente, *Creating Justice through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 JUV. & FAM. CT. J. 35 (2003).

Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101 (2004).

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

Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with "Outside Neutrals"*, 42 JUDGES' J. 10 (Winter 2003).

Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, 50 JUV. & FAM. CT. J. 13 (1999).

## **Links to Organizations**

### **American Bar Association (ABA),**

<http://www.abanet.org>, seeks to provide attorneys and judges with the knowledge and tools needed to assist them in their legal profession. The ABA has several programs targeted to specialized areas of interest, which are highlighted below.

#### **Center on Children and the Law,**

<http://www.abanet.org/child/home2.html>, provides technical assistance, training, and research that "[address] a broad spectrum of law and court-related topics affecting children. These topics include child abuse and neglect, custody and support, guardianship, and children's exposure to domestic violence."

#### **Child Custody Pro Bono Project,**

<http://www.abanet.org/legalservices/probono/childcustody.html>, is a joint project of the ABA Standing Committee on Pro Bono and Public Service and Family Law Section and seeks to "enhance[] and expand[] the delivery of legal services to poor and low income children involved in divorce, adoption, guardianship, unmarried parent, and protective order matters." The Child Custody Pro Bono Project identifies and develops "best practices", training, and technical assistance for courts and pro bono programs, and is a national resource in the area of child custody.



**Commission on Domestic Violence,**

<http://www.abanet.org/domviol/home.html>, works "to mobilize the legal profession to provide access to justice and safety for victims of domestic violence." The Commission produces publications that assist professionals in the field, including the newest edition of *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK*, 2ND ED. (2004).

**Family Law Section,**

<http://www.abanet.org/family/home.html>, has a mission "to [s]erve as the National Leader in the Field of Marital and Family Law." Among its stated goals is to improve the public and professional understanding about marital and family law issues and practitioners.

**American Judges Association (AJA),**

<http://aja.ncsc.dni.us/domviol/page1.html>, seeks to improve "the effective and impartial administration of justice, to enhance the independence and status of the judiciary, to provide for continuing education of its members, and to promote the interchange of ideas of a judicial nature among judges, court organizations and the public." The AJA offers publications to address domestic violence issues, including a *Special Issue on Domestic Violence*, 39 CT. REV. 4-51 (Fall 2002) and *Domestic Violence & The Courtroom: Understanding The Problem-- Knowing The Victim*, both of which can be downloaded from its website.

**Association of Family and Conciliation Courts (AFCC),**

<http://www.afccnet.org>, is "an international and interdisciplinary association of family, court, and community professionals dedicated to constructive resolution of family disputes." Among its stated purposes, the AFCC seeks to provide an interdisciplinary forum for the exchange of ideas and the development of procedures to assist families in conflict and to develop and improve parent education, mediation, custody evaluation, and other processes to aid families in resolving their disputes.

**Battered Women's Justice Project (BWJP),**

<http://bwjp.org>, is a collaborative effort of three organizations whose mission is "to promote systemic change within community organizations and governmental agencies engaged in the civil and criminal justice response to domestic violence that creates true institutional accountability to the goal of ensuring safety for battered women and their families. To this end, BWJP undertakes projects on the local, state, national, and international levels." BWJP, Civil Office, works with professionals on issues such as divorce and support, child custody, separation violence, mediation, and protection orders.

**Center for Families, Children & the Courts (CFCC), Family Violence Project,**

<http://www.courtinfo.ca.gov/programs/cfcc/programs/description/famviol.htm>, is a project of the Judicial Council of California, Administrative Office of the Courts, that focuses on how the courts and court-related professionals address issues of family violence and offers training for child custody evaluators on domestic violence in accordance with the California Rules of Court.

**Family Violence Prevention Fund (FVPPF),**

<http://www.endabuse.org>, "works to prevent violence within the home, and in the community, to help those whose lives are devastated by violence because everyone has the right to live free of violence." FVPPF's Judicial Education Project, in partnership with the National Council of Juvenile and Family Court Judges, conducts education seminars for judges across the country in order to enhance their skills in handling criminal and civil domestic violence cases.



**Legal Resource Center on Violence Against Women (LRC),**

<http://www.lrcvaw.org>, seeks "to obtain legal representation for domestic violence survivors in interstate custody cases and to provide technical assistance to domestic violence victim advocates and attorneys in such cases." The website provides helpful information and links for survivors, advocates, and attorneys.

**Minnesota Center Against Violence and Abuse (MINCAVA),**

<http://www.mincava.umn.edu>, operates an electronic clearinghouse that provides research, education, and access to more than 3,000 violence-related resources on such issues as child abuse, domestic violence, dating violence, stalking, sexual violence, and elder abuse.

**National American Indian Court Judges Association (NAICJA),**

<http://www.naicja.org>, is "a national voluntary association of tribal court judges. Its membership is primarily judges, justices and peacemakers serving in tribal justice systems. NAICJA is a non-profit corporation established in 1969. The Association is primarily devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. The mission of the Association, as a national representative membership organization, is to strengthen and enhance tribal justice systems."

**National Association of Counsel for Children (NACC),**

<http://naccchildlaw.org>, mission is "to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and engages in public policy and legislative advocacy."

**National Association of Women Judges (NAWJ),**

<http://www.nawj.org>, is dedicated "to ensuring equal justice and access to the courts for all including women, youth, the elderly, minorities, the underprivileged, and people with disabilities; providing judicial education on cutting-edge issues of importance; developing judicial leaders; increasing the number of women on the bench in order for the judiciary to more accurately reflect the role of women in a democratic society; and improving the administration of justice to provide gender-fair decisions for both male and female litigants."

**National Center for State Courts (NCSC),**

<http://www.ncsconline.org>, provides "up-to-date information and hands-on assistance that helps [court leaders] better serve the public. NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven 'best practices' for improving court operations in many areas, such as civil case management."

**National Council of Juvenile and Family Court Judges (NCJFCJ),**

<http://www.ncjfcj.org>, is "dedicated to serving the nation's children and families by improving the courts of juvenile and family jurisdictions." NCJFCJ has dedicated programs addressing family violence, child abuse and neglect, victims of juvenile offenders, alcohol and drug abuse, termination of parental rights, child support enforcement, adoption and foster care, and juvenile delinquency.

**U.S. Department of Justice, Office on Violence Against Women (OVW),**

<http://www.ojp.usdoj.gov/vawo>, provides on-line resources with "up-to-date information on interventions to stop violence against women for criminal justice practitioners, advocates, and social service professionals with the latest in research and domestic violence, stalking, batterer intervention programs, child custody [and] protection, sexual assault, and welfare reform."



# I

## The Fundamental Question:

### What If There Are No Resources for an Evaluation?

### Is There a Need for an Emergency/Interim Assessment?

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Card I Side 1

## Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

**REMEMBER:** Not every case will require or need an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

### Is this a case where I need assistance in determining:

- the presence and extent of physical or sexual violence or other assaultive or coercive behaviors used by one parent against the other;
- the impact of domestic violence on the children;
- the effect of domestic violence on the parenting of each party; and
- the impact of domestic violence on decisions about how to structure custody and visitation?

(See also supplemental material, INTRODUCTION, p. 7-11.)

Many litigants are unable to afford evaluations, and many courts have limited evaluation resources. If resource constraints, or the lack of a qualified evaluator, preclude an evaluation in a particular case, this tool may still assist you:

- to identify categories of evidence that the parties' attorneys should produce;
- to outline information that unrepresented litigants need to provide to assist your decision making;
- to allocate limited evaluation resources to maximum effect; \* and
- to make safe and responsible decisions even in situations where you lack complete information—there is value in knowing what you do not know.

**NO**, if a restraining/protection order is in place and provides needed relief, the party against whom it was issued is in compliance, and the situation is stable.

**YES**, if an existing restraining/protection order has been violated or is not adequate (e.g., fails to provide needed relief), or if there is no restraining/protection order in place, and you have reason to be concerned about the safety of one or both of the parties and/or their children. You may want an interim safety assessment performed by a qualified expert before issuing temporary orders to stabilize the situation pending a final resolution of the contested issues. \*

### FACTORS that might prompt an emergency/interim safety assessment include:

- credible allegations of child abuse, which often co-occurs with domestic violence;
- one or more convictions of domestic violence-related or other violent offenses;
- a record of one or more 911 calls;
- possession of, access to, or threats to use firearms in conjunction with evidence of assaultive or coercive behavior perpetrated by one parent against the other;
- evidence of stalking;
- evidence of harm or threats of harm to partner or children, or threats of harm to pets or property;
- evidence of suicide threats or threats of self-harm;
- evidence of threats of abduction of children;
- a history of drug or alcohol abuse;
- a prior record of restraining/protection orders involving this partner or a former partner (see also supplemental material, History of Physical Violence, p. 13, examining cases in which there may be a record against both parents);
- evidence of assaultive and coercive behaviors, even if there is no history of physical or sexual violence; and/or
- evidence of violations of prior or existing restraining/protection orders.

## Is There a Need for an Emergency/Interim Assessment? (cont.)

### Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card I Side 2

#### An emergency/interim safety assessment should:

- be limited to an assessment of what measures are needed to minimize the risks to all concerned pending the resolution of the contested issues in the case;
- be conducted by a domestic violence and risk assessment expert; and
- consider, at a minimum, the advisability of the following alternatives:
  - ♦ suspending all contact between the parent whose behavior raises concerns and his or her partner and children until an interim hearing can be conducted, or pending a final resolution of the case;
  - ♦ providing for appropriately supervised visits; and/or
  - ♦ structuring the exchange of children in a safe setting with or without contact between the parents.

#### The answer may be **YES** when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical or sexual violence, stalking, or a pattern of assaultive or coercive behaviors perpetrated by one parent against the other, but you are nonetheless inclined to permit contact with the abusive parent; and/or
- there are allegations that a parent has harmed or threatened to harm him- or herself or the other parent or the children, threatened injury to property or pets, or otherwise abused the other parent or the children.

#### The answer may *also* be **YES** when:

- The case has, as yet, no proven or alleged violence, but has other evidence or other allegations that raise "**RED FLAGS**" because of their common co-occurrence with domestic violence.

#### **RED FLAGS** include:

- a documented history or allegations of mental illness, substance abuse, or child abuse by either party; \*
  - a pattern of coercion and control even if there is no established history of physical or sexual violence;
  - indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, child abuse or their exposure to domestic violence. Such symptoms may include sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression or other behavioral problems, depression, or anxiety; \*
  - the presence of one or more prior court orders restricting a parent's access to a former partner or any of his or her children in this or another relationship;
  - a history of court or social services involvement with the family;
  - a stipulated or mediated agreement heavily favoring one party, thereby raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented; \*
  - allegations that a parent is turning the children against the other parent; \* and
  - indications that one or both parents are inattentive to the children's needs. \*
- (See also Card I, Side 1, **FACTORS**, and Card II, Side 2, **INFORMATION**.)

#### And the answer may *also* be **YES** when:

- one or both parties have already retained one or more experts;
- one or both parties, or the children's lawyer or guardian *ad litem*, has requested an evaluation that raises concerns about domestic violence or raises "red flags" warranting an investigation of domestic violence; or
- a party seeking custody is also making a contested request to relocate, particularly if there is a hint that the case may involve domestic violence and safety concerns may be an underlying reason for the request. \*

# II

## Safety First



## Frame the Inquiry



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card II Side 1

## Framing the Order: What Do I Need to Know, from Whom, and How Do I Ask?

**REMEMBER:** Not every case will require an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

Your highest priority in framing your order, and the evaluator's highest priority in conducting the inquiry, is to make sure that:

- safety concerns that emerge in the course of the inquiry are promptly addressed; and
- no one is endangered by how the information is collected or shared.

### Investigation, Evaluation, Recommendation

You need information to guide your own application of the relevant legal principles and rules. Whom you choose to provide you with the information will be influenced by the type of information you need.

#### • Investigation: \*

You need an investigation when the questions are factual.

For example:

- ♦ "What has happened in this family?"
- ♦ "What do the relevant records show?"
- ♦ "What does the child say about visiting with his mother or father?"
- ♦ "What is the history of each parent's relationship with each child?" (e.g., who fed, clothed, etc., the children?)

#### • Evaluation: \*

You need an evaluation from a mental health professional to answer the following types of questions if they are relevant to the inquiry:

- ♦ "What is the psychological impact of parental behavior on a child?"
- ♦ "What are the personality, characteristics, functioning, or symptoms of a party or child?"
- ♦ "Are there clinical-level concerns about the mental health of one of the parents or the children?"

#### • Recommendations to the Court: \*

*Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that the judges, not evaluators, make the ultimate best-interests determination.* If you or your court permits or requires custody evaluators to make recommendations, in order to make sure that you can make your own independent assessment, you must be able to determine:

- ♦ whether the recommendation is sufficiently supported by relevant facts;
- ♦ the level of support for the theory and methodology relied upon by the evaluator in his or her professional community; \* and
- ♦ whether the evaluator impermissibly tried to negotiate a resolution of the matter, either through counsel or directly with the parties.

(See Card III, Side 2, ASSESSING THE RECOMMENDATIONS)

## Choose the Expert

## Be Specific about the Information You Need

**\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

Card II Side 2

Continued on Card **IIA**

It is important to choose an evaluator who has training and experience in: \*

- ♦ the issues related to domestic violence and/or sexual assault, including the dangers associated with separation; \*
- ♦ the link between partner abuse and child abuse;
- ♦ the impact of exposure to domestic violence on children;
- ♦ the impact of abuse on parenting; and
- ♦ the psychological, emotional, physical, and economic risks that continued exposure to the abusive parent's behavior can have on the abused parent and the children.

You will also need to match the evaluator's training and skills to the particular inquiry:

- ♦ A case with extensive documentation may require the investigatory skills of an attorney.
- ♦ Obtaining sensitive information from relatively young children may require a mental health clinician with a background in child development and child psychology and up-to-date training on appropriate interviewing techniques.
- ♦ A mental health evaluation will require specialized expertise. The same is true for clinical diagnosis, in the rare case in which such diagnosis is a relevant and necessary aspect of the evaluation.
- ♦ Inquiries dependent upon a particular cultural competence, or specialized expertise in another area, such as substance abuse, will require someone with that competence or expertise.

Although the particular areas of inquiry may differ from case to case, areas that are usually important in a case in which domestic violence has or may have occurred, and that you will want to direct the expert to inquire into, include the following:

- any facts that would trigger a statutory presumption or specific statutory obligations;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- destruction of property or abuse of pets or threats to do so;
- threats of homicide, suicide, serious bodily injury, or child abduction;
- unprovoked behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- patterns of coercive or controlling behavior, including emotionally abusive behavior; inappropriately limiting access to finances, education, or employment; and isolation from friends or family;
- behaviors that appear designed to, or likely to, undermine a parent's relationship with the children or capacity to parent effectively;
- the exposure of children to incidents of physical violence, sexual abuse, threats, stalking, or intimidation; \*
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child; \*
- any specific cultural context that is relevant to the inquiry;
- a parent's immigration status used as a means to maintain coercive control over that parent;
- each parent's history of meeting each child's needs;
- the current situation and needs of each child;
- the nature of the communication between the parents;
- the record of any criminal or civil legal proceeding or police involvement; and
- short- and long-term safety concerns raised by the behavior of a parent. \*

**(See also Card I, Side 1, FACTORS, and Card I, Side 2, RED FLAGS.)**

## **IIA**

### **Articulate Expected Sources of Information**

### **Communicate Expectations about Any Information- Gathering Procedures and Safety Practices**

### **Frame the Process**

**\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.**

**Card IIA Side 1**

Evaluations that are based solely on interviewing and/or observing the parties and their children are significantly less reliable. You will want to ensure that evaluators supplement basic information with:

- interviews with relevant collaterals; \*
- a thorough review of all pertinent written records, assuming they are non-privileged or that any privilege attaching to them has been properly waived; \* and
- in extraordinary circumstances, psychological testing—although this, as explained in the supplementary materials, must be relevant and approached with caution. \*

**(See Card III, Side I, READ THE REPORT CRITICALLY)**

Evaluators must make the information-gathering process safe for all concerned, to avoid putting the parties or their children at risk or compromising the reliability of the information obtained. \*

Evaluators should:

- make initial contact with each party separately;
- reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- respect the terms of existing restraining/protection orders;
- help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information;
- advise the parties of an evaluator's duty to report suspected child abuse;
- whenever possible avoid identifying one party as the source of negative information about the other;
- warn the party at risk about disclosure of information in advance, if it becomes essential to share information with one party that may put the other at risk; \*
- avoid attributing direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children. \*

We propose that your order for a custody evaluation specifically include:

- the timeline with which you expect the evaluator and the parties or their attorneys to comply;
- the respective obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation;
- upon notice and opportunity to be heard, an order to produce records available to the courts but not directly available to the parties or their attorneys, including:
  - ◆ child protective services reports; and
  - ◆ criminal or court activity records;
- the assignment of costs of the evaluation and the costs of the parties' participation in the evaluation;
- the scope and purpose of the evaluation or investigation (you may want to invite input into the scope and purpose of the evaluation or investigation from the parties and their attorneys); and
- the specific questions you want answered in order to expedite the inquiry, to enhance the parties' safety and court efficiency, and to inform your decisions.

## Define the Obligations of the Parties

To facilitate the evaluation and increase the utility of the final product, articulate clearly the obligations of the parties, their attorneys, and the evaluator:

### A. The parties shall:

- provide information as requested and appropriate;
- sign requested consents or waivers after full consideration, and upon advice of counsel if represented, of the implications and advisability of waiving any privilege involved (make sure the parties have access to information in their language or to qualified translators, or that proper attention is given to a party's literacy); \*
- make themselves available to the evaluator; and
- provide the evaluator with access to their children.

### B. The attorneys shall:

- participate in defining the proposed scope and purpose of the evaluation or investigation;
- assist their clients in fulfilling their responsibilities, ensuring that they understand what information is being sought and from which sources;
- provide information and documentary material to the evaluator in an organized and timely fashion as authorized by their client or as directed by the court; and
- advise their clients about what information may be disclosed to the other party and what information may otherwise be placed in the public record of the case.

### C. The evaluator shall:

- ☞ make the safety of the parties and their children a priority at every stage of the process;
- accept the appointment only if qualified;
- accept the appointment only if unaffected by any conflict of interest;
- refrain from engaging in any conflicting professional relationship with anyone involved in the case after accepting the appointment; \*
- follow the terms of his or her licensure and any appropriate professional guidelines and standards;
- conduct the inquiry giving full consideration to the claims and concerns of each party;
- conduct the inquiry in a timely fashion;
- avoid creating situations that may violate the provisions of a restraining/protection order;
- with the permission of the court, draw on any necessary specialized resources; and
- refrain from negotiating a resolution of the matter, unless specifically instructed to do so by the court and with the knowledge of the parties and their attorneys.



*The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.*

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Card IIA Side 2



This document was developed under grant number SJ1-03-N-193 from the State Justice Institute. Reprints for this publication were made possible under Grant No. 99EY0378/06 awarded by the U.S. Department of Health and Human Services. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute or the U.S. Department of Health and Human Services.



NATIONAL COUNCIL OF  
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## Safety First



### Determine Whether to Admit the Report into Evidence

### Read the Report Critically

(Note: The factors listed in this section could be used to determine the admissibility requirements under your state's rules of evidence.)



The hand symbol is used throughout this tool to bring readers' attention to issue areas related to safety for victims of domestic violence and their children.

★ Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card III Side 1

## Reading the Report

- Does the content of the report raise immediate concerns about the existing safety of the parties or their children?
- Does the fact that each party will be given access to the report raise additional safety concerns that should be addressed before the report is shared?

Apart from the task of framing final orders, immediate safety concerns may require you:

- to schedule a hearing pursuant to your state's laws and issue a restraining/protection order, or make a referral for safety planning or other needed services; or
- to involve child protective services in accordance with your state's reporting laws if you conclude from the report that a child is at imminent specific risk of physical or emotional harm.

It is important to remember that custody evaluation reports are a form of evidence, either written or oral, which requires an admissibility determination. Check your state's rules of evidence. See also the Federal Rules of Evidence (FRE): **FRE 401 and 402 (relevance)**, **FRE 403 (probative value)**, and **FRE 702 (experts)**. (See supplemental material, **PARENT ALIENATION AND THE DAUBERT STANDARD**, p. 24.)

From the report, you should be able to determine whether the evaluator:

- **responded to each area of inquiry** detailed in your appointment order;
- **provided you with sufficient information to make a determination on the operative legal principles present in the case;**
- **described instances** where a child has directly witnessed, been exposed to, or been affected by incidents of domestic violence perpetrated by one party against the other;
- **explained the context of the evaluation**—i.e., at what point in the couple's separation process the evaluation took place and the possible impact of that timing on the findings and recommendations; and
- **properly reflected the limited scope of the task** assigned in cases where his or her function is one of investigation rather than evaluation.

To assess the weight to give to the report, you will need to determine whether the report contains sufficient information for you:

- **to rule on potential evidentiary concerns raised by the report:**
  - ◆ Was the information obtained directly from individuals interviewed, documents examined, or observations made by the evaluator? Is the source of each piece of information identified?
  - ◆ Is any information vulnerable to challenge because it was obtained "second-hand"? If so, is that indicated in the report?
  - ◆ Is the information in the report relevant to the legal issues raised by the case?
- **to assess the thoroughness of the factual investigation: ★**
  - ◆ Have relevant collateral sources been interviewed?
  - ◆ Have relevant written records been reviewed?
  - ◆ Have important facts been corroborated?
- **to assess the accuracy of information from the parties and their children:**
  - ☞ Have the safety needs of each member of the family been recognized?
  - ◆ Has the evaluator avoided creating opportunities for intimidation and coercion?

## Read the Report Critically (cont.)

- **to determine whether the factual investigation has been even-handed:**
  - ♦ Can you determine if fair consideration was given to the claims and concerns of each of the parties, including giving each the opportunity to respond to allegations made by the other?
  - ♦ Does the report assess the strengths and deficiencies or vulnerabilities of each parent and each parent/child relationship?
  - ♦ Does the report consider the particular cultural context of the parties' parenting and the relationship between the parties and their children?
  - ♦ Has the evaluator explored all possible interpretations of the information?
- **to identify what information was not available, and why:**
  - ♦ Does the report allow you to determine the extent to which missing information limits the value of the evaluator's conclusions or recommendations?
- **to determine, in cases where the evaluator has conducted an investigation and analyzed, interpreted, or drawn conclusions from the data:**
  - ♦ that the evaluator has fully reported the underlying data, with each source identified and relevant documents or records attached?
  - ♦ that the evaluator has clearly distinguished between the facts and the analysis, interpretation, or conclusions he or she is deriving from them?
  - ♦ that the underlying data support the analyses, interpretations, or conclusions from which they are drawn?
- **to determine, in cases where an evaluator employs specialized mental health expertise:**
  - ♦ that the evaluator has the appropriate training, qualifications, and experience to employ any specialized data-gathering procedures used?
  - ♦ that any psychological tests administered offer relevant information and that the evaluator satisfactorily explained their relevance?
  - ♦ that the tests employed have received appropriate professional endorsement for use in this context (understanding that psychological testing is generally not appropriate in domestic violence situations)?
  - ♦ that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?

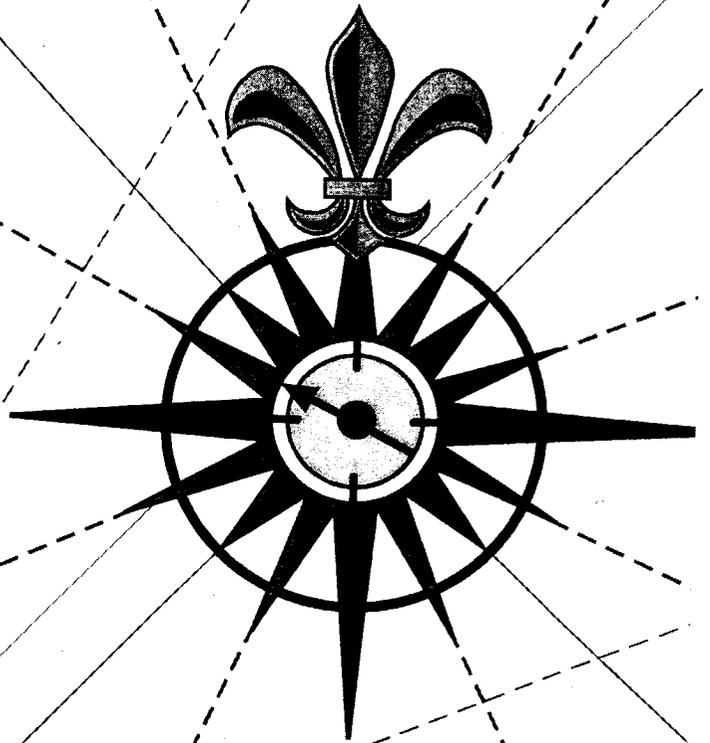
**(For more information on reading the report critically, see the supplemental information regarding confirmatory bias, page 25; see also Card IIA, Side 1, SOURCES OF INFORMATION, and corresponding supplemental material, page 19-21.)**

## Assess the Recommendations

★ Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

If domestic violence is identified as an issue, you will need to determine whether a qualified evaluator: ★

- ★ demonstrated an understanding of the ongoing safety risks;
- offered recommendations that provide the security needed to allow healing from any existing trauma associated with abuse or exposure to abuse;
- considered the full range of protective options, including:
  - ♦ supporting relocation of the vulnerable party and the children to a secure location;
  - ♦ otherwise shielding the vulnerable party from contact with or direct communication from the abusive party;
  - ♦ placing total or partial, permanent or provisional, restrictions on contact between the abusive party and the children;
  - ♦ imposing formal or informal supervision of visitation, or of transfer/exchange; and
  - ♦ conditioning visitation rights on compliance with safety-related conditions; and
- offered recommendations that limit ongoing harassment or coercion.



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## **ASSESSING RISK TO CHILDREN FROM BATTERERS**

By Lundy Bancroft and Jay G. Silverman

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The mounting social and professional awareness of the negative effects on children of exposure to the behavior of batterers has drawn attention to the need for effective tools for assessing risk to children from batterers as parents or guardians (e.g. Williams, Boggess, & Carter, 2001). Such tools are particularly needed by child protective personnel, custody evaluators, and courts with jurisdiction over child custody and child welfare cases, but are also important to the work of many therapists, battered women's service providers, batterer intervention programs, and programs for children exposed to batterers.

The model we are proposing here is particularly suited to assessment of post-separation risk to children from batterers. We commonly encounter the mistaken assumption among professionals, including judges and custody evaluators, that children are in less danger from a batterer once a couple is no longer living together, when the reality is often the opposite (Bancroft & Silverman, 2002; Langford, Isaac, & Kabat, 1999). Assessment of risk to children post-separation should be carried out with as much caution as would be called for in intervening with an intact family.

While couples are still living together, a batterer's danger to children can be mediated to some extent by their mother's ability to protect them. Assessment of her ability to protect requires the examination of such elements as the level of physical dangerousness of the batterer, the mother's strengths as a parent, the ability of her community to provide the necessary legal and supportive resources, and the mother's capacity to seek and use help for herself and her children (Whitney & Davis, 1999), while also avoiding the mistake of characterizing a battered woman as "failing to protect" her children (Magen, 1999). Therefore, the use of our model in assessing risk in intact families needs to be combined with careful and compassionate assessment of the mother's protective capabilities and her willingness to work collaboratively with child protective personnel.

Before describing the elements of a proper assessment, we will review the most serious physical, sexual, and psychological risks that batterers can pose to children, and describe the elements necessary for children's emotional recovery from exposure to battering behavior. Many of the errors currently made by professionals in assessing children's safety with a batterer are a product of the lack of clear delineation of what the central risks are, including the important possibility that a batterer's conduct with children may interfere with their emotional healing from traumatic experiences they have already undergone.

Following our section on the details of evaluating risk, we provide additional assessment guidelines that professionals can apply in cases where a batterer admits to a history of abusiveness but asserts that he has changed. We include this section because batterers sometimes succeed in using unfounded claims of change to circumvent proper evaluation of risk, an unfortunate outcome that we wish to caution against.

### **RISKS POSED TO CHILDREN BY EXPOSURE TO BATTERERS**

Professional approaches to assessing risks to children from batterers often suffer from the absence of a clear definition of what those risks are. This gap can lead to lack of direction in an evaluation, vagueness in an evaluator's report, and recommendations that are based on scant evidence or on stereotypes regarding batterers and battered women. We therefore begin here by delineating the potential sources of physical and psychological injury to children from contact with batterers:

*Risk of exposure to threats or acts of violence towards their mother.* Children of battered women witness a large percentage of the batterer's physical assaults (Kolbo, Blakely, & Engleman, 1996) and sexual assaults (Wolak & Finkelhor, 1998), and the potential traumatic effects of these events are well-established (review in Cummings, 1998). Children also may be physically injured during such assaults, either by accident or because they attempt to intervene (Jaffe, Wolfe, & Wilson, 1990; Roy, 1988).

A high rate of serious assaults by batterers occur post-separation (Tjaden and Thoennes, 2000), and children are likely to witness these incidents (Peled, 2000). The risk that the batterer will assault the mother sexually also increases during and after separation (review in Mahoney & Williams, 1998). When a batterer kills his former partner, children commonly witness the homicide or its aftermath, or are murdered themselves (Langford, Isaac, & Kabat, 1999). Many perpetrators of domestic violence homicides have little or no criminal record involving violence (Langford et al.; Websdale, 1999), complicating the assessment process.

Exposure to post-separation threats or assaults on the mother can impede children's emotional healing. In a recent case of ours, for example, a child's violent nightmares began again, after ceasing for over a year, following his witnessing of frightening verbal aggression by his father during an exchange for visitation.

*Risk of undermining mother-child relationships.* Battering behavior can undermine mother-child relationships and maternal authority in a wide array of ways (Radford & Hester, 2001; McGee, 2000; Hughes & Marshall, 1995), interference which tends to continue or increase post-separation (Bancroft & Silverman, 2002). The emotional recovery of children who have been exposed to domestic violence appears to depend on the quality of their relationship with the non-battering parent more than on any other single factor (see below), and thus batterers who create tensions between mothers and children can sabotage the healing process.

*Risk of physical or sexual abuse of the child by the batterer.* Multiple studies have demonstrated the dramatically elevated rate of child physical abuse (review in McGee, 2000) and child sexual abuse (e.g. McCloskey, Figueredo, & Koss, 1995; Sirles & Franke, 1989; Paveza, 1988) by batterers. This risk may increase post-separation from the mother's inability to monitor the batterer's parenting and from the retaliatory tendencies of many batterers.

*Risk to children of the batterer as a role model.* Sons of batterers have dramatically elevated rates of domestic violence perpetration when they reach adulthood (Silverman & Williamson, 1997; Straus, 1990), and daughters of batterers find it more difficult than other women to seek assistance if they are abused (Doyme et al., 1999).

*Risk of rigid, authoritarian parenting.* Recovery in traumatized children is best facilitated by a nurturing, loving environment that also includes appropriate structure, limits, and predictability. A batterer may be severely controlling toward children (McGee, 2000) and is likely to use a harsh, rigid disciplinary style (Margolin, John, Ghosh, & Gordis, 1996; Holden & Ritchie, 1991), which can intimidate children who have been exposed to his violence and can cause the reawakening of traumatic memories, setting back post-separation healing.

*Risk of neglectful or irresponsible parenting.* Batterers often have difficulty focusing on their children's needs, due to their selfish and self-centered tendencies (Jacobson & Gottman, 1998). In post-separation visitation situations these parenting weaknesses can be accentuated, as batterers may be caring for children for much longer periods of time than they are accustomed to. Additionally, many of our battering clients have used intentionally neglectful parenting as a way to win their children's loyalty, for example by not imposing appropriate safety or eating guidelines, or by permitting the children to watch inappropriate violence or sexuality in media.

Neglectful parenting in our clients commonly takes the form of intermittently showing interest in their

children and then ignoring them for extended periods. Post-separation, batterers of this parenting style tend to drop in and out of visitation, which can be emotionally injurious to their children and disruptive to life in the custodial home.

*Risk of psychological abuse and manipulation.* Batterers have been observed to tend towards verbally abusive parenting styles (McGee, 2000; Adams, 1991) and towards using the children as weapons against the mother (McGee; Erickson & Henderson, 1998; Peled, 1998). The latter risk appears to increase post-separation (McMahon & Pence, 1995), with visitation becoming an opportunity for a batterer to manipulate the children in his continuing efforts to control their mother (Erickson & Henderson).

*Risk of abduction.* A majority of parental abductions take place in the context of domestic violence, and are mostly carried out by batterers or their agents (Greif and Hegar, 1993). Post-separation parental abductions happen most commonly two or more years subsequent to the separation, and about half occur during an authorized visit (Finkelhor, Hotaling, & Sedlak, 1990).

*Risk of exposure to violence in their father's new relationships.* Post-separation, children run the risk that their father will abuse a new partner, as it is common for batterers to abuse women serially (Dutton, 1995; Woffordt, Mihalic, & Menard, 1994).

## **THE NECESSARY CONTEXT FOR CHILDREN'S RECOVERY FROM EXPOSURE TO BATTERING BEHAVIOR**

When a batterer is no longer present in children's home, the possibility exists that healing and recovery will begin, as has been demonstrated by many studies on children's resilience (review in Wolak & Finkelhor, 1998). However, we find that children's continued contact with the batterer sometimes interferes with the creation of a healing context, the critical elements of which include:

*A sense of physical and emotional safety in their current surroundings.* The establishment of safety, and of the feeling of safety, is a first and indispensable step towards any process of emotional healing from trauma (van der Kolk & McFarlane, 1996), and in particular for children whose experience has included fear, danger, and insecurity at home as children of battered women experience (McGee, 2000). Where children are aware of the batterer's capacity for violence, unsupervised contact with him may cause them to feel insecure or anxious.

*Structure, limits and predictability.* Domestic violence can create a sense of chaos and lack of predictability in children's environment. The parenting patterns that accompany battering can aggravate this problem, as batterers tend to alternate between harshness and leniency with children (Holden & Ritchie, 1991) and battered mothers often experience erosion of their authority (Hughes & Marshall, 1995). Children's healing therefore depends on the development of structure, limits, and predictability in their home life to counteract the previous experiences of fear and turmoil.

*A strong bond to the non-battering parent.* Children who have experienced profound emotional distress or trauma are largely dependent for their recovery on the quality of their relationship with their caretaking parent (Jaffe & Geffner, 1998; reviews in Heller, Larrieu, D'Imperio, & Boris, 1999 and Graham-Bermann, 1998). Assisting battered mothers and their children to heal their relationships is one of the most important aspects of promoting recovery (Erickson & Henderson, 1998). Progress towards this goal may be eroded if the batterer uses visitation as a time to encourage the children to disrespect their mother, to feel ashamed of being close to her, or to defy her authority.

*Not to feel responsible to take care of adults.* Children who are exposed to battering behavior may believe that they must protect their mother, father, or siblings. To relieve this stress adults need to avoid burdening the children with adult concerns. The self-centeredness common in batterers leads to a substantial risk that

the father may demand emotional caretaking from his children, particularly in the painful aftermath of parental separation.

*A strong bond to their siblings.* Overall level of family support is important in fostering resilience (Heller et al., 1999). Children exposed to batterers often have unusually high levels of tension in their sibling relationships (Hurley & Jaffe, 1990), and so may need assistance to address the divisions that have occurred. Batterers often foment tensions between siblings through favoritism and other tactics (Bancroft & Silverman, 2002), undercutting their recovery.

*Contact with the battering parent with strong protection for children's physical and emotional safety.* Except in those cases involving the most terrifying batterers or those who have abused the children physically or sexually, children's recovery may be furthered by having an ongoing opportunity to express their love for their father, to have a sense that he knows them, and to be able to tell him about key events in their lives. They may also crave reassurance that he is not in overwhelming distress. However, such contact is counterproductive when it interferes with the creation of a healing context.

It should be noted that a large proportion of batterers are unable to create or support most of the critical healing elements just listed, so that placing children in a batterer's custody or in unsupervised visitation with him will often impede their recovery.

## **ASSESSING RISK TO CHILDREN FROM CONTACT WITH BATTERERS**

Given the range of sources of psychological and physical injury to children from batterers and the many elements necessary for children's recovery, assessing risk to children from batterers is a complex process. Information about a batterer's history of behavior and attitudes has to be gathered from multiple sources, as his own reporting is not likely to be reliable (Adams, 1991; Follingstad, Rutledge, Berg, Hause, & Polek, 1990). Sources should include the mother, the children, past partners of the batterer, court and police records, child protective records, medical records, school personnel, and anyone who has witnessed relevant events. (Custody evaluators have not typically considered this type of investigating and fact-gathering important to their assessments -- see Bow & Quinnell, 2001).

The facts gathered should then be applied to evaluate each of the following 13 points:

### **1) *Level of physical danger to the mother.***

The higher the severity or frequency of a batterer's level of violence, the greater the risk that he will physically abuse children (Straus, 1990). Level of violence is also an indicator of a batterer's likelihood to attempt to kill the mother (Websdale, 1999; Langford et al., 1999), or to carry out other continued assaults against her (Weisz, Tolman, & Saunders, 2000). His history of sexually assaulting the mother is correlated to overall level of physical danger (Campbell, Soeken, McFarlane, & Parker, 1998) and specifically to his likelihood of physically abusing children (Bowker, Arbitell, & McFerron, 1988). Threats of abuse are highly correlated with future physical violence (Follingstad et al., 1990) including post-separation violence (Fleury, Sullivan, & Bybee, 2000). Any history of violence to the mother during her pregnancies also indicates an increased risk to commit frequent or severe violence (Campbell et al.). Evaluators should note that both threatened and actual homicide attempts may take place in cases where the batterer's previous history of violence had not been severe (McCloskey et al., 1995), and that the woman's own assessment of the likelihood of future violence by a batterer may be more accurate than any other predictor (Weisz et al.).

Additional relevant questions include: Has the batterer ever choked the mother? What types of injuries has he caused? Has he ever violated a restraining order? Has he made lethal threats against her or the children? Has he killed or attacked pets? Is he extremely jealous or possessive? Does he have access to weapons? Is he depressed, despondent, or paranoid? Does he stalk her? Is he escalating? What is his criminal record? Does he

chronically abuse substances? Has he been violent towards the children, or towards non-family members? Does he use pornography? (These additional indicators of danger are based on Weisz et. al, 2000; Campbell et al., 1998; Holtzworth-Munroe & Stuart, 1994; Koss et al., 1994; Demare, Briere, & Lips, 1988.)

## **2) *History of physical abuse towards the children.***

As discussed above, batterers are more likely than non-battering men to physically abuse children and this risk may increase post-separation. It thus is important to evaluate a man's historical approach to discipline, including his reactions when angry at the children. Additional relevant questions include: Does he spank the children? Has he ever left marks? Does he ever grab the children roughly? Has he been involved in fights (including any that appeared mutual) with his older children? Does he minimize or justify physically abusive behaviors he has used in the past?

## **3) *History of sexual abuse or boundary violations towards the children.***

As discussed above, there is a substantial overlap between battering and incest perpetration. Evidence of sexual abuse should therefore should be treated with particular care in domestic violence cases. Subtler boundary violations can also be psychologically destructive, and can create a context for future sexual abuse or be signs of current undisclosed sexual abuse (Salter, 1995). Questions to explore include: Does the batterer respect his children's right to privacy, and maintain proper privacy himself? Does he expose the children to pornography? Does he pressure the children for unwanted physical affection or engage them in inappropriate sexual conversation? Does he make inappropriate comments about the children's bodies or physical development? Are there indications of secret-keeping?

## **4) *Level of psychological cruelty to the mother or the children.***

Our clinical experience indicates that a batterer's history of mental cruelty towards the mother or the children is an important indicator of how his conscience operates, and in turn of how safe children will be in his care. We also observe that the most psychologically abusive batterers sometimes can be especially determined to gain revenge against the mother, using the children as weapons if necessary. Research indicates that the degree of emotional abuse in the home is an important determinant of the severity of difficulties developed by children exposed to domestic violence (Hughes, Graham-Bermann, & Gruger, 2001). A history of cruelty is overlooked in many evaluations, despite the fact that a majority of battered women report that the batterer's psychological abuse is even more destructive than his physical violence (Follingstad et al., 1990). Questions to explore include: What have been his most emotionally hurtful acts towards the mother? What behaviors of his have caused the greatest distress to the children? Has he ever deliberately harmed the children emotionally?

## **5) *Level of coercive or manipulative control exercised during the relationship.***

We find that the more severely controlling our clients are towards their partners the more likely they are to draw the children in as weapons of the abuse, and the more likely they are to be authoritarian fathers. Additionally, a dictatorial level of control over children has been associated with increased risk of both physical abuse (review in Milner & Chilamkurti, 1991) and sexual abuse (Leberg, 1997; Salter, 1995). Relevant questions include: Has he interfered with her social or professional contacts? Is he economically coercive? Does he dictate major decisions, showing contempt or disregard for her opinions? Does he monitor her movements? Is he dictatorial or minutely controlling towards the children?

Manipulation as a form of control can be examined through such questions as: Does he play the role of victim in the relationship? Does he abruptly switch to kind and loving behavior when he wishes to achieve certain goals? Has he sown divisions within the family? Is there evidence that he is frequently dishonest? Is he described by his partner, children, or other witnesses as "crazy-making"?

In cases where the batterer has a severe or chronic problem with lying, children's safety can be compromised by his ability to cover up the realities of his parenting behavior. Such a batterer may also lie directly to the children about their mothers, which can create confusion for them or foster tensions in their relationships with their mothers. Evaluators should thus always examine evidence of a batterer's credibility.

#### **6) *Level of entitlement and self-centeredness.***

"Entitlement" refers to a batterer's perception of himself as deserving of special rights and privileges within the family (Silverman & Williamson, 1997; Pence & Paymar, 1993; Edleson & Tolman, 1992). It can be manifested through a selfish focus on his own needs, the enforcement of double standards, a view of family members as personal possessions, or self-centered grandiosity regarding his qualities as a partner or as a parent that contrasts with evidence of his abusiveness.

Self-centeredness has been shown to increase the chance of violent reoffending in batterers (Saunders, 1995; Tolman & Bennett, 1990). Furthermore, our clinical experience is that the batterer who is particularly high in entitlement tends to chronically exercise poor parenting judgement and to expect children to take care of his needs. These observations are also consistent with indications that propensity to perpetrate incest is linked to self-centeredness (Leberg, 1997; Bresee, Stearns, Bess, & Packer, 1986), a view of the children as owned objects (Salter, 1995), and attitudes of paternal entitlement (Hanson, Gizzarelli, & Scott, 1994).

Relevant questions in this area include: Is the batterer frequently and unreasonably demanding, becoming enraged or retaliatory when he is not catered to? Does he define the victim's attempts to defend herself as abuse of him? Does he have double standards regarding his conduct and that of other family members? Does he appear to view the children as owned objects?

#### **7) *History of using the children as weapons, and of undermining the mother's parenting.***

We have observed that batterers who have histories of chronically using children as weapons against their mother, or of deliberately undermining her parenting, usually continue or intensify those behaviors after the relationship breaks up; post-separation improvement in this regard is rare. Change is more common in the other direction, unfortunately, where some batterers who did not use the children as weapons while the couple was together may begin to do so post-separation in response to losing other avenues to control or harass the mother.

Questions to pursue include: Has the batterer mistreated the children out of anger at the mother? Has he taught them negative beliefs about her? Has he ever prevented her from caring for a child? Has he ever threatened to harm, kidnap, or take custody of the children? Has he used the children to frighten her, such as by driving recklessly with them in the car? Has he threatened to quit his job in order to avoid paying child support? Does he involve the children in activities that he knows the mother does not permit, or undermine her authority in other ways?

#### **8) *History of placing children at physical or emotional risk while abusing their mother.***

We find that a batterer's behaviors that have the effect of harming or endangering children during partner abuse, even if the children were not intended targets, can demonstrate that his determination to abuse the mother sometimes overrides his use of safe parenting judgement. This type of reckless insistence on gaining retribution against the mother increases post-separation in some cases, with attendant augmented risk to children. Batterers who are violent in the presence of children have also been found to be more physically dangerous (Thompson, Saltzman, & Johnson, 2001).

Relevant questions include: Has the batterer been violent or mentally cruel during any of the mother's pregnancies? Has he been violent in the presence of the children, assaulted her while a child was in her arms,

or pushed a child out of his way to get at her? Has he ever thrown objects in a way that has risked hitting the children? Has he verbally abused or humiliated the mother in the children's presence? Has he neglected the children when angry at her?

**9) *History of neglectful or severely underinvolved parenting.***

A batterer's history of lack of proper attention to his children's needs is particularly relevant in the post-separation context. In our clinical experience and current research, we observe that a batterer who has shown little interest in his children may do poorly at protecting their health and safety during visitation, and may fail to meet even their basic emotional needs. In addition, studies indicate that a father's very low involvement in parenting during a child's early years increases his statistical risk of perpetrating incest (review in Milner, 1998).

Relevant questions include: Does the batterer have a history of disappearing for hours, days or weeks at a time? Has he ever refused to attend to children's medical needs? Has his lack of attentiveness ever put the children in danger? Has he shown an abrupt interest in the children, perhaps including seeking custody, in response to the dissolution of the parental relationship?

The batterer's own knowledge and compassion regarding children should be tested with such questions as: Can you tell me the names of your children's current and past teachers? Could you describe each child's infancy? What are each child's particular interests, likes, and dislikes? What struggles is each child currently encountering? What kind of involvement do you maintain with any children you have from past relationships?

**10) *Refusal to accept the end of the relationship, or to accept the mother's decision to begin a new relationship.***

A batterer's refusal to accept his partner's decision to leave him, which often is accompanied by severe jealousy and possessiveness, has been linked to increased dangerousness in batterers (Weisz et al., 2000), including danger of homicide (Websdale, 1999), putting children at increased risk. We have observed clinically that those batterers who have high levels of these tendencies often also show increased use of children as tools of abuse or control post-separation. They may perceive the children as owned objects and therefore become intimidating if they learn that there is a new man in their children's lives. Finally, even those batterers who welcome the end of a relationship should be evaluated for their level of desire to punish the mother for perceived transgressions from the past, or to establish paternal dominion over the children.

Relevant questions include: Is the batterer depressed or panicked about the break-up, or insisting that the relationship is not over? Is he stalking her? Did he abruptly demand custody or expanded visitation upon learning that the mother had decided definitively not to go back to him, or when she began a new romantic involvement? Has he ever threatened or assaulted a new partner of hers, or warned her not to let any man other than him be around the children? Has he attempted to frighten the children about the mother's new partner, or to induce guilt in them for developing an attachment to him?

**11) *Level of risk to abduct the children.***

The elevated risk of abduction by a batterer, particularly in cases where he has made related threats, is described earlier. Even in the absence of threats, evaluators should investigate indications such as abrupt passport renewals or efforts to get the children's passports away from the mother, surprise appearances at the children's schools, job-seeking in other states or countries, or unexplained travel plans.

**12) *Substance abuse history.***

Batterers who abuse substances are an increased risk to physically abuse children (Suh & Abel, 1990), to

reoffend violently against the mother (Gondolf, 1998; Woffordt et al., 1994), and to commit homicide (Websdale, 1999; Campbell, 1995). Substance abuse has also been linked to increased risk to perpetrate sexual abuse (Becker & Quinsey, 1993). Even in cases where the batterer states that he has overcome substance abuse, evaluators need to carefully examine the length and depth of the batterer's recovery, including his level of insight regarding the addiction, and should make sure that proper ongoing treatment and self-help are in place. Additionally, any tendency on the batterer's part to blame his violence on the addiction should be treated as a sign of risk for the future even if he is in recovery.

### 13) *Mental health history.*

Although mental illness is found in only a minority of batterers (Gondolf, 1999), even among those who kill (Websdale, 1999), such problems when present can increase a batterer's dangerousness (Websdale; Campbell et al., 1998) and resistance to change (Edleson & Tolman, 1992). Certain diagnoses, such as anti-social personality disorder, obsessive/compulsive disorder, major depression, and borderline personality disorder have been important contributors to danger in some of our cases. A mentally ill batterer needs proper separate interventions for his abusiveness and for his psychological difficulties.

The absence of mental illness or personality disorder, however, reveals little about a batterer's likelihood to be a safe or responsible parent. Psychological tests and evaluations do not predict parenting capacity well even in the absence of domestic violence (Brodzinsky, 1994). Furthermore, mental health testing cannot distinguish a batterer from a non-batterer (O'Leary, 1993), assess dangerousness in batterers (APA Presidential Task Force on Violence and the Family, 1996), or measure propensity to perpetrate incest, (Milner, 1998; Myers, 1997). Psychological evaluation with batterers is therefore useful only for ruling out psychiatric concerns.

(For case examples illustrating the above 13 areas to be explored, see Bancroft & Silverman, 2002.)

In collecting and evaluating evidence regarding these indicators of risk, evaluators should pay particularly close attention to the knowledge and perceptions of the battered mother; we find that failure to do so is one of the most common weaknesses in risk assessments in domestic violence cases, particularly in custody and visitation evaluations. In cases where the batterer is still living in the home, the evaluator needs to develop a cooperative relationship with the battered mother to the greatest extent possible, understanding that proper compassion, support, and services for her are in most cases the key to building safety for her children (Magen, 1999; Whitney & Davis, 1999). Additionally, we wish to caution evaluators against making assumptions about level of risk to children based on the economic class, race, or level of education of the batterer. We repeatedly encounter cases where courts and child protective services have underestimated the physical, sexual, or psychological danger to children from batterers who are well-educated and professionally successful. We also observe cases where risk from minority batterers has been exaggerated, particularly if they are also low-income.

The complexity involved in assessing the range of relevant issues does not lend itself to a formulaic approach to categorizing level of risk to children from batterers. Evaluators thus need to be prepared to conceptualize each batterer's parenting as falling on a *continuum*, and to use multiple source of information to evaluate where on that continuum he appears to fall. It can be helpful to think of three separate dimensions of risk, as a batterer may be found to have one level of physical danger to his children, another level of sexual danger, and yet another of psychological danger. We discourage the use of models that attempt to assess risk to children by placing batterers in distinct *types*, as such models lack both clinical and research bases at this time (see analysis of Johnston & Campbell, 1993, in Bancroft & Silverman, 2002).

It is beyond the scope of this chapter to offer detailed guidelines regarding custody and visitation planning in domestic violence cases. (These are available in Bancroft & Silverman, 2002.) The physical and emotional safety of both mothers and children needs to be paramount in such plans, along with the need to create a healing context that can support children's resilience (as discussed earlier). Where children's experiences

during visitation cause harm to the strength and security of their relationships with their mothers or with each other, or cause setbacks to their emotional healing from the trauma of exposure to domestic violence, the costs of supporting their relationships with their battering father can outweigh the benefits.

## ASSESSING CHANGE IN BATTERERS

Evaluators are sometimes in the position of needing to determine the validity of a batterer's claim to have overcome his problem with abusiveness. Such a determination cannot be made in the absence of a clear understanding of the nature of a battering problem. Domestic violence perpetration has its roots in a definable set of attitudes, beliefs, and behavioral patterns. These characteristics include among others the man's belief in his right to use violence against a partner to impose his will (Silverman & Williamson, 1997), his sense of entitlement within the family (Edleson & Tolman, 1992), his patterns of controlling and manipulative behaviors (Lloyd & Emery, 2000), disrespect for his partner and lack of empathy for her feelings (Russell & Frohberg, 1995; Pence & Paymar, 1993), and his externalizing of responsibility for his actions (Dutton, 1995). We have been involved in a number of cases where an evaluator has expressed his or her belief that a batterer has changed despite multiple indications of lack of progress in overcoming any of the qualities that foster domestic violence.

Assessment of change in a batterer therefore should draw on multiple sources of information (not just the batterer's self-report), and include attention to the following issues at a minimum:

*Has he made full disclosure of his history of physical and psychological abuse?* A batterer must overcome denial and minimization in order to confront his abusive behavior meaningfully (Adams, Bancroft, German, & Sousa, 1992; see Leberg, 1997 on the similar dynamic in treating child sexual abusers). It is common for abusers to claim to have changed while simultaneously denying most of the history of violence, and a skeptical view should be taken of such assertions.

*Has he recognized that abusive behavior is unacceptable?* We find that some batterers who claim to have changed continue to justify their past violent or abusive behavior, usually through blaming the victim, thereby leaving an opening for using such justifications for future abuse. One indication of an abuser who may be making serious progress is his unqualified statements that his behavior was wrong.

*Has he recognized that abusive behavior is a choice?* Some batterers may acknowledge that abuse is wrong but make the excuse that they lost control, were intoxicated, or were in emotional distress. Acceptance of full responsibility is indispensable for change (Adams et al., 1992), and needs to include recognition that abuse is intentional and instrumental (Pence & Paymar, 1993).

*Does he show empathy for the effects of his actions on his partner and children?* As evidence of change, a batterer should be able to identify *in detail* the destructive impact his abuse has had (Pence & Paymar, 1993) and demonstrate that he feels empathy for his victims (Mathews, 1995; Edleson & Tolman, 1992), without shifting attention back to his own emotional injuries, grievances, or excuses.

*Can he identify what his pattern of controlling behaviors and entitled attitudes has been?* In order to change, a batterer has to see that his violence grows out of a surrounding context of abusive behaviors and attitudes (Pence & Paymar, 1993), and be able to name the specific forms of abuse he has relied on (Edleson & Tolman, 1992) and the entitled beliefs that have driven those behaviors.

*Has he replaced abuse with respectful behaviors and attitudes?* A changing batterer responds respectfully to his (ex-)partner's grievances, meets his responsibilities, and stops focusing exclusively on his own needs. He develops non-abusive attitudes, including accepting his (ex-)partner's right to be angry (Bancroft, 2002) and reevaluating his distortedly negative view of her as a person. Attitudinal changes are important predictors of behavioral improvement in batterers (Gondolf, 2000).

*Is he willing to make amends in a meaningful way?* We have observed that batterers who are making genuine change develop a sense of long-term indebtedness towards their victims. This sense includes feeling responsible to lay their own grievances aside because of the extent of injury that the abuse has caused.

*Does he accept the consequences of his actions?* Our clients who make substantial progress come to recognize that abusive behavior rightly carries consequences with it, which may include the woman's decision to end the relationship or the placement of restrictions on the abuser's access to his children. On the other hand, continued anger or externalizing of responsibility regarding such consequences tends to portend a return to abusive behavior.

(For a more detailed guide to assessing change in abusers, see Bancroft & Silverman, 2002).

## SUMMARY

Children exposed to battering behavior can benefit tremendously when professionals have knowledge of the range of risks that batterers present to children, and when a systematic risk assessment tool is applied by child protective services and family courts. It is our hope that the model we are proposing here can serve as a launching point for the development of increasingly refined and sophisticated approaches to protecting children exposed to men who batter and to fostering their healing.

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# 10 Myths about Custody and Domestic Violence and How to Counter Them

**A**ttorneys who represent victims of domestic violence in custody matters often encounter the following false claims. To assist with overcoming these myths, the ABA Commission on Domestic Violence provides these facts and statistics for use in litigation.

## **MYTH 1: Domestic violence is rare among custody litigants.**

- Studies show that 25-50% of disputed custody cases involve domestic violence.

S.L. Keilitz, National Center for State Courts, Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers (1997); J.R. Johnston, High-Conflict Divorce, 4 *Future of Children* 165 (1994).

## **MYTH 2: Any ill effects of domestic violence on children are minimal and short-term.**

- "Children who are exposed to domestic violence may show comparable levels of emotional and behavioral problems to children who were the direct victims of physical or sexual abuse."

Jaffe, Wolfe & Wilson, Children of Battered Women (1990).

- Adverse effects to children who witness DV are well-documented, including aggressive behavior, depression, and/or cognitive deficiencies.

Morrill, Dai, Dunn, Sung & Smith, Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother, 11(8) *Violence Against Women* 1076-1107 (2005); Jeffrey L. Edleson, Problems Associated with Children's Witnessing of Domestic Violence, (1999), available at [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_witness.php](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_witness.php)

- A continuing study by the CDC has shown a significant relationship between exposure to "adverse childhood experiences" (including witnessing domestic violence) and development of adult health problems, including pulmonary disease, heart disease, hepatitis, fractures, obesity, and diabetes (not to mention IV drug use, alcoholism, sexually transmitted diseases and depression).

<http://www.acestudy.org/>  
<http://www.cdc.gov/od/oc/media/pressrel/r980514.htm>

## **MYTH 3: Mothers frequently invent allegations of child sexual abuse to win custody.**

- Child sexual abuse allegations in custody cases are rare (about 6%), and the majority of allegations are substantiated (2/3).

Thoennes & Tjaden, The Extent, Nature, And Validity Of Sexual Abuse Allegations In Custody And Visitation Disputes, 14(2) *Child Sexual Abuse & Neglect* 151-63 (1990).

- False allegations are no more common in divorce or custody disputes than at any other time.

Brown, Frederico, Hewitt, & Sheehan, Revealing The Existence Of Child Abuse In The Context Of Marital Breakdown And Custody And Access Disputes, 24(6) *Child Abuse & Neglect* 849-85 (2000).

- Among false allegations, fathers are far more likely than mothers to make intentionally false accusations (21% compared to 1.3%)

Bala & Schuman, Allegations of Sexual Abuse When Parents Have Separated, 17 *Canadian Family Law Quarterly* 191-241 (2000).

## **MYTH 4: Domestic violence has nothing to do with child abuse.**

- A wide array of studies reveal a significant overlap between domestic violence and child abuse, with most finding that *both* forms of abuse occur in 30-60% of violent families.

Appel & Holden, The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal, 12(4) *Journal of Family Psychology* 578-599 (1998).

- Other studies have shown intimate partner violence ("IPV") to be a strong predictor of child abuse, increasing the risk from 5% after one act of IPV to 100% after 50 acts of IPV.

S.M. Ross, Risk of Physical Abuse to Children of Spouse Abusing Parents, 20(7) *Child Abuse & Neglect* 589-98 (1996).

## **MYTH 5: Abusive fathers don't get custody.**

- Abusive parents are more likely to seek sole custody than nonviolent ones...

American Psychological Association, Violence And The Family: Report Of The American Psychological Association Presidential Task Force On Violence And The Family, (1996), available at <http://www.apa.org/pi/viol&fam.html>

- ...and they are successful about 70% of the time.

American Judges Foundation, Domestic Violence and the Court House: Understanding the Problem...Knowing the Victim, available at <http://aja.ncsc.dni.us/domviol/page5.html>

- Allegations of domestic violence have no demonstrated effect on the rate at which fathers are awarded custody of their children, nor do such allegations affect the rate at which fathers are ordered into supervised visitation. (i.e. abusers win unsupervised custody and visitation at the same rate as non-abusers)

Kernic, Monary-Ernsdorff, Koepsell & Holt, Children In The Crossfire: Child Custody Determinations Among Couples With A History Of Intimate Partner Violence 11(8) Violence Against Women, 991-1021 (2005).

## **MYTH 6: Fit mothers don't lose custody.**

- Mothers who are victims of DV are often depressed and suffering from post-traumatic stress disorder, and as a result, can present poorly in court and to best-interest attorneys and/or custody evaluators.

J.M. Golding, Intimate Partner Violence As A Risk Factor For Mental Disorders: A Meta-Analysis, 14 Journal of Family Violence 99-132 (1999); Kernic, Monary-Ernsdorff, Koepsell & Holt, Children In The Crossfire: Child Custody Determinations Among Couples With A History Of Intimate Partner Violence 11(8) Violence Against Women 991-1021 (2005).

## **MYTH 7: Parental Alienation Syndrome ("PAS") is a scientifically sound phenomenon.**

- The American Psychological Association has noted the lack of data to support so-called "parental alienation syndrome," and raised concern about the term's use.

American Psychological Association, Violence And The Family: Report Of The American Psychological Association Presidential Task Force On Violence And The Family, (1996), available at <http://www.apa.org/releases/passyndrome.html>

## **MYTH 8: Children are in less danger from a batterer/parent once the parents separate.**

- Many batterers' motivation to intimidate and control their victims through the children *increases* after separation, due to the loss of other methods of exerting control.

Lundy Bancroft & Jay Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics (2002); Langford, Isaac & Kabat, Homicides Related to Intimate Partner Violence in Massachusetts 1991-1995, Peace at Home (1999).

## **MYTH 9: Parents who batter are mentally ill, OR Parents with no evidence of mental illness cannot be batterers.**

- Mental illness is found only in a minority of batterers.

Gondolf, MCMI-III Results for Batterer Program Participants in Four Cities: Less "Pathological" Than Expected, 14(1) Journal of Family Violence 1-17 (1999); Gelles R. & Straus M, Intimate Violence (1988) (reporting that mental illness accounts for only 10% of abusive incidents).

- Psychological testing is not a good predictor of parenting capacity.

Brodzinsky, On the Use and Misuse of Psychological Testing in Child Custody Evaluations, 24(2) Professional Psychology: Research and Practice 213-219 (1994).

- Mental health testing cannot distinguish a batterer from a non-batterer.

O'Leary, Through a Psychological Lens: Personality Traits, Personality Disorders, and Levels of Violence, in Current Controversies on Family Violence 7-30 (Gelles & Loseke, eds.,1993).

## **MYTH 10: If a child demonstrates no fear or aversion to a parent, then there is no reason not to award unsupervised contact or custody.**

- Children can experience "traumatic bonding" with a parent who abuses the child or their other parent, forming unusually strong but unhealthy ties to a batterer as a survival technique (often referred to as "Stockholm Syndrome").

Lundy Bancroft & Jay Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics, 39-40 (2002); Herman, Trauma and Recovery (1992).

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## **Domestic Violence: The Impact on Children**

**Each year, an estimated 3.3 million children are exposed to violence by family members against their mothers or female caretakers.** — American Psychol. Ass'n, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p. 11.

Events can be witnessed in many ways, not just by sight. Children may hear their mother's screams and crying; the abuser's threats, sounds of hitting, cursing, and degrading language. Children also witness abuse after it has occurred— their mother's bruises and torn clothes, broken furniture, their mother's tears.

—National Center on Women and Family Law, *The Effect of Woman Abuse on Children*, 1990.

**The U.S. Advisory Board on Child Abuse and Neglect suggests that domestic violence may be the single major precursor to child abuse and neglect in this country.**

- ❖ in homes where partner abuse occurs, children are 150 times more likely to be abused. Department of Justice, Bureau of Justice Assistance, *Family Violence: Interventions for the Justice System*, 1993.
- ❖ 40–60% of men who abuse women also abuse children. American Psychol. Ass'n, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p. 80.
- ❖ fathers who batter mothers are 2 times more likely to seek sole physical custody of their children than are non-violent fathers. American Psychol. Ass'n, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p. 40.



- ❖ Infants exposed to violence in the home experience eating and sleeping disturbances. Infants are also at greater risk of injury because they are often in the arms of one parent during a violent episode.
- ❖ Preteen girls more often show symptoms of depression, anxiety, sleep disturbances, etc. Boys more often physically act out by bullying, fighting at school, disobeying, destroying property, etc.
- ❖ Teens who witness domestic violence are six times more likely to commit suicide. They are also more likely to act out sexually, become involved in delinquent behavior, run away from home, or become involved in an abusive dating relationship.

—National Center on Women and Family Law, *The Effect of Woman Abuse on Children*, 1990.

Domestic Violence  
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Following our section on the details of evaluating risk, we provide additional assessment guidelines that professionals can apply in cases where a batterer admits to a history of abusiveness but asserts that he has changed. We include this section because batterers sometimes succeed in using unfounded claims of change to circumvent proper evaluation of risk, an unfortunate outcome that we wish to caution against.

## **RISKS POSED TO CHILDREN BY EXPOSURE TO BATTERERS**

Professional approaches to assessing risks to children from batterers often suffer from the absence of a clear definition of what those risks are. This gap can lead to lack of direction in an evaluation, vagueness in an evaluator's report, and recommendations that are based on scant evidence or on stereotypes regarding batterers and battered women. We therefore begin here by delineating the potential sources of physical and psychological injury to children from contact with batterers:

*Risk of exposure to threats or acts of violence towards their mother.* Children of battered women witness a large percentage of the batterer's physical assaults (Kolbo, Blakely, & Engleman, 1996) and sexual assaults (Wolak & Finkelhor, 1998), and the potential traumatic effects of these events are well-established (review in Cummings, 1998). Children also may be physically injured during such assaults, either by accident or because they attempt to intervene (Jaffe, Wolfe, & Wilson, 1990; Roy, 1988).

A high rate of serious assaults by batterers occur post-separation (Tjaden and Thoennes, 2000), and children are likely to witness these incidents (Peled, 2000). The risk that the batterer will assault the mother sexually also increases during and after separation (review in Mahoney & Williams, 1998). When a batterer kills his former partner, children commonly witness the homicide or its aftermath, or are murdered themselves (Langford, Isaac, & Kabat, 1999). Many perpetrators of domestic violence homicides have little or no criminal record involving violence (Langford et al.; Websdale, 1999), complicating the assessment process.

Exposure to post-separation threats or assaults on the mother can impede children's emotional healing. In a recent case of ours, for example, a child's violent nightmares began again, after ceasing for over a year, following his witnessing of frightening verbal aggression by his father during an exchange for visitation.

*Risk of undermining mother-child relationships.* Battering behavior can undermine mother-child relationships and maternal authority in a wide array of ways (Radford & Hester, 2001; McGee, 2000; Hughes & Marshall, 1995), interference which tends to continue or increase post-separation (Bancroft & Silverman, 2002). The emotional recovery of children who have been exposed to domestic violence appears to depend on the quality of their relationship with the non-battering parent more than on any other single factor (see below), and thus batterers who create tensions between mothers and children can sabotage the healing process.

*Risk of physical or sexual abuse of the child by the batterer.* Multiple studies have demonstrated the dramatically elevated rate of child physical abuse (review in McGee, 2000) and child sexual abuse (e.g. McCloskey, Figueredo, & Koss, 1995; Sirles & Franke, 1989; Paveza, 1988) by batterers. This risk may increase post-separation from the mother's inability to monitor the batterer's parenting and from the retaliatory tendencies of many batterers.

*Risk to children of the batterer as a role model.* Sons of batterers have dramatically elevated rates of domestic violence perpetration when they reach adulthood (Silverman & Williamson, 1997; Straus, 1990), and daughters of batterers find it more difficult than other women to seek assistance if they are abused (Doyme et al., 1999).

*Risk of rigid, authoritarian parenting.* Recovery in traumatized children is best facilitated by a nurturing, loving environment that also includes appropriate structure, limits, and predictability. A batterer may be severely controlling toward children (McGee, 2000) and is likely to use a harsh, rigid disciplinary style (Margolin, John, Ghosh, & Gordis, 1996; Holden & Ritchie, 1991), which can intimidate children who have been exposed to his violence and can cause the reawakening of traumatic memories, setting back post-separation healing.

*Risk of neglectful or irresponsible parenting.* Batterers often have difficulty focusing on their children's needs, due to their selfish and self-centered tendencies (Jacobson & Gottman, 1998). In post-separation visitation situations these parenting weaknesses can be accentuated, as batterers may be caring for children for much longer periods of time than they are accustomed to. Additionally, many of our battering clients have used intentionally neglectful parenting as a way to win their children's loyalty, for example by not imposing appropriate safety or eating guidelines, or by permitting the children to watch inappropriate violence or sexuality in media.

Neglectful parenting in our clients commonly takes the form of intermittently showing interest in their children and then ignoring them for extended periods. Post-separation, batterers of this parenting style tend to drop in and out of visitation, which can be emotionally injurious to their children and disruptive to life in the custodial home.

*Risk of psychological abuse and manipulation.* Batterers have been observed to tend towards verbally abusive parenting styles (McGee, 2000; Adams, 1991) and towards using the children as weapons against the mother (McGee; Erickson & Henderson, 1998; Peled, 1998). The latter risk appears to increase post-separation (McMahon & Pence, 1995), with visitation becoming an opportunity for a batterer to manipulate the children in his continuing efforts to control their mother (Erickson & Henderson).

*Risk of abduction.* A majority of parental abductions take place in the context of domestic violence, and are mostly carried out by batterers or their agents (Greif and Hegar, 1993). Post-separation parental abductions happen most commonly two or more years subsequent to the separation, and about half occur during an authorized visit (Finkelhor, Hotaling, & Sedlak, 1990).

*Risk of exposure to violence in their father's new relationships.* Post-separation, children run the risk that their father will abuse a new partner, as it is common for batterers to abuse women serially (Dutton, 1995; Woffordt, Mihalic, & Menard, 1994).

## **THE NECESSARY CONTEXT FOR CHILDREN'S RECOVERY FROM EXPOSURE TO BATTERING BEHAVIOR**

When a batterer is no longer present in children's home, the possibility exists that healing and recovery will begin, as has been demonstrated by many studies on children's resilience (review in Wolak & Finkelhor, 1998). However, we find that children's continued contact with the batterer sometimes interferes with the creation of a healing context, the critical elements of which include:

*A sense of physical and emotional safety in their current surroundings.* The establishment of safety, and of the feeling of safety, is a first and indispensable step towards any process of emotional healing from trauma (van der Kolk & McFarlane, 1996), and in particular for children whose experience has included fear, danger, and insecurity at home as children of battered women experience (McGee, 2000). Where children are aware of the batterer's capacity for violence, unsupervised contact with him may cause them to feel insecure or anxious.

*Structure, limits and predictability.* Domestic violence can create a sense of chaos and lack of predictability in children's environment. The parenting patterns that accompany battering can aggravate this problem, as batterers tend to alternate between harshness and leniency with children (Holden & Ritchie, 1991) and battered mothers often experience erosion of their authority (Hughes & Marshall, 1995). Children's healing therefore depends on the development of structure, limits, and predictability in their home life to counteract the previous experiences of fear and turmoil.

*A strong bond to the non-battering parent.* Children who have experienced profound emotional distress or trauma are largely dependent for their recovery on the quality of their relationship with their caretaking parent (Jaffe & Geffner, 1998; reviews in Heller, Larrivee, D'Imperio, & Boris, 1999 and Graham-Bermann, 1998). Assisting battered mothers and their children to heal their relationships is one of the most important aspects of promoting recovery (Erickson & Henderson, 1998). Progress towards this goal may be eroded if the batterer uses visitation as a time to encourage the children to disrespect their mother, to feel ashamed of being close to her, or to defy her authority.

*Not to feel responsible to take care of adults.* Children who are exposed to battering behavior may believe that they must protect their mother, father, or siblings. To relieve this stress adults need to avoid burdening the children with adult concerns. The self-centeredness common in batterers leads to a substantial risk that the father may demand emotional caretaking from his children, particularly in the painful aftermath of parental separation.

*A strong bond to their siblings.* Overall level of family support is important in fostering resilience (Heller et al., 1999). Children exposed to batterers often have unusually high levels of tension in their sibling relationships (Hurley & Jaffe, 1990), and so may need assistance to address the divisions that have occurred. Batterers often foment tensions between siblings through favoritism and other tactics (Bancroft & Silverman, 2002), undercutting their recovery.

*Contact with the battering parent with strong protection for children's physical and emotional safety.* Except in those cases involving the most terrifying batterers or those who have abused the children physically or sexually, children's recovery may be furthered by having an ongoing opportunity to express their love for their father, to have a sense that he knows them, and to be able to tell him about key events in their lives. They may also crave reassurance that he is not in overwhelming distress. However, such contact is counterproductive when it interferes with the creation of a healing context.

It should be noted that a large proportion of batterers are unable to create or support most of the critical healing elements just listed, so that placing children in a batterer's custody or in unsupervised visitation with him will often impede their recovery.

#### **ASSESSING RISK TO CHILDREN FROM CONTACT WITH BATTERERS**

Given the range of sources of psychological and physical injury to children from batterers and the many elements necessary for children's recovery, assessing risk to children from batterers is a complex process. Information about a batterer's history of behavior and attitudes has to be gathered from multiple sources, as his own reporting is not likely to be reliable (Adams, 1991; Follingstad, Rutledge Berg, Hause, & Polek, 1990). Sources should include the mother, the children, past partners of the batterer, court and police records, child protective records, medical records, school personnel, and anyone who has witnessed relevant events. (Custody evaluators have not typically considered this type of investigating and fact-gathering important to their assessments -- see Bow & Quinnell, 2001).

The facts gathered should then be applied to evaluate each of the following 13 points:

1) *Level of physical danger to the mother.*

The higher the severity or frequency of a batterer's level of violence, the greater the risk that he will physically abuse children (Straus, 1990). Level of violence is also an indicator of a batterer's likelihood to attempt to kill the mother (Websdale, 1999; Langford et al., 1999), or to carry out other continued assaults against her (Weisz, Tolman, & Saunders, 2000). His history of sexually assaulting the mother is correlated to overall level of physical danger (Campbell, Soeken, McFarlane, & Parker, 1998) and specifically to his likelihood of physically abusing children (Bowker, Arbitell, & McFerron, 1988). Threats of abuse are highly correlated with future physical violence (Follingstad et al., 1990) including post-separation violence (Fleury, Sullivan, & Bybee, 2000). Any history of violence to the mother during her pregnancies also indicates an

increased risk to commit frequent or severe violence (Campbell et al.). Evaluators should note that both threatened and actual homicide attempts may take place in cases where the batterer's previous history of violence had not been severe (McCloskey et al., 1995), and that the woman's own assessment of the likelihood of future violence by a batterer may be more accurate than any other predictor (Weisz et al.).

Additional relevant questions include: Has the batterer ever choked the mother? What types of injuries has he caused? Has he ever violated a restraining order? Has he made lethal threats against her or the children? Has he killed or attacked pets? Is he extremely jealous or possessive? Does he have access to weapons? Is he depressed, despondent, or paranoid? Does he stalk her? Is he escalating? What is his criminal record? Does he chronically abuse substances? Has he been violent towards the children, or towards non-family members? Does he use pornography? (These additional indicators of danger are based on Weisz et al., 2000; Campbell et al., 1998; Holtzworth-Munroe & Stuart, 1994; Koss et al., 1994; Demare, Briere, & Lips, 1988.)

## **2) *History of physical abuse towards the children.***

As discussed above, batterers are more likely than non-battering men to physically abuse children and this risk may increase post-separation. It thus is important to evaluate a man's historical approach to discipline, including his reactions when angry at the children. Additional relevant questions include: Does he spank the children? Has he ever left marks? Does he ever grab the children roughly? Has he been involved in fights (including any that appeared mutual) with his older children? Does he minimize or justify physically abusive behaviors he has used in the past?

## **3) *History of sexual abuse or boundary violations towards the children.***

As discussed above, there is a substantial overlap between battering and incest perpetration. Evidence of sexual abuse should therefore be treated with particular care in domestic violence cases. Subtler boundary violations can also be psychologically destructive, and can create a context for future sexual abuse or be signs of current undisclosed sexual abuse (Salter, 1995). Questions to explore include: Does the batterer respect his children's right to privacy, and maintain proper privacy himself? Does he expose the children to pornography? Does he pressure the children for unwanted physical affection or engage them in inappropriate sexual conversation? Does he make inappropriate comments about the children's bodies or physical development? Are there indications of secret-keeping?

## **4) *Level of psychological cruelty to the mother or the children.***

Our clinical experience indicates that a batterer's history of mental cruelty towards the mother or the children is an important indicator of how his conscience operates, and in turn of how safe children will be in his care. We also observe that the most psychologically abusive batterers sometimes can be especially determined to gain revenge against the mother, using the children as weapons if necessary. Research

indicates that the degree of emotional abuse in the home is an important determinant of the severity of difficulties developed by children exposed to domestic violence (Hughes, Graham-Bermann, & Gruger, 2001). A history of cruelty is overlooked in many evaluations, despite the fact that a majority of battered women report that the batterer's psychological abuse is even more destructive than his physical violence (Follingstad et al., 1990). Questions to explore include: What have been his most emotionally hurtful acts towards the mother? What behaviors of his have caused the greatest distress to the children? Has he ever deliberately harmed the children emotionally?

*5) Level of coercive or manipulative control exercised during the relationship.*

We find that the more severely controlling our clients are towards their partners the more likely they are to draw the children in as weapons of the abuse, and the more likely they are to be authoritarian fathers. Additionally, a dictatorial level of control over children has been associated with increased risk of both physical abuse (review in Milner & Chilamkurti, 1991) and sexual abuse (Leberg, 1997; Salter, 1995). Relevant questions include: Has he interfered with her social or professional contacts? Is he economically coercive? Does he dictate major decisions, showing contempt or disregard for her opinions? Does he monitor her movements? Is he dictatorial or minutely controlling towards the children?

Manipulation as a form of control can be examined through such questions as: Does he play the role of victim in the relationship? Does he abruptly switch to kind and loving behavior when he wishes to achieve certain goals? Has he sown divisions within the family? Is there evidence that he is frequently dishonest? Is he described by his partner, children, or other witnesses as "crazy-making"?

In cases where the batterer has a severe or chronic problem with lying, children's safety can be compromised by his ability to cover up the realities of his parenting behavior. Such a batterer may also lie directly to the children about their mothers, which can create confusion for them or foster tensions in their relationships with their mothers. Evaluators should thus always examine evidence of a batterer's credibility.

*6) Level of entitlement and self-centeredness.*

"Entitlement" refers to a batterer's perception of himself as deserving of special rights and privileges within the family (Silverman & Williamson, 1997; Pence & Paymar, 1993; Edleson & Tolman, 1992). It can be manifested through a selfish focus on his own needs, the enforcement of double standards, a view of family members as personal possessions, or self-centered grandiosity regarding his qualities as a partner or as a parent that contrasts with evidence of his abusiveness.

Self-centeredness has been shown to increase the chance of violent reoffending in batterers (Saunders, 1995; Tolman & Bennett, 1990). Furthermore, our clinical experience is that the batterer who is particularly high in entitlement tends to chronically exercise poor parenting judgement and to expect children to take care of his needs. These

observations are also consistent with indications that propensity to perpetrate incest is linked to self-centeredness (Leberg, 1997; Bresee, Stearns, Bess, & Packer, 1986), a view of the children as owned objects (Salter, 1995), and attitudes of paternal entitlement (Hanson, Gizzarelli, & Scott, 1994).

Relevant questions in this area include: Is the batterer frequently and unreasonably demanding, becoming enraged or retaliatory when he is not catered to? Does he define the victim's attempts to defend herself as abuse of him? Does he have double standards regarding his conduct and that of other family members? Does he appear to view the children as owned objects?

**7) *History of using the children as weapons, and of undermining the mother's parenting.***

We have observed that batterers who have histories of chronically using children as weapons against their mother, or of deliberately undermining her parenting, usually continue or intensify those behaviors after the relationship breaks up; post-separation improvement in this regard is rare. Change is more common in the other direction, unfortunately, where some batterers who did not use the children as weapons while the couple was together may begin to do so post-separation in response to losing other avenues to control or harass the mother.

Questions to pursue include: Has the batterer mistreated the children out of anger at the mother? Has he taught them negative beliefs about her? Has he ever prevented her from caring for a child? Has he ever threatened to harm, kidnap, or take custody of the children? Has he used the children to frighten her, such as by driving recklessly with them in the car? Has he threatened to quit his job in order to avoid paying child support? Does he involve the children in activities that he knows the mother does not permit, or undermine her authority in other ways?

**8) *History of placing children at physical or emotional risk while abusing their mother.***

We find that a batterer's behaviors that have the effect of harming or endangering children during partner abuse, even if the children were not intended targets, can demonstrate that his determination to abuse the mother sometimes overrides his use of safe parenting judgement. This type of reckless insistence on gaining retribution against the mother increases post-separation in some cases, with attendant augmented risk to children. Batterers who are violent in the presence of children have also been found to be more physically dangerous (Thompson, Saltzman, & Johnson, 2001).

Relevant questions include: Has the batterer been violent or mentally cruel during any of the mother's pregnancies? Has he been violent in the presence of the children, assaulted her while a child was in her arms, or pushed a child out of his way to get at her? Has he ever thrown objects in a way that has risked hitting the children? Has he verbally abused or humiliated the mother in the children's presence? Has he neglected the children when angry at her?

**9) *History of neglectful or severely underinvolved parenting.***

A batterer's history of lack of proper attention to his children's needs is particularly relevant in the post-separation context. In our clinical experience and current research, we observe that a batterer who has shown little interest in his children may do poorly at protecting their health and safety during visitation, and may fail to meet even their basic emotional needs. In addition, studies indicate that a father's very low involvement in parenting during a child's early years increases his statistical risk of perpetrating incest (review in Milner, 1998).

Relevant questions include: Does the batterer have a history of disappearing for hours, days or weeks at a time? Has he ever refused to attend to children's medical needs? Has his lack of attentiveness ever put the children in danger? Has he shown an abrupt interest in the children, perhaps including seeking custody, in response to the dissolution of the parental relationship?

The batterer's own knowledge and compassion regarding children should be tested with such questions as: Can you tell me the names of your children's current and past teachers? Could you describe each child's infancy? What are each child's particular interests, likes, and dislikes? What struggles is each child currently encountering? What kind of involvement do you maintain with any children you have from past relationships?

**10) *Refusal to accept the end of the relationship, or to accept the mother's decision to begin a new relationship.***

A batterer's refusal to accept his partner's decision to leave him, which often is accompanied by severe jealousy and possessiveness, has been linked to increased dangerousness in batterers (Weisz et al., 2000), including danger of homicide (Websdale, 1999), putting children at increased risk. We have observed clinically that those batterers who have high levels of these tendencies often also show increased use of children as tools of abuse or control post-separation. They may perceive the children as owned objects and therefore become intimidating if they learn that there is a new man in their children's lives. Finally, even those batterers who welcome the end of a relationship should be evaluated for their level of desire to punish the mother for perceived transgressions from the past, or to establish paternal dominion over the children.

Relevant questions include: Is the batterer depressed or panicked about the break-up, or insisting that the relationship is not over? Is he stalking her? Did he abruptly demand custody or expanded visitation upon learning that the mother had decided definitively not to go back to him, or when she began a new romantic involvement? Has he ever threatened or assaulted a new partner of hers, or warned her not to let any man other than him be around the children? Has he attempted to frighten the children about the mother's new partner, or to induce guilt in them for developing an attachment to him?

**11) *Level of risk to abduct the children.***

The elevated risk of abduction by a batterer, particularly in cases where he has made related threats, is described earlier. Even in the absence of threats, evaluators should investigate indications such as abrupt passport renewals or efforts to get the children's passports away from the mother, surprise appearances at the children's schools, job-seeking in other states or countries, or unexplained travel plans.

#### 12) *Substance abuse history.*

Batterers who abuse substances are an increased risk to physically abuse children (Suh & Abel, 1990), to reoffend violently against the mother (Gondolf, 1998; Woffordt et al., 1994), and to commit homicide (Websdale, 1999; Campbell, 1995). Substance abuse has also been linked to increased risk to perpetrate sexual abuse (Becker & Quinsey, 1993). Even in cases where the batterer states that he has overcome substance abuse, evaluators need to carefully examine the length and depth of the batterer's recovery, including his level of insight regarding the addiction, and should make sure that proper ongoing treatment and self-help are in place. Additionally, any tendency on the batterer's part to blame his violence on the addiction should be treated as a sign of risk for the future even if he is in recovery.

#### 13) *Mental health history.*

Although mental illness is found in only a minority of batterers (Gondolf, 1999), even among those who kill (Websdale, 1999), such problems when present can increase a batterer's dangerousness (Websdale; Campbell et al., 1998) and resistance to change (Edleson & Tolman, 1992). Certain diagnoses, such as anti-social personality disorder, obsessive/compulsive disorder, major depression, and borderline personality disorder have been important contributors to danger in some of our cases. A mentally ill batterer needs proper separate interventions for his abusiveness and for his psychological difficulties.

The absence of mental illness or personality disorder, however, reveals little about a batterer's likelihood to be a safe or responsible parent. Psychological tests and evaluations do not predict parenting capacity well even in the absence of domestic violence (Brodzinsky, 1994). Furthermore, mental health testing cannot distinguish a batterer from a non-batterer (O'Leary, 1993), assess dangerousness in batterers (APA Presidential Task Force on Violence and the Family, 1996), or measure propensity to perpetrate incest, (Milner, 1998; Myers, 1997). Psychological evaluation with batterers is therefore useful only for ruling out psychiatric concerns.

(For case examples illustrating the above 13 areas to be explored, see Bancroft & Silverman, 2002.)

In collecting and evaluating evidence regarding these indicators of risk, evaluators should pay particularly close attention to the knowledge and perceptions of the battered mother; we find that failure to do so is one of the most common weaknesses in risk assessments in

domestic violence cases, particularly in custody and visitation evaluations. In cases where the batterer is still living in the home, the evaluator needs to develop a cooperative relationship with the battered mother to the greatest extent possible, understanding that proper compassion, support, and services for her are in most cases the key to building safety for her children (Magen, 1999; Whitney & Davis, 1999). Additionally, we wish to caution evaluators against making assumptions about level of risk to children based on the economic class, race, or level of education of the batterer. We repeatedly encounter cases where courts and child protective services have underestimated the physical, sexual, or psychological danger to children from batterers who are well-educated and professionally successful. We also observe cases where risk from minority batterers has been exaggerated, particularly if they are also low-income.

The complexity involved in assessing the range of relevant issues does not lend itself to a formulaic approach to categorizing level of risk to children from batterers. Evaluators thus need to be prepared to conceptualize each batterer's parenting as falling on a *continuum*, and to use multiple source of information to evaluate where on that continuum he appears to fall. It can be helpful to think of three separate dimensions of risk, as a batterer may be found to have one level of physical danger to his children, another level of sexual danger, and yet another of psychological danger. We discourage the use of models that attempt to assess risk to children by placing batterers in distinct *types*, as such models lack both clinical and research bases at this time (see analysis of Johnston & Campbell, 1993, in Bancroft & Silverman, 2002).

It is beyond the scope of this chapter to offer detailed guidelines regarding custody and visitation planning in domestic violence cases. (These are available in Bancroft & Silverman, 2002.) The physical and emotional safety of both mothers and children needs to be paramount in such plans, along with the need to create a healing context that can support children's resilience (as discussed earlier). Where children's experiences during visitation cause harm to the strength and security of their relationships with their mothers or with each other, or cause setbacks to their emotional healing from the trauma of exposure to domestic violence, the costs of supporting their relationships with their battering father can outweigh the benefits.

### **ASSESSING CHANGE IN BATTERERS**

Evaluators are sometimes in the position of needing to determine the validity of a batterer's claim to have overcome his problem with abusiveness. Such a determination cannot be made in the absence of a clear understanding of the nature of a battering problem. Domestic violence perpetration has its roots in a definable set of attitudes, beliefs, and behavioral patterns. These characteristics include among others the man's belief in his right to use violence against a partner to impose his will (Silverman & Williamson, 1997), his sense of entitlement within the family (Edleson & Tolman, 1992), his patterns of controlling and manipulative behaviors (Lloyd & Emery, 2000), disrespect for his partner and lack of empathy for her feelings (Russell & Frohberg, 1995; Pence & Paymar, 1993), and his externalizing of responsibility for his actions (Dutton, 1995). We have been involved in a number of cases where an evaluator has expressed his or her

belief that a batterer has changed despite multiple indications of lack of progress in overcoming any of the qualities that foster domestic violence.

Assessment of change in a batterer therefore should draw on multiple sources of information (not just the batterer's self-report), and include attention to the following issues at a minimum:

*Has he made full disclosure of his history of physical and psychological abuse?* A batterer must overcome denial and minimization in order to confront his abusive behavior meaningfully (Adams, Bancroft, German, & Sousa, 1992; see Leberg, 1997 on the similar dynamic in treating child sexual abusers). It is common for abusers to claim to have changed while simultaneously denying most of the history of violence, and a skeptical view should be taken of such assertions.

*Has he recognized that abusive behavior is unacceptable?* We find that some batterers who claim to have changed continue to justify their past violent or abusive behavior, usually through blaming the victim, thereby leaving an opening for using such justifications for future abuse. One indication of an abuser who may be making serious progress is his unqualified statements that his behavior was wrong.

*Has he recognized that abusive behavior is a choice?* Some batterers may acknowledge that abuse is wrong but make the excuse that they lost control, were intoxicated, or were in emotional distress. Acceptance of full responsibility is indispensable for change (Adams et al., 1992), and needs to include recognition that abuse is intentional and instrumental (Pence & Paymar, 1993).

*Does he show empathy for the effects of his actions on his partner and children?* As evidence of change, a batterer should be able to identify in detail the destructive impact his abuse has had (Pence & Paymar, 1993) and demonstrate that he feels empathy for his victims (Mathews, 1995; Edleson & Tolman, 1992), without shifting attention back to his own emotional injuries, grievances, or excuses.

*Can he identify what his pattern of controlling behaviors and entitled attitudes has been?* In order to change, a batterer has to see that his violence grows out of a surrounding context of abusive behaviors and attitudes (Pence & Paymar, 1993), and be able to name the specific forms of abuse he has relied on (Edleson & Tolman, 1992) and the entitled beliefs that have driven those behaviors.

*Has he replaced abuse with respectful behaviors and attitudes?* A changing batterer responds respectfully to his (ex-)partner's grievances, meets his responsibilities, and stops focusing exclusively on his own needs. He develops non-abusive attitudes, including accepting his (ex-)partner's right to be angry (Bancroft, 2002) and reevaluating his distortedly negative view of her as a person. Attitudinal changes are important predictors of behavioral improvement in batterers (Gondolf, 2000).

*Is he willing to make amends in a meaningful way?* We have observed that batterers who are making genuine change develop a sense of long-term indebtedness towards their victims. This sense includes feeling responsible to lay their own grievances aside because of the extent of injury that the abuse has caused.

*Does he accept the consequences of his actions?* Our clients who make substantial progress come to recognize that abusive behavior rightly carries consequences with it, which may include the woman's decision to end the relationship or the placement of restrictions on the abuser's access to his children. On the other hand, continued anger or externalizing of responsibility regarding such consequences tends to portend a return to abusive behavior.

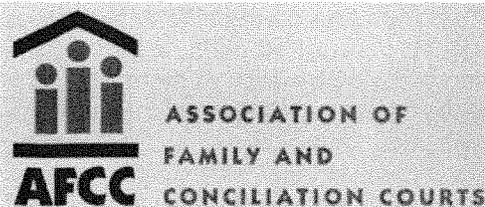
(For a more detailed guide to assessing change in abusers, see Bancroft & Silverman, 2002).

## SUMMARY

Children exposed to battering behavior can benefit tremendously when professionals have knowledge of the range of risks that batterers present to children, and when a systematic risk assessment tool is applied by child protective services and family courts. It is our hope that the model we are proposing here can serve as a launching point for the development of increasingly refined and sophisticated approaches to protecting children exposed to men who batter and to fostering their healing.

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## Ask the Experts

January 2012

### Top Ten Tips for Handling Child Custody Cases Involving Domestic Violence

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Recent research confirms what many experienced practitioners know: intimate partner violence can have serious effects on children who are directly exposed to the violence or who are simply living with parents who use violence and coercive controls to manage family relationships. Increasingly, practitioners recognize that they need to know whether these potentially damaging qualities are present in families and to handle cases in a way that decreases future harm to children and victim parents. But not all domestic violence affects children or adult victims in the same ways and, therefore, parenting arrangements must be tailored to reflect the actual experiences of each family member, especially each child. The following are tips for ensuring that children exposed to domestic violence have safe and healthy futures.

#### 1. Determine the context and full meaning of the violence to the family

Recognizing that not all domestic violence is the same, it is important to find out: (a) what the perpetrator intended by the violence, including whether the purpose of the violence was to terrorize, dominate and control; (b) what meaning the victim parent takes from the violence; and (c) what effect the violence has on the victim parent and the children. Identifying coercive controlling abuse is particularly critical because such abusers often parent in ways that have lasting negative effects on children and make joint parenting very problematic.

#### 2. Screen every case for domestic violence

Even though it seems counter-intuitive, many true victims (even those who have experienced ongoing and serious domestic violence) decline to disclose the fact to custody practitioners, even their own attorneys. Some victims feel that no one will believe them, some do not understand why it would be relevant, some have been told not to raise the issue, and some fear the repercussions of disclosure. Many will disclose only after time and following the establishment of trust in the practitioner, so screening at various points in the case can be helpful.

#### 3. Use screening tools or guides to help you screen for domestic violence and to assess the full implications of the violence for future parenting arrangements

Recent research confirms that relying on one's own clinical instinct or "gut feeling" to decide whether domestic violence is an issue in a case is not a trustworthy screening method, even for experienced professionals. Asking behavior-specific questions is more likely to uncover domestic violence and elicit full disclosure than asking general questions. There are many screening tools and guides available to practitioners, some of which have been designed to meet specific needs, such as risk or danger assessment, or to be applied in limited practice settings, such as mediation.

#### 4. For the purpose of considering what dispute resolution methods will be most appropriate and helpful in a case, understand the features and characteristics of the domestic violence

Not all cases are equally well-suited for certain dispute resolution alternatives. For example, coercive controlling abusers focused on domination may be ill-suited to participate in facilitative processes that require good faith negotiation, full disclosure, and centralizing the interests of the children. Domestic abuse may also affect decisions about the best timing for moving from one stage of dispute resolution to another in the case.

#### 5. Ensure that parenting arrangements account for the connection between the features of the domestic violence (including its severity and context) and the parenting of the abusive parent

Because the decision to use violence against a partner may also signal problematic or even dangerous attitudes and beliefs about parenting and children, it is critical to explore the extent to which the abusive parent has engaged in behaviors that have negative effects on the children. Familiarize yourself with the groundbreaking writing that has been done in the last few years on this topic. Learn about how adult victims of domestic violence can have parenting problems that

may relate directly to the abuse and what kinds of interventions can have the most benefits to the children's long-term welfare and the welfare of the other parent.

**6. Recognize and account for the fact that families that have experienced domestic violence are often drawn into multiple, sometimes conflicting systems**

Domestic violence cases are simultaneously or serially processed across multiple systems, including the criminal justice system, civil legal system, child protection system, healthcare system, government benefit system, and various social service systems. The interventions offered across these systems are often fragmented and poorly coordinated. For instance, the criminal justice system often expects a victim parent to leave and testify against her abuser. The child protection system often expects that same victim to obtain a protection order to keep the abuser away from the children. At the same time, the family court system might expect the victim parent to foster a close and continuing relationship between the children and their other parent. These competing expectations can create impossible conflicts for the abused parent. The parent cannot simultaneously insist on having no contact with the abuser and maintain close and continuing contact with the abuser at the very same time. Practitioners must be mindful that multiple intervention systems have the potential for creating conflicting expectations for parties and sending mixed messages to all family members.

**7. Be mindful of the past, focused on the present and realistic about the future**

Longstanding patterns of abuse and coercive control are rarely altered in the absence of appropriate and proven interventions. Some abusers never change, although many can with help and as an outcome of accountability measures which encourage them to think differently about how they relate to their children and partners. It is important to resist the assumption that parenting problems related to domestic violence will evaporate simply because the relationship between the parents is dissolved. Instead, help to create a parenting arrangement that is realistic and workable and considers all relevant factors, including the behavior and characteristics of the abusive parent and what it says about his or her likely future approach to parenting.

**8. Centralize and focus on the real life experiences and needs of each parent and child, including the risks presented or faced by each of them**

Attempt to see the system and the world from the perspectives of each parent and child and account for their actual concerns in resolving the matter instead of succumbing to the temptation to jump to conclusions about what the child and parent have experienced and what they need.

**9. Respect people's ability to make their own critical life decisions...**

...including the methods for current and future dispute resolution they prefer. Facilitate the restoration of a domestic violence victim's agency and autonomy by providing full information and helping them to weigh their options.

**10. Make referrals to appropriate services, including detailed risk assessment and individualized safety planning whenever domestic violence is identified**

About half of all domestic violence deaths were not foreseen or feared by the victim, and information about risk factors can make all the difference in a victim's ability to protect herself or himself from serious injury.

## Domestic Violence: Parenting, Custody & Risks for Children

In family courts across the country, domestic violence is recognized as a factor to consider when creating child custody and visitation plans. Parents with a history of domestic violence need resolutions that promote safety for both the children and the non-offending parent, and also limit the children's exposure to parental conflict and violence.

This document was developed as a guide for lawyers working on custody cases involving domestic violence. It provides a general overview of domestic violence, parenting profiles of perpetrators and risks to children. It also offers research-based recommendations for custody, visitation and shared parenting for cases involving domestic violence. This guide should be used in combination with consultations from trained clinicians.

In the District of Columbia, custody decisions must contemplate the impact of domestic violence on the child and the custodial parent.<sup>1</sup> Although there generally is a presumption of joint custody between parents in the District of Columbia, the presumption is lost if a judge has found by a preponderance of the evidence that a party perpetrated an intrafamily offense, domestic violence, child abuse or neglect or parental kidnapping. In such instances, there is a presumption against joint custody.<sup>2</sup> If a judge finds by a preponderance of evidence that a contestant for custody has committed an intrafamily offense, any determination that custody or visitation is to be granted to the abusive parent shall be supported by a written statement by the judicial officer specifying factors and findings which support that determination.<sup>3</sup> In determining visitation arrangements, if the judicial officer finds that an intrafamily offense has occurred, the judicial officer shall only award visitation if the judicial officer finds that the child and custodial parent can be adequately protected from harm inflicted by the other party.<sup>4</sup> The party found to have committed an intrafamily offense has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.<sup>5</sup>

### I. Overview and Definitions of Domestic Violence:

Domestic violence is a broad concept that can encompass everything from isolated physical altercations to ongoing patterns of control and coercion. Understanding the dynamics

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<sup>1</sup> See D.C. CODE § 16-914(a)(2), (a)(3)(F) (LexisNexis 2016); see also *Wilkins v. Ferguson*, 928 A.2d 655, 669 (D.C. 2007).

<sup>2</sup> D.C. CODE § 16-914(2).

<sup>3</sup> *Id.* § 16-914(a-1).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

of violence in the relationship is the first step towards further assessment of child-focused parenting plans once the parents are no longer in a romantic relationship.<sup>6</sup>

Generally, “perpetrator of domestic violence” and “batterer” are terms used to describe individuals who demonstrate a *pattern* of abusive behaviors over time that are designed to control, dominate, humiliate or terrorize their victims.<sup>7</sup> One researcher describes domestic violence as “involving a systematic *pattern* of using violence, the threat of violence, and other coercive behaviors and tactics, to exert power, to induce fear and to control another person.”<sup>8</sup> The key characteristic of domestic violence is the *pattern* of abuse. The box below sets out the different types of domestic violence most relevant to family law cases.<sup>9</sup>

#### **TYPES OF DOMESTIC VIOLENCE**

**Abusive-controlling violent relationships, also called Intimate Terrorism:** This involves an individual using violence for the purpose of taking general control over his<sup>10</sup> partner. Typically frequent, brutal and primarily male perpetrated, this type of domestic violence is an ongoing pattern of domination over one partner using fear, submission and compliance. There is considered to be a link between this violence profile and child abuse.

**Violent Resistance:** This is typically initiated by the female partner in response to the intimate terrorism. In custody disputes, there can be evidence of female perpetrated domestic violence, but it is important to understand whether the violence was in response to intimate terrorism.

**Conflict-instigated violence or Situational Couple Violence:** This is violence that is not related to a pattern of power and control but rather as a response to the escalations of specific conflicts or multiple conflicts. In this type of violence, it is important to know whether the situational violence is mild and isolated or chronic and severe. It is generally considered to be violence that is perpetrated by both partners. If the violence is chronic and severe, general anger management problems should be explored as they relate to a potential risk of child abuse.

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<sup>6</sup> See generally Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children’s Best Interest*, J. CTR. FOR FAMS., CHILD. & COURTS 81, (2005) [hereinafter 2005 Jaffe]; see generally Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, (2008) [hereinafter 2008 Jaffe]; see generally Peter G. Jaffe et al., *A framework for Addressing Allegations of Domestic Violence in Child Custody Disputes*, 6 J. CHILD CUSTODY 169 (2009) [hereinafter 2009 Jaffe].

<sup>7</sup> 2005 Jaffe, *supra* note 6, at 83; 2008 Jaffe, *supra* note 6, at 500-01.

<sup>8</sup> Sue Osthoff, *But Gertrude, I Beg to Differ, A Hit is Not a Hit, is Not a Hit*, 8 VIOLENCE AGAINST WOMEN 1521, 1521-22 (2002).

<sup>9</sup> 2008 Jaffe, *supra* note 6, at 501; Michael P. Johnson, *Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couple Violence*, 2 J. CHILD. CUSTODY 43, 44-45 (2005).

<sup>10</sup> For simplicity, this document uses the pronoun “he” and “father” for perpetrator. *Much research suggests that most domestic violence is male perpetrated (97% of domestic violence relationships are male-perpetrated)*. See Johnson, *supra* note 9, at 47.

**Separation-instigated violence:** This type of violence can be perpetrated by either partner and is in reaction to stress during separation and/or divorce. It is not typically characterized by past violence or coercive control.

## II. Parenting profile of batterers:

There are many factors to consider around visitation and custody in a case involving domestic violence. The sections above have defined the types of violence, and below examines the parenting profiles of perpetrators and the potential risks to children. The presence of domestic violence in a family is an automatic red flag for the possible coexistence of child abuse.<sup>11</sup> Studies have shown that between 30 and 60 percent of children are likely to be abused if their mothers have been abused.<sup>12</sup> That abuse often happens after separation when the perpetrator sometimes shifts the abusive behaviors to the children. Additionally, batterers tend to be poor role models by “modeling” violent and controlling behaviors in intimate relationships. The children run the risk of being re-exposed to domestic violence when the batterer has a future intimate relationship.<sup>13</sup>

In general, the most concerning type of domestic violence is “intimate terrorism,” where the perpetrator engaged in coercion and control behaviors. Intimate terrorism leads to more incidents of child abuse, incest and further abuse of the former partner. These parents, frequently exhibit the types of concerning parenting behaviors that make shared parenting unrealistic.<sup>14</sup> In the case of situational couple violence, it is important to assess the severity and chronicity of the abuse. This type of violence typically results from an anger-management issue where the perpetrator turns to violence when angered. For example, if violent instances happened monthly with severe injuries, it would be natural to be concerned about how the perpetrator would handle his anger with his children.<sup>15</sup> If the instances of violence occurred twice a year or less, the likelihood of abuse of the children would decrease.

There is a spectrum of parenting styles by batterers and not all batterers will exhibit each of these traits. For example, some batterers can be dependably kind to their children while simultaneously abusing their partner.<sup>16</sup> The children’s exposure to abuse of their mother is considered to have negative effects on children and therefore seen as reflecting on his parenting.<sup>17</sup> The box below explores categories of the parenting profiles of batterers and the associated risk to children and victims.

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<sup>11</sup> Lundy Bancroft et al., *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* at 54-57 (2nd ed. 2012); 2005 Jaffe, *supra* note 6, at 82.

<sup>12</sup> See 2005 Jaffe, *supra* note 6, at 82; see also 2009 Jaffe, *supra* note 6, at 172.

<sup>13</sup> BANCROFT ET AL., *supra* note 11, at 66-67; 2008 Jaffe, *supra* note 6, at 502-03; 2009 Jaffe, *supra* note 6, at 176.

<sup>14</sup> Margaret F. Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 *Fam. Ct. Rev.* 271, 271 (2014).

<sup>15</sup> Johnson, *supra* note 9, at 50.

<sup>16</sup> BANCROFT ET AL., *supra* note 11, at 33.

<sup>17</sup> 2008 Jaffe, *supra* note 6, at 502; Johnson, *supra* note 9, at 49.

## PARENTING STYLES OF BATTERERS

**Authoritarianism:** BATTERERS tend to be rigid, authoritarian parents. They expect to be obeyed without questions and are not tolerant of resistance or arguing from children. Holden and Ritchie<sup>18</sup> and Holden et al<sup>19</sup> found that batterers tend to respond to conflicts with their children with more anger, more spanking and more *power-assertive* responses (i.e., verbal and physical force) than nonbatterers. Other researchers and clinicians have observed a pattern of unpredictable swings between authoritarianism and permissive or indifferent parenting.<sup>20</sup> This parenting style and lack of empathy for children has been linked to a risk of child abuse.<sup>21</sup>

**Underinvolvement, Neglect, and Irresponsibility:** BATTERERS tend to be underinvolved in combination with periods of authoritarian parenting, and can be less physically affectionate with their children than nonbatterers.<sup>22</sup> There is a perception that caring for children is the responsibility of the mother. These specific batterers often lack knowledge about their children and their interests and may expect them to behave in a way that is not developmentally appropriate.<sup>23</sup>

**Undermining of the mother:** Due to their exposure to the violence or controlling behavior towards the mother, children can absorb messages from the batterer's behavior that can shape their responses to their mother's parenting. They may learn that it is okay to yell at their mother, to call her names or use physical violence towards her. Other family dynamics may consist of the batterer overruling the mother's decisions, telling the children she is incompetent or ridiculing her in front of them.<sup>24</sup>

**Self-Centeredness:** When children are babies there is a tendency for a batterer to be intolerant of their crying and show an unwillingness to modify his lifestyle to meet their needs.<sup>25</sup> As they get older, he may expect his children to meet *his* needs and can maintain poor emotional boundaries with them. For example, he may expect them to make themselves abruptly available when he wants to spend time with them, and in postseparation dynamics he may push for more visitation only to leave the children watching television with a relative.<sup>26</sup> They

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<sup>18</sup> George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEV. 311 (1991).

<sup>19</sup> George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES 289 (George W. Holden et al. eds., 1998).

<sup>20</sup> Brinig et al., *supra* note 14, at 274-75.

<sup>21</sup> BANCROFT ET AL., *supra* note 11, at 34-36

<sup>22</sup> See generally Simon Lapierre, *More Responsibilities, Less Control: Understanding the Challenges and Difficulties Involved in Mothering in the Context of Domestic Violence*, 40 Brit. J. Soc. Work 1434 (2010); see generally also Holden, *supra* note 18.

<sup>23</sup> NEIL JACOBSEN & JOHN GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 105 (1998).

<sup>24</sup> BANCROFT ET AL., *supra* note 11, at 38-39; Brinig et al., *supra* note 14, at 274-75; 2005 Jaffe, *supra* note 6, at 82.

<sup>25</sup> JACOBSEN & GOTTMAN, *supra* note 24, at 35

<sup>26</sup> BANCROFT ET AL., *supra* note 11, at 39-40.

may tend to take credit for things their children do well and hold their partner accountable for any issues or failures.<sup>27</sup>

**Manipulativeness:** Almost 80% of battered women report that the abuser has some history of using the children to manipulate or control her.<sup>28</sup> Batterers are able to confuse children about the nature of the abuse and who is responsible for it. After separation, mothers are often more concerned with a batterer's ability to manipulate his children than they are concerned about any other aspect of his parenting.<sup>29</sup>

**Ability to perform under observation:** There is a stark contrast between public and private behaviors of most batterers when it comes to parenting. In the presence of friends or professionals, many batterers can behave in gentle, caring and attentive ways. These brief interactions do not require the skills or capacity for day-to-day parenting. In addition, some children who are regularly exposed to abuse can be more comfortable with the abusive parent as long as there are other people around.<sup>30</sup> In contrast, many victims of domestic violence, as a result of the prolonged abuse, can suffer from difficulties with anxiety, depression, substance abuse and posttraumatic stress disorder. All of those issue could impact their general functioning, negatively impact their parenting and present negatively in court.<sup>31</sup> Victims need time and support to heal and reestablish competent parenting that protects themselves and their children.<sup>32</sup>

### III. Assessing Risk for Children

When working with families that have experienced domestic violence it is important to explore possible risks to children and continued risk to victims when considering parenting time and shared custody options. Set out below is a tool to explore these risks for children in custody disputes. These questions are designed to help identify red flags in the perpetrators. The questions in **bold** are designed to elicit indicators of "intimate terrorism" or an "abusive-controlling type of violence" (see definitions *supra* Part I). If the type of violence in a romantic relationship is considered to be the abusive-controlling type, then the risk that the batterer may emotionally, physically or sexually abuse his children increases.<sup>33</sup>

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<sup>27</sup> Catherine Ayoub et al., *Alleging Psychological Impairment of the Accuser to Defend Oneself Against a Child Abuse Allegation: A Manifestation of Wife Battering and False Accusation*, in *Assessing Child Maltreatment Reports: The Problem of False Allegations* 191 (Michael Robin ed., 1991).

<sup>28</sup> Lyungai F. Mbilinyi et al., *What Happens to Children When Their Mothers Are Battered? Reports from a Four City Anonymous Telephone Survey*, 22 *J. Fam. Violence* 309, 313 (2007).

<sup>29</sup> BANCROFT ET AL., *supra* note 11, at 41.

<sup>30</sup> *Id.* at 41-42.

<sup>31</sup> 2008 Jaffe, *supra* note 6, at 505-06.

<sup>32</sup> Brinig et al., *supra* note 14, at 275.

<sup>33</sup> 2005 Jaffe, *supra* note 6, at 82]; Johnson, *supra* note 9, at 50.

### 1. The perpetrator's history of physical abuse toward the children.

Domestic violence perpetrators have an increased statistical risk to physically abuse their children and that risk may increase after separation.<sup>34</sup>

- What is the father's approach to discipline?
- How does he react when he is angry at the children?
- Has he ever left marks or grabbed the children roughly?
- Has he ever been involved in fights (even if mutual) with older children?
- Does he justify or minimize physically abusive behaviors he has used with the children?
- Does he pressure the children to keep secrets about his behavior toward them?

### 2. The perpetrator's history of neglectful or under-involved parenting.

In some domestic violence cases, there is a history of neglect or low involvement in the perpetrator's parenting. There are a concerns about unsupervised contact if the father is unable to attend to the children's safety and health as well as emotional needs.<sup>35</sup>

- Does the father have any history of disappearing for hours, days or weeks at a time?
- **Has he ever refused to address a child's medical needs?**
- **Has he ever threatened to abandon the family without support?**
- Has he ever abandoned children from past relationships?

During assessment, detailed questions should be asked about the children and their needs that would elicit the depth of his understanding and compassion towards the children.

### 3. Perpetrator's history of sexual abuse or boundary violations with the children.

Allegations of boundary violation that do not rise to the level of sexual abuse should be explored since we know that there is in an increased risk of incest by domestic violence perpetrators.<sup>36</sup>

- Does the perpetrator respect the children's right to privacy?
- Does he expose the children to pornography or allow them access to it?
- Does he pressure the children to give him physical affection against their wishes?
- Does he engage them in inappropriate sexual conversations?

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<sup>34</sup> BANCROFT ET AL., *supra* note 11, at 198-99.

<sup>35</sup> *Id.* at 199-200.

<sup>36</sup> Nancy D. Kellogg & Shirley W. Menard, *Violence among family members of children and adolescents evaluated for sexual abuse*, 27 CHILD ABUSE & NEGLECT 1367, 1367-76 (2003); Laura McCloskey, et al., *The Effect of Systemic Family Violence on Children's Mental Health*, 66 CHILD DEV. 1239, 1239-61 (1995).

#### 4. Level of psychological cruelty toward partner or former partner and toward the children.

This is considered the single best predictor of whether the batterer will use the children as weapons against the mother.<sup>37</sup> His capacity for cruelty towards his adult victims or children is a predictor of how safe the children will be in his care.

- What have been his most emotionally hurtful acts towards the mother?
- **Does he continue to justify those acts?**
- What have been his most emotionally hurtful acts towards the children?
- **Has he ever done something that seemed designed to harm the children emotionally?**

#### 5. Level of physical danger to the partner or former partner.

The higher the physical violence toward the mother, the greater the risk he will physically abuse the children. Level of violence is an indicator of the possibility he would attempt to kill the mother, which can often involve the children.<sup>38</sup> Sexual assaults of the mother are correlated to overall dangerousness of the domestic violence perpetrator.<sup>39</sup> How severe and frequent have the assaults been?

- **Has he ever choked her?**
- Has she felt the need to obtain a restraining order?
- Has the order been violated?
- **Has he ever threatened to kill her or the children**
- **Has he ever killed or attacked pets as a terrorizing tactic?**
- Has he been sexually violent towards the mother?
- Has his violence escalated over time?
- **Has he ever assaulted her during pregnancy?**
- Has the violence escalated after separation?
- Does he have problems with violence in general?

#### 6. Level of coercive or manipulative control during the relationship.

The more severely controlling toward their partners, the more likely they are to involve the children in continued abuse of the partner. They are also more likely to have an authoritarian parenting style.<sup>40</sup>

- **Has he stopped his partner from having friends and social contacts?**
- **Does he control family finances in a coercive way?**
- **Has he chronically shown contempt for her opinions?**
- **Does he monitor her movements?**

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<sup>37</sup> Marisa L. Beeble et al., *Abusive Men's Use of Children to Control Their Partners and Ex-Partners*, 12 EUROPEAN PSYCHOLOGIST 54, 54-55 (2007).

<sup>38</sup> See generally LINDA LANGFORD ET AL., *HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995* (1999).

<sup>39</sup> Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS* at 85-89 (Jacquelyn C. Campbell ed., 2d ed. 2007).

<sup>40</sup> BANCROFT ET AL., *supra* note 11, at 206-07.

- **Is he dictatorial toward the children?**
- **Does he make extreme swings between kindness and abusiveness?**

#### **IV. Visitation & Parenting Plans:**

Due to the risk factors, a tiered approach to visitation is often recommended to allow time for the perpetrator to participate in specialized treatment programs and gradually move toward more normal contact with his children.<sup>41</sup> Example of a proposed graduation in contact:

- Visitation in supervised visitation center
- Visitation supervised in the community by a trained supervisor
- Visitation supervised by friends or relatives (if there is a flight risk)
- Visits of two to four hours without supervision
- Daylong visits without supervision
- Overnight visitation (depending on risks/type of violence/level of violence)

Evaluation of visitation arrangement and shared parenting should include answers to the following questions:<sup>42</sup>

- Are the children strengthening their connection to their mother?
- How are their trauma-related symptoms progressing?
- Is their father supporting their therapy and recovery?
- Is he supporting their relationship with their mother?
- Do the parents recognize and support the children's needs?
- Do the children feel safe, secure and supported by the parents?
- Is communication between parents direct, constructive, and focused on the children?
- Do parents separate their roles as parents from their roles as former partners?

While there is a wide range of options for custody arrangements in family court, only a few are recommended in domestic violence cases. Below you will find parenting arrangements that could be appropriate for families dealing with high conflict or violence. These are based on family violence literature with the goal of protecting children and the best interests of the child and family.<sup>43</sup>

#### **RECOMMENDED PARENTING PLANS:**

**Parallel Parenting:** In parallel parenting, each parent is involved in the children's lives but contact between parents is minimized. There is limited flexibility and they follow a highly structured and detailed schedule.<sup>44</sup> One parent may have sole legal custody or they may divide

<sup>41</sup> BANCROFT ET AL., *supra* note 11, at 214-21.

<sup>42</sup> *Id.* at 218-21; Brinig et al., *supra* note 14, at 277-78.

<sup>43</sup> See generally 2008 Jaffe, *supra* note 6; see generally 2005 Jaffe, *supra* note 6; see generally Daniel G. Saunders, *Research Based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence*, 12 J. CHILD CUSTODY 71 (2015).

<sup>44</sup> 2008 Jaffe, *supra* note 6, at 516; see generally 2005 Jaffe, *supra* note 6.

responsibility for major decisions. Exchanges often take place in a neutral, safe and comfortable setting. Parallel parenting is considered appropriate for couples who have experienced situational couple violence or separation-instigated violence but are otherwise considered “good” or “good enough” parents.<sup>45</sup>

**Supervised Exchange:** In this parenting plan, the nonviolent parent typically has sole physical and legal custody. This involves transferring the child from one parent to another using a third party. The supervision can be informal through a family member or friend or it can be with a designated professional. The court typically sets specific criteria that need to be met by the perpetrator in order to graduate to unsupervised exchanges. This is appropriate for couples who have engaged in situational couple violence, violent resistance or separation-instigated violence.<sup>46</sup>

**Supervised Access:** This is also known as supervised visitation. The nonviolent parent has sole physical and legal custody. Concerns about the perpetrator’s potential for emotional or physical abuse of the children means the visits usually only last for a few hours. This is appropriate when the perpetrator has been recently or is currently violent and when the relationship is the abusive/controlling type. It is also appropriate if the child has been traumatized by the domestic violence or abuse but wants contact with the parent.<sup>47</sup>

**Suspended Contact:** In this arrangement, all contact between the child and the parent is suspended for the short or long term. Contact may resume after a specific period of time with appropriate treatment compliance and other services in place. This plan is typically used with a perpetrator of the abusive/controlling type who shows no remorse or willingness to change. The perpetrator will often refuse to comply with court orders and may make threats to the child and the victim.<sup>48</sup>

## V. Assessing for Change and Services

Interventions and services available to batterers are often court mandated with the standards of care varying widely.<sup>49</sup> A group intervention model is recommended with the duration of treatment ranging from twelve to fifty-two weeks. The different treatment models used include feminist psychoeducational men’s groups, cognitive-behavioral men’s groups, anger-management groups and, occasionally, couples groups.<sup>50</sup> A meta-analysis conducted in 2004 found that a woman is five percent less likely to be re-assaulted by her partner who

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<sup>45</sup> 2008 Jaffe, *supra* note 6, at 512.

<sup>46</sup> *Id.* at 513; Saunders, *supra* note 43, at 85; Brinig et al., *supra* note 16, at 274-75.

<sup>47</sup> 2008 Jaffe, *supra* note 6, at 514; Brinig et al., *supra* note 16, at 276.

<sup>48</sup> 2008 Jaffe, *supra* note 6, at 515; 2009 Jaffe, *supra* note 6, at 173; Saunders, *supra* note 43, at 84-85.

<sup>49</sup> See generally Julia C. Babcock et al., *Does batterers’ treatment work? A meta-analytic review of domestic violence treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004).

<sup>50</sup> *Id.* at 1024-27.

completed a batterers' program then by a partner who was only arrested and not mandated for treatment.<sup>51</sup>

It is difficult to assess change in a batterer's parenting without also addressing the underlying behaviors and attitudes of his pattern of abusing partners. Change cannot be measured by a recent period with no physical violence since studies show that it is common for batterers to go twelve months or more without violent incident.<sup>52</sup> In an assessment or evaluation setting, batterers often have an understanding of the types of language that would most likely impress professionals.<sup>53</sup> Meaningful change in batterers is a long and difficult process; Bancroft, Ritchie & Silverman have found that those batterers who *do* change attribute it to hard, painful self-examination and a lifelong commitment to reform.<sup>54</sup> The authors have identified twelve steps they consider critical for a batterer to become a responsible and safe parent.<sup>55</sup> In addition to the twelve steps, the authors have also described specific indicators that can help monitor change in the batterer's orientation towards his children:

- Has the batterer exhibited a number of years (vs. months) of consistently improved parenting behavior?
- Are there any indications that the improvement of parenting behaviors are actually motivated by a desire to control or punish his former partner?
- Has he participated in parent education classes and taken other steps to make himself a more informed parent?
- Has he accepted complete responsibility for the previous problems in his parenting and developed empathy around the effects he has had on his children?

Many victims of domestic violence can suffer from significant mental health issues that have the potential to impact their parenting capacity. Emotional problems in victims of domestic violence are common and include anxiety, depression, low self-esteem, substance abuse and posttraumatic stress symptoms.<sup>56</sup> Of course, the impact on victims can vary widely based on an individual's prior trauma history, her social supports and other protective factors. Outcomes for victims also vary based on the type of psychological and/or physical violence experienced.<sup>57</sup>

The stress of domestic violence inherently creates stress in parenting and in the family system. This stress can impact a mother's physical and emotional capacity to meet the needs of

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<sup>51</sup> *Id.* at 1044.

<sup>52</sup> Scott L. Feld & Murray A. Straus, *Escalating and desisting from wife assault in marriage*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* (Murray A. Straus & Richard J. Gelles eds., 1990).

<sup>53</sup> 2008 Jaffe, *supra* note 6, at 506.

<sup>54</sup> *Supra* note 11, at 229-31.

<sup>55</sup> *Id.* at 225-28.

<sup>56</sup> See generally Honore M. Hughes et al., *Profiles of Distress in Sheltered Battered Women: Implications for Intervention*, 26 *VIOLENCE AND VICTIMS* 445, (2011); see also BANCROFT ET AL., *supra* note 11, at 140-41.

<sup>57</sup> Hughes, *supra* note 51, at 445-46; BANCROFT ET AL., *supra* note 11, at 144-47; 2008 Jaffe, *supra* note 6, at 503.

her children.<sup>58</sup> Additionally, the mother's trauma response or depression symptoms may cause her level of functioning to be inconsistent, impacting the children's ability to form a secure attachment with their mother.<sup>59</sup> Group therapy and individual therapy are recommended for victims of domestic violence and should be provided by a clinician trained in working with this population.<sup>60</sup> Additionally, family therapy (not including batterer) is advised to address any damage to the mother-child relationship including any issues due to the mother having her parenting authority undermined.

## VI. Conclusion

Family Courts have come a long way in addressing the challenges of domestic violence and custody matters, however a gap often exists between the ideal plan for a family and the resources available in the community. As discussed in this paper, it is important to differentiate among the types of domestic violence, the parenting profile of the batterer and the risks to children when developing a parenting plan. The assessment of all of the above factors is challenging without support from, and collaboration with, clinicians and community services. Once assessed and the ideal parenting plan is created, the next challenge is identifying the proper resources and levels of oversight needed to make the parenting plan a success.

In sum, parenting plans should be structured to support the safety of the child and victim, the treatment and autonomy of the victim, and to encourage the accountability and recovery of the abuser.<sup>61</sup> Court orders would ideally be modeled for each type of parenting plan with corresponding treatment recommendations for services and protocols developed for coordinating and monitoring those services.<sup>62</sup>

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<sup>58</sup> Alytia A. Levendosky et al., *Parenting in Battered Women: The Effects of Domestic Violence of Women and Their Children*, 16 J. FAM. VIOLENCE 171, 172-73 (2001).

<sup>59</sup> *Id.* at 184-87; Hughes, *supra* note 52, at 457-58.

<sup>60</sup> Hughes, *supra* note 52, at 457-58; Levendosky et al., *supra* note 53, at 172-73; BANCROFT ET AL., *supra* note 11, at 239-45.

<sup>61</sup> See generally Brinig et al., *supra* note 16.

<sup>62</sup> 2008 Jaffe, *supra* note 6, at 519.