

The Custody Courts' Critical Need for Expertise in Domestic Violence

by Barry Goldstein, J.D.*

Editor's Note: For the past few decades, domestic violence professionals and advocates, authors, and awakened litigants have been reporting unjust and improper practices by legal agents working in the divorce/child custody courts of our nation. At this moment, more and more books, articles, reports, and other resources are accessible to battered mothers entering the court system, allowing them to be forewarned and therefore better prepared to fight for justice and protection for themselves and their children. Based on a substantial body of research, we now know that causing harm to a mother invariably causes harm to her children. Yet despite this expanding knowledge base, perfectly fit mothers continue to lose custody of their children to battering and/or child-abusing ex-partners in courtrooms across the country. In this article, author and advocate Barry Goldstein, who has handled and testified in such cases, breaks these complex problems down into their component parts and explains how they fit together to create this horrifying phenomenon. In addition, he calls for massive change in the attitudes, processes, and practices by which the courts end up re-victimizing the same battered women and their children whom they are charged with protecting.

INTRODUCTION

Over the past several decades, custody courts have frequently been criticized for their failure to adequately protect children from the abusive behaviors of danger-

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ous fathers. In response to such criticism, instead of changing their thinking and their recommendations, court professionals all too often punish battered mothers who continue to insist on their need for protection, despite the court's contrary findings. These problems

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are due in part to the fact that, when court professionals evaluate cases involving domestic violence and/or child abuse allegations against a biological father, they often rely not on the fact patterns characterizing these cases but on the common myths and misperceptions about

domestic violence and abuse. Such faulty reliance, in turn, leads them to draw the wrong conclusions about what is actually occurring in these cases—often with disastrous effects for the mothers and children involved.

Current scientific research contained in books such as *The Batterer as Parent*,¹ *Domestic Violence, Abuse and Child Custody*,² and in many studies, including the new Department of Justice study led by Dr. Daniel Saunders of the University of Michigan,³ supports the mothers' complaints. So does a finding that at least 58,000 children are sent for custody and visitation every year with dangerous abusers.⁴ Even more frightening is a review of news articles that show hundreds of children were murdered by abusive fathers involved in contested custody cases in the last few years, often with the unintended assistance of the custody courts.⁵

Judges are unlikely to make appropriate rulings on domestic violence custody cases when they make such decisions without a fundamental knowledge of domestic violence. Due to this, courts began to rely on mental health professionals for expertise at a time before any domestic violence research was available, and many people assumed abuse was caused by mental illness, substance abuse, or the provocative actions of the victims. It is time for state

¹ Lundy Bancroft and Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).

² Mo Therese Hannah and Barry Goldstein, *Domestic Violence, Abuse and Child Custody: Legal Strategies and Policy Issues* (2010).

³ This study will be on the Department of Justice website. The author is familiar with the research based upon the presentation of Dr. Saunders and his colleagues at the 2010 NCADV Conference in Anaheim.

⁴ Joy Silberg, "How Many Children Are Court-Ordered Into Unsupervised Contact With an Abusive Parent After Divorce (August 31, 2010), available at <http://americanmotherspoliticalparty.org/ampp-article-library-family-court-custody-abuse-dv/1-research-articles-family-court-bias-custody-abuse-battered-moms/41-how-many-children-are-court-ordered-into-unsupervised-contact-with-an-abusive-parent-after-divorce>.

⁵ Dastardly Dads BlogSpot, "175 Killer Dads: Fathers Who Ended Their Children's Lives in Situations Involving Child Custody, Visitation, and/or Child Support" (USA) (February 25, 2011), available at <http://dastardlydads.blogspot.com/2011/02/175-killer-dads-fathers-who-ended-their.html>. This information is regularly updated.

court administrative judges to answer a fundamental question: How can it possibly make sense for courts to respond to domestic violence custody cases without expertise in lethality assessment, domestic violence, gender bias, and the effects of domestic violence on children?

LETHALITY ASSESSMENT

Safety Concerns

Every state has laws requiring consideration of domestic violence by courts that handle custody and visitation cases. The most important priority to be considered is the safety of the children and the abuser's partner. Some court professionals have minimized domestic violence because the person at immediate risk is not the child; however, besides the established connection between domestic violence and child abuse, the murder or serious injury of a mother profoundly harms the child. The best way to assure safety is through a lethality assessment, but this is rarely part of an evaluation or investigation of domestic violence custody cases.

Domestic violence experts know that while we can never be 100% certain that an abuser will not end up harming or even killing a partner or children, certain behaviors are associated with a significantly increased risk of lethality. Among these signs of lethality are choking, strangling, or grabbing the victim's throat; assaulting a woman while pregnant; rape or attempted rape; threatening murder, suicide, or kidnapping; killing or hurting pets; the belief that a woman has no right to leave her partner; access to guns; substance abuse; and seeking custody of children despite having little or no involvement with them while the relationship was intact.

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Custody and Visitation Decisions

Assessment of these vital signs is critical to women and children's safety when making custody and visitation determinations, but when courts rely on evaluators with inadequate training in domestic violence, judges are forced to make decisions without the necessary information. The problem is that with few exceptions, evaluators do not adequately consider these lethality signs. Even when evaluators hear reports from the mother or her children about such abusive behaviors, they typically minimize their significance. Further, while unable to provide courts with this critical information, evaluators instead focus on far less important issues—for example, how “friendly” the mother is toward the father's relationship with the children—thus minimizing the significance of the domestic violence allegations. Often, the emphasis on these less important issues ends up favoring abusive fathers.

One obstacle to providing safety to children and their mother is that the notion of a father deliberately and maliciously harming his wife and children is so repugnant that the average person has a hard time believing it happens, much less at pandemic rates. Even court professionals adhere to the common misperception that a man who is well-groomed, well-spoken, and well-paid could not possibly be someone who would endanger his own family. Often, in reports about one or another heinous domestic violence crime (including murder-suicides, the murder of children while they are visiting their non-custodial father, etc.), the reporter has collected the shocked comments of friends and neighbors, who say things like, “He was a model father; you would always see him playing outside with his kids,” or “They seemed so much in love”—all meant to suggest that the alleged criminal “couldn’t possibly be an abuser.”

In most cases, when courts deny or minimize a mother’s domestic violence allegations while retaliating against her for believing the father is dangerous despite all evidence to the contrary, the court makes its decision without having obtained a lethality assessment. The court then demands that she “get over it” without any meaningful consideration of the possibility that the father is, in fact, dangerous. In some cases, the courts have refused to hear evidence from a domestic violence expert, believing either that there is no need for such an expert or that the expert would give a biased opinion—i.e., in favor of the mother’s allegations.

RECOGNIZING DOMESTIC VIOLENCE

Relying on the Wrong Information

Judge Mike Brigner has described providing trainings on domestic violence to other judges. He reports that the question he most often hears is about what to do when women come to court and lie about being abused. When asked why they believe the mother is lying, the response is that the mother returned to her abuser, sought a protective order and failed to follow through, and does not have police or medical records documenting his abuse.⁶ We know that battered women often do all of these things for safety and other good reasons. Another common mistake of court professionals is to observe children showing no fear while interacting with their father, so they then conclude that the father could not possibly be abusive. The children understand that their father would not hurt them in front of a witness, particularly someone he is trying to impress. Court professionals without sufficient domestic violence training routinely discredit abuse allegations based on information like this that is not probative of the issue.

⁶ Mike Brigna, “Why Do Judges Do That?” In M. T. Hannah & B. Goldstein, *supra*, note 2 (pp. 13-1–13-2.)

Following Patterns of Behavior

At the same time, the court professionals don't know how to detect a pattern of controlling and coercive behavior. Often, they look only for physical assaults. Judges often describe how difficult it is to make decisions based on the he-said-she-said evidence available. In most of these cases, there is a lot of corroborating evidence that could make the case easy to understand, but the court professionals never use it because they don't understand its significance.

Did the father engage in verbal, psychological, and financial abuse? Did he isolate the mother from family and friends? Did he check her odometer to make sure she drove only to and from work or monitor her in other ways? Did he make false allegations that she cheated on him? Did the father maintain control of the family finances, require or forbid the mother from working outside the home? Did he threaten to go after custody if she dared leave him? Is he seeking custody after having little to do with the children during the relationship? Abusers do not engage in all of these controlling behaviors, but if these or similar behaviors are included in his pattern of coercive tactics, a professional will recognize this as domestic violence—that is, if the professional has the eyes to see.

The father demonstrated his practice of using coercive tactics to get his way, but the unqualified court professionals didn't understand the significance of his behavior and sent the child to live with him.

In a notorious case in Dutchess County, New York, the father admitted telling his wife that he brought her here from Russia, so she had no right to leave him. He said she would never get away from him.⁷ The father essentially told the court what his motivation was for seeking custody, but the court ignored the evidence because it wasn't about a physical assault.

In another case, the mother taped a phone conversation with her abusive husband. The court professionals focused on the fact every third word out of the father's mouth was a vile curse, but the substance of his conversation was even more revealing. The entire conversation was about how he would punish and hurt (although not physically) the mother if she didn't agree to give him custody.⁸ There was no discussion on his part about what was best for the baby, much less any compromise or give and take. The father demonstrated his practice of using coercive tactics to get his way, but the unqualified court professionals didn't understand the significance of his behavior and sent the child to live with him.

⁷ Barry Goldstein, "Recognizing and Overcoming Abusers' Legal Tactics." In M. T. Hannah & B. Goldstein, *supra*, note 2 (pp.18-1–18-32).

⁸ Barry Goldstein, "Recognizing and Overcoming Abusers' Legal Tactics." In M. T. Hannah & B. Goldstein, *supra* (p.18-3).

One of the biggest obstacles to recognizing domestic violence is the myth that women frequently make false allegations of abuse. They actually make deliberately false allegations between one and two percent of the time.⁹ The problem is compounded because many court professionals have been taught to view contested custody as “high conflict” cases, but a large majority is, in fact, domestic violence cases.¹⁰ Confirmation bias and widespread use of flawed practices lead many judges to miss valid allegations of abuse.

GENDER BIAS

Unconscious Bias

Lynn Hecht Schafran wrote an important article that helps illustrate how gender bias plays out in custody cases. She tells the story of a new psychologist appointed to evaluate a young family. When she visits the father’s home, it is a complete mess, with no food in the refrigerator. She writes that the father lives in a typical bachelor apartment. The mother’s apartment is somewhat messy, but not as bad as the father’s. There is food in the refrigerator, but not as much as would be ideal. The evaluator writes the mother lives in a messy apartment with inadequate food. Because she was still inexperienced, this psychologist had a supervisor who pointed out to the evaluator the gender bias in her thinking. The evaluator quickly corrected her report.¹¹ This article is particularly helpful because it demonstrates how someone, even a female, as in this case, can engage in gender bias without realizing it.

Over 40 state court systems have sponsored gender bias committees, virtually all of which discovered widespread gender bias against women, especially female litigants in custody cases. Common examples of gender bias include holding women to higher standards of proof, affording women less credibility, and blaming women for the actions of their abuser. The mother is blamed for trying to protect her children by limiting the father’s contact, instead of the father being blamed for the intimidating behaviors that caused the mother to fear him.¹²

In two notorious cases in Dutchess County, New York, over 20 different judges failed to object to the use of a certainty standard against the mother and the normal probability standard for the father.¹³ A first year law student

⁹ Stephanie J. Dallams & Joy L. Silberg, “Myths That Place Children at Risk During Custody Litigation,” 9(3) *Sexual Assault Rep.* 33 (Jan/Feb.2006).

¹⁰ Peter G. Jaffe, Claire V. Crooks, & Samantha E. Poisson, “Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes.” 54(4) *J. & Fam. Ct. J.* 57 (Fall 2003).

¹¹ Lynn Hecht Schafran, “Evaluating the Evaluators: Problems With Outside Neutrals,” 20(6) *GPSOLO Mag.* (2003) available at http://www.legalmomentum.org/assets/pdfs/evaluating_the_evaluators.pdf.

¹² Thomas E. Hornsby, “Do Judges Adequately Address the Causes and Impact of Violence in Children’s Lives in Deciding Contested Child Custody Cases?” In M. T. Hannah & B. Goldstein, *supra* (pp. 7-1-7-32).

¹³ M. T. Hannah & B. Goldstein, *supra*, note 7.

would understand that the case ought to be reversed due to this fundamental violation of due process and equal protection, but in a system that so routinely imposes greater obstacles for women, none of the judges seemed to notice.

Primary Attachment

Another common example of gender bias is when custody courts ignore or minimize the importance of primary attachment. The parent who provides most of the child care during the first few years of a child's life is the primary attachment figure. Children who are separated from their primary attachment figure are more likely to suffer depression and low self-esteem and commit suicide when older.¹⁴ We repeatedly see courts give custody to fathers based on the prediction that the father was more likely to promote the relationship with the mother. In most of these cases, once the father gains control, he does the opposite, but courts that were aggressive in forcing mothers to promote relationships with the father often do nothing when the mother's relationship is interfered with. Gender bias is difficult to prevent because those engaging in it are unaware they are doing so. Nevertheless, despite repeated findings of gender bias, custody courts continue to rely on professionals biased against women and rarely reverse decisions because of gender bias.

EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN

Every state requires custody courts to consider domestic violence when deciding custody and visitation because of research demonstrating the harm to children of witnessing domestic violence. The witnessing can include seeing or hearing his abuse, seeing the mother's bruises, or feeling her fear. Children can be seriously harmed even when the abuse is not physical. Children have developmental goals in each age category, and witnessing domestic violence prevents children from reaching these goals. In very young children, the abuse can affect the hardwiring in the baby's brain, resulting in life-long difficulties. Furthermore, children who witness domestic violence are more likely to engage in a variety of harmful behaviors when they are older that can prevent them from ever reaching their potential.¹⁵

Many evaluators and other experts relied on by the custody courts have had little more than a few hours' worth of formal education or training in domestic violence. Even those who claim knowledge of domestic violence often don't understand its dynamics, as they demonstrate in child custody litigation. We repeatedly hear of evaluators coming up with findings that are contrary to what is well-known about the dynamics of domestic violence; for example, that

¹⁴ S. Goldberg, *Attachment Part Three: Attachment Across the Life Span* (Nov. 2004), available at <http://www.aboutkidshealth.ca/news/Attachment-Part-Three-Attachment-across-the-life-span.aspx?articleID=7966&categoryID=news-type>.

¹⁵ Claire V. Crooks, Peter G. Jaffe, & Nicholas Bala, "Factoring in the Effects of Children's Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans." In M. T. Hannah & B. Goldstein, *supra* (pp. 22-1-22-25).

Genuine domestic violence experts understand that abuse is based upon the abuser's belief system, which is unlikely to change simply because the relationship is over.

the abuser assaulted his partner only once or twice and then stopped—therefore, he couldn't be a (real) abuser—or that the abuser's behavior is no longer harmful, since the couple has separated and he hasn't hit her

since. Genuine domestic violence experts understand that abuse is based upon the abuser's belief system, which is unlikely to change simply because the relationship is over. If he is given custody or unsupervised visitation, the children are likely to witness more domestic violence when he mistreats his future partners. Professionals who are unfamiliar with the extent of harm caused by domestic violence to children tend to focus on less important issues, thus placing children at risk.

CONCLUSION

The custody court system has no chance to handle domestic violence cases properly and protect the children in these cases as long as the fundamental information contained in this article is not incorporated into the evaluation of child custody/visitation cases involving allegations of abuse. At the same time, most domestic violence advocates are familiar with this information and could provide it to the court if asked. Therefore, domestic violence advocates should be trained to testify as expert witnesses to assist the courts in making decisions based on the vital information that they need. Certainly, courts must refuse to permit testimony from mental health professionals who lack an understanding of the research discussed in this article; at the very least, those giving testimony should be required to consult with a domestic violence advocate or other expert as part of the investigation. Judges should never refuse to hear a domestic violence expert in cases where domestic violence is alleged.

Because so much research is now available for custody courts hearing domestic violence cases, deciding cases without considering this information might very well rise to the level of malpractice. How could it possibly be right to send a child to live with an alleged abuser without considering the significance of allegations that he assaulted his partner when she was pregnant, raped her, put his hands around her throat, or engaged in other behaviors that the true experts on domestic violence know to be associated with lethality?



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