

Second Edition



# A Judge's Guide

Making Child-Centered Decisions in Custody Cases



ABA Child Custody  
and Adoption  
Pro Bono Project



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ABA Center on Children  
and the Law

**A JUDGE'S GUIDE:  
MAKING CHILD-CENTERED DECISIONS  
IN CUSTODY CASES  
Second Edition**

**American Bar Association  
Child Custody and Adoption Pro Bono Project**  
*A Project of the Standing Committee on Pro Bono and Public Service  
and the Family Law Section*

**American Bar Association  
Center on Children and the Law**  
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# Introduction

Child custody and visitation disputes are among the most difficult for judges to decide. These disputes entail complex legal, social, cultural, economic, mental health, and related issues. They require judges to predict likely future behavior and outcomes, rely increasingly on competing expert testimony, and ultimately depend upon a broad, indeterminate standard of the “best interests of the child.” This best interests standard demands that courts decide cases in a way that ensures the well-being of children. For guidance, judges often have little more to consider than factors listed in the relevant state statute.

Case law on the best interests of the child is not always instructive. While the child’s best interests form the basis of most decisions, trial courts often recite the factors without making specific findings concerning each element. In many states, an appellate court opinion on best interests provides minimal guidance, because the lower court decision is only reversible if there was an abuse of discretion. To a child, therefore, the need for the trial court “to get it right” is all the more important, since reversal on appeal is unlikely.

We hope that this book will facilitate your decision making in a child’s best interests with information on the following topics:

- Managing the contested child custody case.
  - Representation for the child in complex custody cases.
  - Understanding child and youth development to minimize the negative impact of divorce and separation on children and their families.
  - Evaluating the parent-child relationship, parenting impairments, and parenting skills.
  - Determining the types of mental health, home study, and other evaluations needed when making child custody decisions.
  - Selecting appropriate professionals to conduct assessments.
-

- Considering complex issues such as supervised visitation, relocation, alleged domestic violence or sexual abuse, third party claims, and joint custody.

Although this book only addresses child custody decision making in civil child custody cases, we anticipate that it will be useful to you when you preside over other types of cases in which the best interests of the child standard applies, such as dependency, adoption, and guardianship cases. This guide will also benefit children's attorneys and guardians ad litem who make recommendations to courts based on the best interests standards.

## **Managing the Child Custody Case**

**Y**ou may wonder why this chapter is the first in this book. Why not begin with a historical overview of child custody decision making? Why not start with a discussion of the various factors listed in state statutes or case law that influence judicial decision making in child custody cases? The judges with whom we spoke when developing the first edition of this guide stated that one of the biggest challenges in presiding over child custody cases is creating a court environment conducive to gathering evidence and making thoughtful decisions. As these judges noted, high conflict custody cases usually make their way into the courtroom, while other cases involving more amicable parties settle. In order to render decisions in a child's best interest, these judges cited facilitation of a civil and respectful atmosphere in the courtroom as critical in child custody cases. Such facilitation is often made difficult by the inherent incongruity of making decisions regarding complex family relationships in an adversarial setting.

In this chapter, we will explore the following:

- The Goals of Effective Case Management
- Creating an Atmosphere of Civility and Respect
  - ◆ Mediation Parallels and Listening Skills
  - ◆ Body Language
  - ◆ Addressing Bias
  - ◆ Addressing Attorney Behavior
- Representing the Parties, Including the Child
  - ◆ Importance of Attorneys for All Parties

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- ◆ Appointing Competent Counsel for the Child
- ◆ The Pro Se Litigant
- Expeditious Decision Making
  - ◆ Court Improvement
  - ◆ A Child's Concept of Time
  - ◆ Docket Control and Scheduling Orders
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  - ◆ The Appellate Process
  - ◆ Court Facilities
- Other Innovative Approaches
  - ◆ Parent Education Programs and Parenting Coordination
  - ◆ Mediation
  - ◆ Use of Special Masters
  - ◆ Parenting Plans
  - ◆ Unified Family Courts

“Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room and that in the end depends primarily on the judge.” *Brown v. Walter*, 62 F.2d 798, 800 (2d Cir. 1933), cited in NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE JUDICIAL ADMINISTRATION DIVISION OF THE AMERICAN BAR ASSOCIATION AND THE NATIONAL JUDICIAL COLLEGE, *THE JUDGE’S BOOK 13* (2<sup>nd</sup> ed. 1994).

## The Goals of Effective Case Management

In managing the child custody case, you must minimize the hostility between combative parents to safeguard the child. Research findings indicate that children exposed to parental hostility, during divorce or separation, are more likely to exhibit negative behaviors. An Idaho Bench/Bar Committee addressing the impact of high-conflict divorce on children concluded:

The judicial process, adversarial and conflictual in nature, should not increase the conflict between parents and cause additional harm to children. There is a significant body of evidence to suggest that the more protracted the conflict in the judicial process, the greater the harm to children.<sup>1</sup>

The manner in which you approach cases affects how the parties view the judicial system and how they participate in their cases. The National Conference of State Trial Judges encourages judges to achieve the following case management goals: 1) fair treatment of all litigants; 2) timely disposition consistent with the case; 3) enhancement of the litigation process; and 4) public confidence in the court.<sup>2</sup>

More specific to proceedings involving family relationships, the ABA STANDARDS RELATING TO TRIAL COURTS provide that judges have the “affirmative responsibility” to ensure their decisions are just and based on the facts.<sup>3</sup> Furthermore, the court should consider the interests of children and other involved individuals, as well as “the public interest in the quality and stability of family relationships.”<sup>4</sup> To facilitate these aims, Section 2.71 of the STANDARDS mandates *inter alia* that judges:

- Appoint lawyers for indigent persons to avoid a miscarriage of justice in cases involving “potentially serious consequences,” and when appropriate, for children.<sup>5</sup>
- Initiate an independent investigation of the facts of a case when there is reason to believe that the litigants will be presenting inadequate evidence or the child’s interests warrant such an investigation.
- Encourage litigants “so far as reasonably possible” to arrive at a “conciliatory and mutually respectful attitude” regarding case resolution.



- If it appears that family discord can be ameliorated, refer the parties to mediation or counseling prior to entering a disposition in a case.<sup>6</sup>

The commentary to Section 2.71 notes that, where the interests of a child are affected by the proceeding, judges have the duty to protect a child's well-being since a child cannot usually do so for him or herself.<sup>7</sup> The court also should "assure that legal changes in [a family relationship] are made upon sufficient grounds and that consequent social relationships between the persons involved are as stable and positive as practicable."<sup>8</sup> Prior to deciding a child custody case, the court should consider the results of an investigation or evaluation performed by competent court personnel or by staff of a cooperating social services agency.<sup>9</sup>

## Creating an Atmosphere of Civility and Respect

Judges presiding over child custody cases must be patient, empathetic, and firm. Parties, and even their attorneys, are often anxious, demanding, and prone to angry outbursts. These tensions often erupt in the courtroom and it is the judge's job to keep these situations under control. Nancy Zalusky Berg, a family law practitioner, asserts:

I have been told in the past that there are no more difficult clients, or, one might add, lawyers, than those involved in divorce proceedings. The generally temporary insanity attributable to the divorce litigants should be considered contagious since the lawyers and judges involved with these cases so frequently seem to become infected. Nice people behave very badly during a divorce. But then nice people will often behave very badly whenever they find themselves threatened in very basic ways.<sup>10</sup>

How can you effectively deal with attorneys and parties so as to obtain the necessary facts to make a sound judgment? Although Ms. Berg's comments are addressed to lawyers, they apply equally to judges. She states:

You must become psychologically minded. The first step is to become aware of the human being before you. You must become skilled in empathy. The best way to accomplish that is to learn to communicate and listen effectively.<sup>11</sup>

## Mediation Parallels and Listening Skills

To enhance listening skills, mediation techniques can be adapted for use by judges. Valerie McNaughton, a judge in Colorado, notes that judges often need to refine

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their listening skills to more effectively communicate with those who appear before them and to ultimately reach the fairest decision.

Mediation teaches us to listen, since that is the fastest way to resolve conflict. If you don't know what the issue is, you may solve the wrong problem. A courtroom complicates the task by providing an intimidating setting for discussion of very personal issues. Consider a defendant's perspective. She is facing what may be a major issue in her life: a criminal charge, a divorce, or a child custody matter. Her partner in this conversation is an authority figure clad in a black robe sitting behind an intimidating bench above her. There are bailiffs, marshals, and neighbors sitting and standing in the all-too-public room. The black-robed figure, abruptly banging his desk with a wooden hammer, is asking her personal questions and asking her to make life-changing decisions. Is it any wonder she is not communicating effectively?<sup>12</sup>

Judge McNaughton adds that judges should learn to listen in a manner that will result in better understanding.<sup>13</sup> She offers some suggestions on how to be "active" listeners:

- Resist the impulse to control the pace or content of comments made in the formal courtroom setting.
- Resist the urge to interpret what parties say as a challenge to your authority.
- Ask for clarification of any remarks made that you are not sure you understand.
- Neutrally (nonjudgmentally) rephrase parties' statements to test and demonstrate your understanding.
- Give the parties an opportunity to talk about their underlying concerns and to put themselves in the other party's shoes.<sup>14</sup>

Other judges offer recommendations for managing hostile parties. Judge Isabella Grant, a retired judge experienced in domestic relations cases, emphasizes the importance of trying to get parties to understand how their hostility hurts their children and how they are going to have to cooperate to help their children develop.<sup>15</sup> From her extensive work presiding over child custody cases, Judge Kathleen O'Ferrall Friedman, a retired judge in Baltimore, also notes how parental hostility is extremely harmful to children and should not be ignored. She relates how she heard one boy wish that his parents loved him as much as they hated

each other. She will not allow hostility in the courtroom or in her chambers, and makes it clear the parties are to be civil to one another in her presence. Recognizing that she is not a psychologist or social worker, she also attempts, within the amount of time she has allotted for a case, to find out why a parent is hostile and to address it.<sup>16</sup>

Even employing some of these techniques, there will be occasions in which you will be unable to prevent an angry outburst in the courtroom. The following approaches may help to lessen the disruption and apprise the parties of appropriate courtroom conduct:

- Display patience and objectivity.
- Call a recess or a brief continuance to allow the parties to “cool” down.
- Lay down specific rules for conduct, including issuing warnings to potential contemptors. A judge could state, “I’m sorry. What did you say? I didn’t hear that clearly.” This brief interlude may allow the disruptive individual to calm down and at that same time establish proof of an intentional act if the person repeats the improper statement.<sup>17</sup>
- Threaten a contempt order keeping in mind “that litigants and spectators are caught up in the emotion of the case . . . [and that] tension, frustration, and fear could well control their senses.”<sup>18</sup>
- If a child in a case is the one who is causing the disruption, the contempt power should not be used against him or her. Allow a trusted adult or mental health professional working with the child to intervene and calm the child.

### **Body Language**

Body language plays an important role in courtroom management. Communication experts have found that nonverbal communication has four times the impact of oral communication.<sup>19</sup> In *THE JUDGE’S BOOK*, the National Conference of State Trial Judges states that “[a] judge may . . . unconsciously [convey] powerful negative messages to everyone in the courtroom solely through posture, tone of voice, and quality of attention to the speaker.”<sup>20</sup> For example, a judge who does not make eye contact with the parties, counsel, or witnesses, or appears to be doing paperwork while on the bench, sends a message of disinterest – your case is not important to the court. The judge also should “not engage in body language that inappropriately discloses [his or her] feelings or conveys a belief as to the weight of the evidence.”<sup>21</sup> Judges should be cognizant that their

facial expressions and even the nodding of their heads can have an impact on the parties' perceptions of judicial fairness.<sup>22</sup>

### Addressing Bias

Judges must pay special attention to potential biases while hearing and deciding child custody cases. If the parties feel a judge is biased against them because of their race, gender, socioeconomic status, disability, sexual orientation, or other status,<sup>23</sup> they will feel disempowered and have little faith that justice will be done in their cases. If the parties feel that their positions have been thoughtfully considered by the court, even if the court rules against them, conflict is more likely to be diminished and court orders honored. Children benefit in the long run. In addition, bias-free proceedings enhance the likelihood that children will find themselves in the care of the most appropriate caretakers.

“Frankly, to recognize the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect.” JUDGE JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 414 (1949), cited in THE JUDGE’S BOOK at 132.

Canon 2 of the ABA MODEL CODE OF JUDICIAL CONDUCT mandates that “. . . [a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”<sup>24</sup> This provision means that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.”<sup>25</sup> The judge’s duty also extends to lawyers in the courtroom as “[a] judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”<sup>26</sup>

You should consider participating in educational programs designed to address the influence of bias on judicial decision making. Judges who have experienced “diversity training” relate that it helped them develop a greater self-awareness of how their values and biases may influence their decision making. In commenting on a full-day training on cultural awareness for judges in Cook County, Illinois, Associate Judge Samuel J. Betar, III, reported that the participants were shown slides of people and asked to state their occupations. Although he did not believe himself to be biased, Judge Betar found that “[the] training demonstrates . . . how subconsciously you can draw inferences about people from their appearances [and] this insight alone made the training worthwhile.”<sup>27</sup> Likewise, Judge

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Elizabeth Loreda Rivera discovered the training “to be a very positive experience.”<sup>28</sup> She concluded:

Because of my background I would tend to think that I would be very aware of diversity issues. However, the dialogue brought to light that as judges we don’t think about diversity issues as much as we should. We all think in stereotypes on occasion. We all have some innate bias.<sup>29</sup>

THE JUDGE’S BOOK is worth examining for its chapter on race and gender fairness, including its section on custody and visitation. It provides advice on how you can avoid discriminatory behavior in the courtroom, as well as examples of how judicial bias can be inappropriately conveyed. Most importantly, it emphasizes that, if judges are to diminish bias in decision making in child custody cases, they must be careful not to allow stereotypes, myths, and other misconceptions influence their evaluation of potential caretakers for children. For example, THE JUDGE’S BOOK states:

Despite the elimination of the maternal preference doctrine, some judges have great difficulty in awarding fathers custody, believing that it is the nature and role of women alone to be nurturers and to care for children. A Minnesota judge wrote on [a] task force survey, “I believe that God has given women a psychological makeup that is better suited to caring for small children. Men are usually more objective and not as emotional.” An Iowa judge said he would not award custody to a “househusband” father because he would be a terrible role model for his son. With respect to visitation decisions, some judges are reluctant to give fathers overnight visitation with infants, believing that men cannot care for babies.

In contrast to these attitudes, other judges, apparently determined not to appear biased against men, award fathers custody on little more than a showing of interest in post-divorce parenting. Neither of these approaches is acceptable. Fathers and mothers should be evaluated for custody on the basis of their individual parenting history and skills.<sup>30</sup>

The book goes on to address unjustified biases against women working outside the home, how ignoring evidence of domestic violence demonstrates gender bias, and bias and its impact on child sexual abuse cases.

THE JUDGE’S BOOK also gives explicit advice on how to avoid discriminatory behavior in the courtroom, including the following:

## MANAGING THE CHILD CUSTODY CASE

- Use consistent language “in forms of address and treatment to avoid the impression that one person is being favored over another, and to prevent denigration of one person’s status as compared to another’s.”
- Avoid comments on women’s personal appearance.
- Refrain from “[h]ostile remarks, slurs, and ‘jokes’ that reflect race and gender bias” as these are “absolutely impermissible.”<sup>31</sup>

In addition to being cognizant of your own nonverbal behavior, you should also be attuned to cultural differences in court participants’ nonverbal communication. Attention to cultural differences is especially important in assessing the credibility of parties and witnesses. For example, as noted in *THE JUDGE’S BOOK*, judges raised in the Western European culture tend to believe that an individual who is telling the truth will stand up and look a judge straight in the eye. By contrast, such behavior is considered disrespectful in some Native American and Asian cultures, and the more appropriate response in these cultures is to look down and avoid a direct gaze. If a judge is not familiar with such cultural differences, he may unfairly judge a witness or defendant as untrustworthy. It is important to become educated regarding such cultural differences in order to appropriately assess issues such as credibility.<sup>32</sup>

In summary, Judge Karen Aileen Howze’s examination of cultural context in dependency court proceedings has applicability to decision making in child custody cases. She asserts:

. . . The critical first step requires that the scope of relevant facts be expanded to include the total life experiences of adults and children before the court.

Whether in Baltimore, Cincinnati or on Hawaii, the people who come before the courts bring their cultural and social precepts. From family to family, case to case, differences rule. Even if families appear on the surface to be similar, the combinations of cultural and subcultural context are too numerous to expect uniformity.

Ultimately, judicial officers assigned to abuse and neglect cases must understand that matters of culture often affect decisions concerning children and their families. . . .

The reality remains: norms that are set today will no longer be applicable or valid tomorrow. Instead, social workers and the legal profession must develop a more disciplined method of questioning the facts in each case to determine whether cultural and subcultural factors may be at play. . . .<sup>33</sup>

## Addressing Attorney Behavior

So far, this chapter has focused on the behaviors of judges and parties involved in family court proceedings. Attorneys for the parties can also play a role in fueling the fires of conflict in child custody cases. In order to better address negative attorney behavior, you should refer to the American Academy of Matrimonial Lawyers (AAML) BOUNDS OF ADVOCACY.<sup>34</sup> These standards encourage attorneys to settle cases through alternative dispute resolution,<sup>35</sup> to advise clients how meritless custody claims are harmful to children,<sup>36</sup> and to refuse to represent clients who seek the attorney's assistance in engaging in vindictive conduct toward opposing parties.<sup>37</sup>

## Representing the Parties, Including the Child

### Importance of Attorneys for All Parties

The ABA STANDARDS RELATING TO TRIAL COURTS require that judges appoint an attorney for parties in specified domestic relations cases, including an attorney for the child, when appropriate.<sup>38</sup> The commentary relevant to these standards states:

. . . [T]he legal and ethical duty of judges to decide cases justly and efficiently requires that counsel be appointed where needed to prevent miscarriage of justice. A particularly important instance of such cases is those that involve the relationship of parent and child, which is close to personal liberty in the hierarchy of accepted values. Where custody of children is controverted in the divorce or separation of the parents, the consequences may include partial or entire loss of custody to one parent or the other. A person threatened with this consequence should have the assistance of counsel. Moreover, the interests of the child in either divorce or termination proceedings should not be left to representation by other parties in the proceedings – parents, foster parents, or social agencies – but should be asserted through independent representation of counsel or by a *guardian ad litem*.<sup>39</sup>

Likewise, the Institute of Judicial Administration (IJA)/ABA JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 1.1 provides that “[t]he participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” Standard 2.3(b) goes on to state that “independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody [and] should be available . . . in all proceedings collateral to neglect and dependency matters . . .”

In addition to enhancing access to justice, attorneys can be instrumental in getting parties to settle their cases, hopefully expeditiously, without having to resort to contentious litigation. To ensure that individuals with low incomes have independent counsel, you should learn about existing legal services and pro bono programs in your community that can provide assistance to indigent parties. Unfortunately, given the high number of individuals in need of free legal assistance, legal services and pro bono programs seldom can serve all those in need.

Judges can play an influential role in supporting the expansion of free and low-cost legal services and pro bono programs in their communities. The National Council of Juvenile and Family Court Judges has asserted that “[f]amily court judges must take a leadership role to improve the administration of justice for children and families within the courts, in their communities, state capitols, and nationally.”<sup>40</sup> Aspects of permissible judicial advocacy are covered in *The Judge as Leader in Improved Child Representation*, authored by Miriam Rollins, Esq., and found in A JUDGE’S GUIDE TO IMPROVING LEGAL REPRESENTATION FOR CHILDREN. She addresses the judge’s role as community leader, policy advocate, educator of the public, and committee participant, as well as the impact of the ABA MODEL CODE OF JUDICIAL CONDUCT and state-adopted versions of such rules.<sup>41</sup>

### **Appointing Competent Counsel for Children**

Children are often the subjects of family law litigation that will affect the rest of their lives. These lawsuits frequently result in a court or an administrative body taking action that will significantly impact the child’s status and living arrangements. Moreover, these children’s interests are often at odds with those of their parents. Due to the repercussions of these types of proceedings upon children, no other area of the legal profession has a greater potential impact upon society. It is therefore imperative that the legal system be equipped to provide proper safeguards to ensure that the needs of these children are met.

Perhaps the most important of these safeguards is court-appointed legal representation of children. For this reason, most jurisdictions require the appointment of a lawyer for every child in an abuse or neglect proceeding, and authorize the discretionary appointment of lawyers for children in custody disputes. It is critical that these lawyers, who are entrusted with special responsibilities that affect the subject children far more than other consumers of legal services, are clear about their role and duties.<sup>42</sup>

The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act was adopted in 2007 by the Uniform Laws Commission (ULC) (formerly known as the National Commission on Uniform State Laws (NCCUSL)).<sup>43</sup> This act is based upon the ABA STANDARDS FOR THE REPRESENTATION OF CHILDREN IN CUSTODY CASES<sup>44</sup>, the ABA STANDARDS FOR THE REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES,<sup>45</sup> and the



NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES RESOURCE GUIDELINES FOR ACCESS TO COMPETENT REPRESENTATION.<sup>46</sup> You should familiarize yourself with this Act, and the standards it was based upon, and with the applicable state statutes and court rules addressing appointment of representatives for children in your jurisdiction.

### **The Pro Se Litigant**

Parties without attorneys are common in child custody proceedings. The number of pro se litigants has increased tremendously “with some reports indicating that eighty percent or more of family law cases involve at least one pro se litigant.”<sup>47</sup> Responding to a national survey of judges and court administrators, one judge noted that proceedings with a pro se litigant “are very difficult to control [and] tend to take longer and be more emotional.”<sup>48</sup> He added that it was “difficult to shape the issues without acting as an attorney for either side and risk losing impartiality.”<sup>49</sup> In addition, another judge concluded that “[t]he potential for violence rises when lawyers are not present in domestic cases and spousal abuse cases.”<sup>50</sup>

Given the importance of having the evidence necessary to make a determination in the child’s best interest, as well as assess any potential for violence, you should appoint counsel for the pro se litigant when child custody is at issue. You should determine whether your communities’ legal services programs have attorneys available to represent parties in domestic relations cases or whether law school clinical programs exist in which students provide legal representation under the supervision of a licensed attorney. Also, you should communicate with your state or local bar association to learn more about pro bono programs available in your jurisdiction. The ABA Center for Pro Bono offers consultation and access to a clearinghouse of materials on pro bono legal services. The Center’s website

**Contact information:**

**ABA Center for Pro Bono**  
321 N. Clark Street Chicago,  
Illinois 60654  
312-988-5759

[www.abanet.org/legalservices/probono/](http://www.abanet.org/legalservices/probono/)

includes web links for IOLTA program sites, lawyer referral services, legal aid offices with web sites, pro bono sites, and other related entities.<sup>51</sup>

In addition to supporting systemic changes that enhance access to legal representation, you should explore the implementation of family court pro se projects that can help pro se litigants in less complex custody proceedings (e.g., parties are essentially in agreement as to the parenting plan). These pro se programs distribute brochures, provide information via the Internet, encourage party participation in educational clinics, or facilitate access to “self-service centers.”<sup>52</sup> Some even employ legal staff to assist indigent individuals.

For parties who insist that they do not want an attorney representing them, you should caution these individuals that it is not in their interest or their children’s to

proceed pro se. Where a party appears pro se, the ABA STANDARDS RELATING TO TRIAL COURTS provide that “the court should take whatever measures may be reasonable and necessary to ensure a fair trial.”<sup>53</sup> In addition to encouraging the pro se litigant to obtain counsel or making the appropriate referral for legal services, these measures include “ask[ing] such questions and suggest[ing] the production of such evidence as may be necessary to supplement or clarify the litigants’ presentation of the case.”<sup>54</sup>

Judges “report that most pro se litigants will be satisfied with the result if the judge is courteous, appears to take their cause seriously, and will take the time to explain the reasons for the ruling or the verdict.”<sup>55</sup> Judge Tom Warren of Washington State provides tips on “how to remain sane” in pro se proceedings:

- Keep absolute control of the structure of the trial or hearing.
- Require that all testimony be directed to the judge. I am careful to let the parties state everything that they want to present, but prohibit interruption of their opponent’s testimony or presentation.
- By my questioning of parties and witnesses, after their initial presentation I guide the proceeding to the important issues and avoid the inevitable effort to talk endlessly about facts or incidents which are not necessary to deciding the questions before the court.<sup>56</sup>

Judge Kathleen O’Ferrall Friedman also reminds judges that, in dealing with a pro se litigant, “it is always important to do everything on the record.”<sup>57</sup>

## **Expeditious Decision Making**

### **Court Improvement**

Throughout this nation, many state courts are undertaking major efforts to improve their handling of family law cases. In particular, almost all states currently have court improvement programs designed to address the handling of child abuse and neglect cases.<sup>58</sup> Moreover, numerous courts have implemented or are considering the establishment of unified family court systems, problem-solving courts, and case management systems. These systems are designed to address both the legal and non-legal needs of families. The court facilitates access to services for families to help address problems such as poverty, substance abuse, lack of access to mental health care, co-parenting issues, high conflict custody, and domestic violence. The holistic wellness of children is also receiving increased attention, addressing issues such as the child’s educational, health-related, and spiritual needs. Much can be learned from these courts’ experiences in implementing systemic reforms designed to benefit children and their families.

### **A Child's Concept of Time**

Imagine that you are eight years old. Your parents are divorced. You have alleged that your mother's husband sexually abused you. You go to your father's home for an extended visit and report this allegation. Your father decides not to return you to your mother's custody out of concern for your safety. Through her attorney, your mother files a petition alleging visitation interference. Pending the hearing, you are allowed to remain with your father and your mother has supervised visitation rights. The court schedules a hearing in 30 days. In addition to your case, about 30 others are also scheduled on the same day. The day arrives for the court hearing. Unfortunately, despite the fact that you, the parties' attorneys, and witnesses are present for the hearing, the court only hears about 30 minutes of testimony due to the crowded docket. The hearing is continued for another 30 days. The next hearing date arrives – yet another crowded docket. The case is once again postponed. In all, the case is tried over the course of almost two years at periodic intervals with at least three different judges presiding. Each time you appear you are reminded of your sexual encounter with your stepfather. You live with the constant fear that you will be returned to an unsafe household. Ultimately, the court decides that you should live with your father permanently.

Unfortunately, the above scenario is based on a true case and not uncommon. A lack of expedited decision making in child custody cases hurts children. In the National Council of Juvenile and Family Court Judges publication *RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* (hereinafter *RESOURCE GUIDELINES*), the authors address the child's sense of time:

Children have a very different sense of time from adults. Short periods of time for adults seem interminable for children, and extended periods of uncertainty exacerbate childhood anxiety. When litigation proceeds at what attorneys and judges regard as a normal pace, children often perceive the proceedings as extending for vast and infinite periods.

The passage of time is magnified for children in both anxiety levels and direct effect. Three years is not a terribly long period for an adult. For a six-year-old, it is half a lifetime [and] for a three-year-old, it is the formative stage for trust and security . . . .<sup>59</sup>

Judge J. Robert Lowenbach of Colorado voices a similar sentiment:

Webster's New World Dictionary defines limbo as a "region bordering on hell . . . a place or condition of neglect or oblivion for unwanted things or persons." A child's sense of time is much different than that of an adult as is the impact of experience on the

developing child's brain. Six months in the life of a one year old represents half of that child's total life compared to only 1.2% in the total life for a forty year old.<sup>60</sup>

It is in children's best interests for judges to institute court policies and practices that diminish delays in child custody decision making, as addressed by the STANDARDS RELATING TO TRIAL COURTS:

Judges are responsible for the prompt and just disposition of matters assigned. The bench has the duty to control the movement of cases through the system. The bar has a duty to cooperate by being ready to proceed with scheduled matters. Judges should not grant, nor should lawyers request, postponements except for good cause . . . .<sup>61</sup>

Even though the RESOURCE GUIDELINES pertain to the court's handling of child abuse and neglect cases, its recommendations on calendaring and case flow management are relevant to the handling of other types of child custody matters.<sup>62</sup> Samples of some these suggestions are presented below.<sup>63</sup>

### **Docket Control and Scheduling Orders**

Court-initiated docket control plays a major role in streamlining the process, with its emphasis on pretrial scheduling orders, discovery plans, status conferences, bifurcated trials, and definite final trial settings. No longer must parties live for years under a cloud of uncertainty about the timing of the litigation process that temporarily grips their lives. Moreover, lawyers no longer must prepare for the trial of a single lawsuit time after time because they are not sure when their case will actually be called to trial.

A primary tool that courts increasingly use to control their dockets is the pretrial scheduling order, which serves as a roadmap for both the lawyer and client.<sup>64</sup> A pretrial order assists in the disposition of the case without undue expense or burden to the parties, aids the trial court in narrowing the issues, and disposes of other matters which may assist in the final disposition of the action.<sup>65</sup> While pretrial scheduling orders are not addressed by statute in many states, they are governed by procedural rules.<sup>66</sup> Because trial courts are vested with broad authority to manage their dockets and handle all pretrial matters, appellate courts have routinely held that courts have implied power to make and enforce these types of orders.<sup>67</sup>

Issues covered in pretrial scheduling orders typically include the following: establishment of a firm date for trial; designation of a level of discovery and imposition of discovery deadlines; imposition of deadlines for amendment of pleadings; designation of mediators and orders for mediation; orders for parenting coordination and other forms of therapeutic intervention; and orders for forensic evaluations, including social studies, psychological evaluations, and business

valuations. While courts are authorized to enforce these deadlines, it is also within their discretion to extend these deadlines where appropriate.<sup>68</sup>

Other subjects that may be covered in a pretrial order include limitation of the number of witnesses; admission and stipulation of facts; appointment of experts regarding child and property-related issues; discovery deadlines; and submission of memorandums or trial briefs on specific points of law. Evidentiary rules give courts discretion to limit the number of witnesses when the probative value of the evidence is substantially outweighed by the needless presentation of cumulative evidence.<sup>69</sup> The parties may also be required to submit a list of witnesses, including the nature of their testimony. Failure to provide witness lists may result in sanctions being levied by the court, including the possible exclusion of undisclosed witnesses; however, rebuttal witnesses will typically be allowed to testify absent a discovery request for disclosure of reasonably anticipated rebuttal witnesses.

Parties are routinely ordered to prepare proposed parenting plans and property divisions, to narrow and clarify the issues. Sworn inventories are also routinely ordered, providing legal recourse in the event that property is not properly disclosed. In the common scenario involving a party who believes that assets have not been fully disclosed, a pretrial order awarding undisclosed property to the innocent party deters deceit.

Aspects of the actual trial that may be addressed by pretrial orders include exchange of witness lists, exhibit lists, and reports of experts. Bifurcated and summary trials are effective in expediting the process and encouraging settlement of remaining issues. Such trials allow specific issues in controversy, such as the enforcement of a prenuptial agreement, to be dealt with in a separate trial, in an expedited manner.

To further expedite the trial of the lawsuit, many courts require exhibits to be pre-marked and exchanged with the opposing party prior to trial. It has been held that a court does not commit error by excluding an exhibit that was not listed in a pretrial order.<sup>70</sup> Trial notebooks also serve as effective aids to assist the court in understanding the evidence; however, the exhibits contained therein should not be presented to the court prior to their proper admission into evidence, as portions of the notebook may be held to be inadmissible.

### **Direct Calendaring**

“Direct calendaring” is the system of case assignment in which one judicial officer is assigned to a family throughout the life of a case, as opposed to the “master calendaring” system in which multiple judicial officers are assigned. The RESOURCE GUIDELINES indicate that “[d]irect calendaring enables judges or judicial officers to become thoroughly familiar with the needs of children and families, the efforts over time to address those needs, and the complexities of each

family's situation[,]" thereby making it "more likely [they will] make decisions consistent with the best interests of the child."<sup>71</sup> This approach may help to avoid the scenario in which unreasonable delays lead to multiple judges presiding over a case, resulting in wasted court time as different judges rehear the same evidence. Direct calendaring also expedites enforcement of court orders and rulings on change of custody petitions.

### **Scheduling for Credible Court Dates**

Hearings should be scheduled for and conducted on a day and time certain.<sup>72</sup> If a hearing is contested, it should be started on the day and time planned, and completed within a continuous period of days.<sup>73</sup> You should make it a priority to allocate sufficient, uninterrupted time to hear cases.

In cases likely to be contested, pretrial conferences should be scheduled to enable judicial officers and all counsel for the parties to identify issues, resolve service of process problems, and estimate trial time.<sup>74</sup> If appointment of counsel is appropriate for the parties, including the child, this appointment should occur at the earliest stages of the proceedings.<sup>75</sup> Delays should not result because a party does not have an attorney or an attorney is not fully apprised by the court of "firm" future court dates.<sup>76</sup>

Court orders should clearly specify the date and time for future appearances.<sup>77</sup> Regarding continuances, the court should instruct litigants and their attorneys that "trial dates are firm."<sup>78</sup> As the same time, attorneys and parties must be educated on how children will be detrimentally impacted by litigation delays. The RESOURCE GUIDELINES advocate that courts establish firm and consistent continuance policies:

Continuances should not be allowed because hearing dates prove inconvenient for attorneys and parties. Continuances should be granted only when attorneys or parties are ill; essential witnesses cannot be located; or service of process has not been completed. Neither should continuances be granted based upon the stipulation of the parties.<sup>79</sup>

Furthermore, courts should not permit administrative personnel to grant continuances and should require the reason(s) for a continuance to be documented in the record.<sup>80</sup>

### **Case Tracking**

Judges and court administrators should consider the implementation of case management tracking systems that can assist judicial staff in their efforts to make timely case decisions. The RESOURCE GUIDELINES advocate the use of tickler systems, court staff to contact parties and remind them of various deadlines, and

“computerized data system[s] capable of spotting cases that have been seriously delayed, and capable of measuring court progress in case flow management.”<sup>81</sup>

### **Judicial Caseloads**

If you are to allocate sufficient, uninterrupted time to hear child custody cases, you must have reasonable caseloads. In addition, you must have sufficient time to prepare for cases, issue opinions, perform administrative responsibilities, and undertake professional and community activities. If you handle a diverse caseload, including non-family court matters, it is especially important not to allow the family court docket to become a low priority. Rather, child custody cases must be a judicial priority if decision making is to be timely.

### **The Appellate Process**

High conflict custody cases have a high probability of being appealed. Appellate courts should implement rules, policies, and practices designed to expedite appellate review. A 1992 analysis of termination of parental rights appeals in Michigan found that the “primary” delays in appellate proceedings involved the “filing of transcripts, appellate briefs, and [cases] being heard after [an] appellee’s brief [was] filed.”<sup>82</sup> As a result of these findings, the Michigan Probate Judges Association issued a unanimous resolution supporting changes in Court of Appeals and Probate Court rules and procedures to expedite the handling of termination of parental rights appeals.<sup>83</sup> The resolution encompassed such recommendations as having the highest court review the time frame for case processing, examine court rules dealing with time limits “as to their reasonableness as well as the strength of the existing sanctions,” and make revisions to court rules as necessary.<sup>84</sup>

### **Court Facilities**

The physical environment of the court can have an immense impact on how children and families perceive the judicial system, as well as influence whether judges, court staff, attorneys, and others work effectively. Several recommendations of the RESOURCE GUIDELINES are worth noting. For example, the courthouse should have a central location in the community and be easily accessed by public transportation. Because a traditional courtroom may intimidate children, a smaller courtroom may be more appropriate.<sup>85</sup>

The RESOURCE GUIDELINES also address privacy and safety concerns. Judges should protect the privacy of the parties. “Persons not directly involved in the hearing should not be permitted to be present in the courtroom. Other space should be provided for parties, witnesses, and attorneys waiting for hearings in the same court.”<sup>86</sup> Regarding safety, a bailiff should be present in the courtroom, as well as a telephone, and the judge “should have a silent buzzer or other device to obtain additional security personnel when necessary.”<sup>87</sup>

In addition, other commentators have suggested that there be separate waiting areas for children and adults, including child care facilities, with children's areas having a child-friendly decor. Moreover, special provision should be made for the victims of child and domestic abuse so that they do not have to come into contact with alleged abusers. Finally, and pertinent to security, child care and waiting areas should have sufficient security to protect against abduction or other violence.

## **Other Innovative Approaches**

These concluding sections will explore innovative court programs that can be instrumental in encouraging settlement of cases and at the same time protect children's well-being. Most commenters agree that the adversarial nature of court proceedings can heighten tensions among family members and be harmful to children. Many jurisdictions have implemented a variety of parent education and alternative dispute resolution programs, as well as unified family court systems, designed to facilitate outcomes beneficial to children experiencing parental conflict. One should review the list of resources at the end of this book for relevant references.

### **Parent Education Programs and Parenting Coordination**

Many parents experiencing divorce and separation are unaware of how their negative behaviors detrimentally impact their children. They may be swept up in the passion of the moment and may fail to acknowledge their children's anguish over parental separation or divorce. Their children also may not know how to deal with the strong range of emotions they may be feeling.

With the aim of diminishing parental conflict and trauma to children, many courts have established mandatory or voluntary parenting education programs. For instance, once a petition for divorce or custody is filed, the Circuit Court for Baltimore City requires all parents to attend sessions on parenting children who are experiencing divorce or separation.<sup>88</sup> At the same time, these parents' children can attend a support group in which they learn how to cope with familial changes.<sup>89</sup> A local mental health provider coordinates the programs.<sup>90</sup> To complement its parent educational programs, San Diego County also provides parents with access to parenting information on its website. Giving parents access to parenting skills training not only enhances their parenting abilities, it can help them engage more easily in mediation to develop child-focused agreements addressing custody and visitation.

Parenting coordination programs are also being used by courts to assist families in resolving their conflict in a less adversarial manner. These programs involve the appointment of mental health professionals to assist families in developing co-parenting plans, rather than to determine which parent should be awarded custody. This shift in attitude highlights the need for children who are the subjects of custody proceedings to continue to have ongoing relationships with



both parents, and decreases the incentive for parents to attack each other through the process of the litigation. Of course, these programs should not be used when domestic violence or similar concerns are at issue.

#### **Divorce Education Programs for Parents**

The intent of the divorce education seminar is to introduce a mindset early in the divorce process that there is a healthy way to divorce. Parents learn that they can make responsible decisions about their children, that children need each parent to be appropriately involved, and that parents need to put their adult relationship aside to communicate about their children. A typical seminar, ranging from two to eight hours, includes:

- Discussing grief and loss.
- Explaining family changes from a child's perspective.
- Understanding the developmental response to divorce.
- Learning communication, problem solving, anger management, and conflict resolution skills.
- Maintaining good parent-child relationships.
- Building constructive co-parent relationships.

#### **Mediation**

In many states, once a petition for divorce or custody is filed or it becomes apparent that a case is likely to be litigated, parties are ordered to participate in mediation. In others, mediation is voluntary. In contrast to the situation in which attorneys for parties in consultation with their clients arrive at a settlement, mediation is a process whereby a neutral, trained professional facilitates the development of a case settlement or parenting plan agreeable to the parties. Sometimes, a settlement can only be reached on one or two issues. In other cases, a settlement can be reached on all issues.

Courts with alternative dispute resolution programs typically find that these programs are effective in diminishing the number of contested cases coming before judges.<sup>91</sup> Because all parties are encouraged to participate actively during mediation sessions, they may feel that they have had more input into the process and, as such, are more likely to comply with an agreement. Mimi Lyster, an expert on parenting plans, discusses the benefits of negotiation:

Most researchers -- especially those who study the effects of divorce on children -- believe passionately that using the court to resolve custody issues is a mistake in all but a few cases. It is far better, in the opinion of these researchers, for parents to negotiate their own parenting agreements, with the help of outside experts such as mediators, counselors, and lawyers on an as-needed basis.<sup>92</sup>

It is debated as to whether mediation should be mandated, since by definition mediation is a process that is non-coercive, one whereby parties attempt to cooperate with one another and voluntarily enter into an agreement. After reviewing the literature, one commentator found “that there is a need for empirically sound methods for discriminating between couples who are ready for mediation and those who are not.”<sup>93</sup> It is generally not recommended that mediation be used in cases involving allegations of domestic violence “as it may place women and children at risk for ongoing intimidation.”<sup>94</sup> In cases in which children are at risk for harm and parents cannot agree on how to reduce that risk, judicial intervention is fitting.<sup>95</sup> Moreover, some believe that only parties represented by counsel should engage in mediation given the potential for unequal bargaining power, especially in cases in which parties are not well-educated or may have developmental or mental disabilities.

**The RESOURCE GUIDELINES provide guidance for the development of mediation programs, including the following suggestions:**

- **Mediation programs “should be court-based or court-supervised and have strong judicial and interdisciplinary support.”**
- **Mediation should be confidential.**
- **Agreements should be specific and be made part of the court record.**
- **“Mediators must be highly trained, experienced and skilled professionals, have credibility with the court and related professionals, and be perceived by family members as being neutral and having the best interests of the child and family at heart.”**

### **Use of Special Masters**

Several jurisdictions have begun to employ specially qualified individuals, e.g., special masters and custody commissioners, to facilitate the resolution of certain types of post-divorce high conflict cases.<sup>96</sup> These cases include ones in which parties continuously disagree about parenting issues, appear in court frequently, and cannot resolve disputes through typical mediation processes.<sup>97</sup> These cases also may encompass those in which issues of parental fitness require ongoing

monitoring, as well as cases in which new parents need to establish healthy communication skills regarding the care of infants and toddlers.<sup>98</sup>

A special master, usually a mental health professional or highly skilled mediator, can work with the family to facilitate interparty communication, provide therapeutic intervention, and ultimately mediate an appropriate parenting agreement. In unresolved cases, the special master has some authority to make decisions impacting the family, subject to judicial review. As use of special masters has increased, issues have arisen regarding the qualifications of special masters; ethical considerations given special masters' multiple roles as therapist, mediator, and judicial arbiter; and the delegation of decision-making authority to non-judges.

### **Parenting Plans**

Many courts no longer issue a general order awarding one parent custody of a child with reasonable visitation to the other. Some believe that these general child custody awards do not fully acknowledge the parental role of the noncustodial parent.<sup>99</sup> Because of their lack of specificity, they also increase the likelihood that parties will come back to court to litigate visitation rights.<sup>100</sup>

In an increasing number of jurisdictions, detailed parenting plans are negotiated. As part of this process, parents are encouraged to address numerous issues relevant to raising children. For instance, the state of Washington outlines the procedure for the filing of parenting plans. The code states that two primary goals of the "permanent parenting plan" are to "[m]inimize the child's exposure to harmful parental conflict" and "[e]ncourage the parents, where appropriate . . . , to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention."<sup>101</sup>

The agreements viewed as most beneficial to children are ones that "try to anticipate and reduce conflict, allow for continuing relationships with both parents and other adults with whom the children have significant bonds, and allow everyone to find 'normalcy' in their new relationships through consistent routines."<sup>102</sup> The plans require parents to think about their decision-making responsibilities relevant to such issues as their children's contact with parents and significant others, health care, education, and spiritual needs.<sup>103</sup>

### **Unified Family Courts**

Especially over the past decade, judges, court administrators, and others have come to understand the need for coordinating court and others services for families experiencing separation and divorce. In many jurisdictions, one family experiencing a multitude of problems will find themselves in several different courtrooms in the same jurisdiction. For example, in a case involving domestic violence, the family might find itself before one court with jurisdiction to issue restraining orders against an abuser, another court with jurisdiction to rule on

## **MANAGING THE CHILD CUSTODY CASE**

child abuse and neglect allegations, and yet another court to address separation, divorce, and ultimate child custody issues. Besides being an inefficient method for handling cases and burdensome to families, each judge presiding over the individual cases would not necessarily be aware of the evidence being presented in all three cases. In addition, legal, mental health, and other support services beneficial to preventing and alleviating family dysfunction would not be readily available and accessible to many families.

The unified family court model seeks to remedy problems of case coordination and access to services. It encompasses many of the innovative approaches to case management discussed in this chapter's sections on court improvement, alternative dispute resolution, and parenting education. It emphasizes the importance of a family court bench of competent judges committed to family law practice and sensitive to the many needs of families experiencing conflict. For a more detailed discussion of unified family courts, see the listing of resources at the end of this book.

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<sup>1</sup> Charles B. Bauer & Kit Furey, *Bench/Bar Committee Recommends Practical Ways to Reduce Impact of High-Conflict Divorce on Children*, 39 THE ADVOCATE 13 (June 1996); see also JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (Free Press 1997).

<sup>2</sup> NATIONAL CONFERENCE OF STATE TRIAL JUDGES OF THE JUDICIAL ADMINISTRATION DIVISION OF THE AMERICAN BAR ASSOCIATION AND THE NATIONAL JUDICIAL COLLEGE, THE JUDGE'S BOOK 173, 184 (National Judicial College 2<sup>nd</sup> ed. 1994) (hereinafter THE JUDGE'S BOOK).

<sup>3</sup> STANDARDS RELATING TO TRIAL COURTS § 2.71 (American Bar Association 1992).

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

<sup>5</sup> STANDARDS RELATING TO TRIAL COURTS § 2.71 refers to § 2.20 which requires that “[a] litigant should be permitted to employ counsel in any judicial proceeding . . . and that if the litigant cannot afford counsel, counsel should be provided . . . in any other case having potentially serious consequences when, in the opinion of the court, assistance of counsel is needed to prevent a miscarriage of justice.”

<sup>6</sup> STANDARDS RELATING TO TRIAL COURTS § 2.71(a), (b), (c), (d) (American Bar Association 1992).

<sup>7</sup> STANDARDS RELATING TO TRIAL COURTS § 2.71 cmt. (American Bar Association 1992).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Nancy Zalusky Berg, *Dealing with Difficult Clients, Difficult Lawyers and Difficult Judges*, <http://www.wbdlaw.com/CM/Articles/DealingwithDifficultClients.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> Valerie McNaughton, *Active Listening: Applying Mediation Skills in the Courtroom*, 38 (2) JUDGES J. 23 (1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Telephone interview with Judge Isabella Grant. Conducted by Heather Davies, ABA Center on Children and the Law (June 2, 1999).

<sup>16</sup> Telephone interview with Judge Kathleen O’Ferrall Friedman. Conducted by Heather Davies, ABA Center on Children and the Law (June 2, 1999).

<sup>17</sup> THE JUDGE’S BOOK, *supra* note 2, at 282.

<sup>18</sup> *Id.* at 278.

<sup>19</sup> *Id.* at 131.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 38.

<sup>22</sup> *Id.* at 37.

<sup>23</sup> “Cultural context encompasses more than race and ethnicity. Other areas that must be explored in each case: economic status, literacy, language, immigration status, mental and physical disabilities, education, gender, age and sexual orientation.” KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS 7 (American Bar Association 1996).

<sup>24</sup> MODEL CODE OF JUDICIAL CONDUCT RULE 2.3(A) (2007).

<sup>25</sup> *Id.* at 2.3(B).

<sup>26</sup> *Id.* at 2.3(C).

<sup>27</sup> Judge Daniel Gillespie, *Diversity Training Being Instituted For Judges*, TRIAL JUDGES’ NEWS, Fall 1999, at 48.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> THE JUDGE’S BOOK, *supra* note 2, at 121-22.

<sup>31</sup> *Id.* at 125-26.

<sup>32</sup> *Id.*

<sup>33</sup> HOWZE, *supra* note 23, at 7.

<sup>34</sup> AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY (2000), *available at* [http://aaml.org/files/public/Bounds\\_of\\_Advocacy.htm](http://aaml.org/files/public/Bounds_of_Advocacy.htm).

<sup>35</sup> *Id.* at Rule 1.5 and cmt.

<sup>36</sup> *Id.* at Rule 5.2 and cmt.

<sup>37</sup> *Id.* at Rule 1.3 and cmt.

<sup>38</sup> STANDARDS RELATING TO TRIAL COURTS § 2.71(a) and 2.20(a)(iv) (American Bar Association 1992).

<sup>39</sup> STANDARDS RELATING TO TRIAL COURTS § 2.20 cmt. (American Bar Association 1992).

<sup>40</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILDREN AND FAMILIES FIRST: A MANDATE FOR AMERICA’S COURTS 4 (1993), *cited in* KATHI GRASSO, ET. AL., A JUDGE’S GUIDE TO IMPROVING LEGAL REPRESENTATION (State Justice Institute & American Bar Association 1998).

<sup>41</sup> GRASSO, *supra* note 40, at 10-22 includes a discussion of “The Judge as Leader in Improved Child Representation.” This discussion, authored by Miriam Rollins, Esq., comprehensively examines the issue of permissible judicial advocacy.

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- <sup>42</sup> See Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice*, NACC Children’s Law Manual Series (1999).
- <sup>43</sup> Barbara Ann Atwood, *The New (and Improved) Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L. Q. 1 (2008).
- <sup>44</sup> See Appendix 4 of this Guide.
- <sup>45</sup> 29 Fam. L. Q. 375 (1995).
- <sup>46</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995), available at <http://www.ncjrs.org/pdffiles/resguid.pdf>
- <sup>47</sup> Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047 (1999).
- <sup>48</sup> Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, JUDICATURE, July/August 1998, at 18.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Id.*
- <sup>51</sup> See America Bar Association Commission on Interest on Lawyer’s Trust Accounts, <http://www.abanet.org/legalservices/iolta/>.
- <sup>52</sup> Goldschmidt, *supra* note 48, at 21.
- <sup>53</sup> STANDARDS RELATING TO TRIAL COURTS § 2.23 (American Bar Association 1992).
- <sup>54</sup> *Id.* at § 2.23 cmt.
- <sup>55</sup> THE JUDGE’S BOOK, *supra* note 2, at 37.
- <sup>56</sup> Judge Tom Warren, *How to Remain Sane in Small Claim’s Court, or an Anti-Harassment Hearing, or any Pro Se Proceeding*, JUDICIAL DIVISION RECORD, Fall 1999, at 4.
- <sup>57</sup> Telephone interview with Judge Kathleen O’Ferrall Friedman. Conducted by Heather Davies, ABA Center on Children and the Law (June 2, 1999).
- <sup>58</sup> See <http://www.abanet.org/abanet/child/home.cfm> (highlighting the court improvement activities of participating states).
- <sup>59</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PUBLICATION DEVELOPMENT COMMITTEE, VICTIMS OF CHILD ABUSE PROJECT, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14 (National Council of Juvenile and Family Court Judges 1995); see also BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD AND ADOLESCENCE (Basic Books 1958); JEAN PIAGET, JUDGMENT AND REASONING IN THE CHILD (Littlefield, Adams 1976).

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- <sup>60</sup> Judge J. Robert Lowenbach, *Curtailling Continuances*, ABA CHILD LAW PRACTICE, March 2000, at 16.
- <sup>61</sup> STANDARDS RELATING TO TRIAL COURTS § 2.31 (American Bar Association 1992).
- <sup>62</sup> The discussion of the RESOURCE GUIDELINES and appellate process presented in this section is based in part on the author's previous description in AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW & THE NATIONAL CENTER FOR STATE COURTS, MICHIGAN COURT IMPROVEMENT PROGRAM ASSESSMENT OF PROBATE COURTS' HANDLING OF CHILD ABUSE AND NEGLECT CASES: FINAL REPORT (American Bar Association 1997). This report was submitted to the Michigan Supreme Court State Court Administrative Office.
- <sup>63</sup> The discussion of the RESOURCE GUIDELINES recommendations is adapted in part from the MICHIGAN COURT IMPROVEMENT PROGRAM ASSESSMENT, *supra* note 65.
- <sup>64</sup> See *Koslow's v. Mackie*, 796 S.W. 2d 700, 703 (Tex. 1990)(held that "the trial court [has] power implicit under rule 166 to provide in his pretrial order that the refusal to participate in the status conference or the failure to file a timely joint status report would result in the cause's being 'set for disposition hearing, at which time cause will have to be shown why dismissal, default, or other sanctions should not be imposed' "); see also *In re Bledsoe*, 41 S.W. 3d 807, 812 (Tex. App. 2001)(held that the "trial court has power, implicit under rule 166, to sanction a party for failing to obey its pretrial orders").
- <sup>65</sup> See *Walden v. Affiliated Computer Servs.*, 97 S.W.3d 303 (Tex. App. 2003)(held that the purpose of Texas Rule of Civil Procedure 166 is to assist in the disposition of the case without undue expense or burden to the parties); see also *Mission Municipal Hospital v. Bryant*, 563 S.W.2d 293 (Tex. App. 1977)(held that the purpose of a pretrial hearing is to aid the court in narrowing the issues and in disposing of other matters which may assist in the final disposition of the action).
- <sup>66</sup> In Texas, courts look to Texas Rule of Civil Procedure (TRCP) 166 for authority over pretrial scheduling orders.
- <sup>67</sup> *Koslow's v. Mackie*, 796 S.W. 2d 700 (Tex. 1990) stated that "[w]ithout the power to require appropriate action, the pretrial conference rule would be meaningless. Specifying the sanctions that may be imposed is appropriate to 'aid in the disposition of the action' to compel the parties to obey the pretrial directive." See also *Hakemy Bros., Ltd. v. State Bank & Trust Co.*, 189 S.W.3d 920 (Tex. App. – Dallas 2006, pet. denied) (trial court did not err by denying an amendment to a petition where it conflicted with a scheduling order and added a new cause of action); *Singleton v. Northwest Tex. Healthcare Sys.*, LEXIS 1594 (Tex. App. – Amarillo 2006, no pet.)(trial court did not abuse its discretion in granting defendant's motion to strike plaintiff's second amended petition



stating a health care liability claim; the amended pleading was filed after the date set in the agreed scheduling order entered in accordance with Tex. R. Civ. P. 166 and Tex. R. Civ. P. 190); *G.R.A.V.I.T.Y. Enters v. Reese Supply Co.*, 177 S.W.3d 537 (Tex. App. – Dallas 2005, no pet.)(trial court did not err in striking plaintiff's second amended petition filed 10 days before trial in a breach of contract case in which the deadline for filing amended pleadings was set by the trial court's scheduling order. The seven-day deadline of Tex. R. Civ. P. 63 did not apply when the trial court had entered its scheduling order pursuant to Tex. R. Civ. P. 166 setting a different deadline.); *In re Bledsoe*, 41 S.W.3d 807, 812 (Tex. App. – Fort Worth 2001, orig. proceeding)(the “trial court has power, implicit under rule 166, to sanction a party for failing to obey its pretrial orders”).

<sup>68</sup> *Bongie v. Tech. Risks, Inc.*, LEXIS 11282 (Tex. App. – Houston [14<sup>th</sup> Dist] 2004, no pet.) held that the trial court did not abuse its discretion when it allowed third-party defendants to file amended special appearances after a deadline in the docket control order. The trial court allowed the late-filed motions to prevent manifest injustice because the third-party defendants did not have notice of the deadline; *Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A.*, 142 S.W.3d 393 (Tex. App. – El Paso 2004, no pet.) held that the trial court did not abuse its discretion by amending the scheduling order and extending deadlines which had already passed based on the serious illness of the lead counsel for appellee bank. Tex. R. Civ. P. 166 recognizes the fundamental rule that a trial court has the inherent right to change or modify any interlocutory order or judgment until the time the judgment on the merits in the case becomes final.

<sup>69</sup> Tex. Rule of Evidence 403 provides that “relevant, evidence may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence.”

<sup>70</sup> *Hamilton v. Morris Res., Ltd.*, 225 S.W.3d 336 (Tex. App. – San Antonio 2007, pet.denied) held the “exclusion of an exhibit not listed in a pretrial order is not an impermissible sanction.”

<sup>71</sup> RESOURCES GUIDELINES, *supra* note 46, at 19.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 21.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 20.

<sup>82</sup> MICHIGAN PROBATE JUDGES ASSOCIATION, RESOLUTION 2: RESOLUTION OF THE MICHIGAN PROBATE JUDGES ASSOCIATION REGARDING DELAYS IN TERMINATION APPEALS FROM THE JUVENILE COURT (January 22, 1992)(unanimously adopted at the MPJA Winter Conference and citing report findings of the Children's Charter of the Courts of Michigan).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> RESOURCE GUIDELINES, *supra* note 46, at 24.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> JUDITH MORAN, CIRCUIT COURT FOR BALTIMORE CITY, FAMILY DIVISION/ DOMESTIC DOCKET. ANNUAL REPORT OF THE FAMILY DIVISION 6-7 (JANUARY 1999).

<sup>89</sup> *Id.* at 17. The program serves children from the ages of six through eleven, and there are plans to expand the program to adolescents.

<sup>90</sup> *Id.* at 11, 17.

<sup>91</sup> For information on studies of family mediation, see Jessica Pearson, *Family Mediation*, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH FINDINGS-IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 51-89 (State Justice Institute & National Center for State Courts 1994).

<sup>92</sup> MIMI E. LYSTER, *CHILD CUSTODY: BUILDING AGREEMENTS THAT WORK* 1/2 (Nolo Press, Inc. 1995).

<sup>93</sup> Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION COURTS REV. 487, 495 (1999)(citing C. Hysjulien, B. Wood, & G.A. Benjamin, *Child Custody Evaluations: A Review of Methods Used in Litigation and Alternative Dispute Resolution*, 32 FAM. & CONCILIATION COURTS REV. 466-489 (1994)).

<sup>94</sup> Vestal, *supra* note 93, at 496. Mediation has been utilized in dependency cases involving child abuse and neglect to address the development of case and permanency plans. Programs have been established in a number of states, including Connecticut, Florida, California, Maryland, Oregon, and Colorado. For further discussion of mediation, *see* <http://www.abanet.org/abanet/child/home.cfm> (highlighting the court improvement activities of participating states, including mediation).

<sup>95</sup> LYSTER, *supra* note 92, at 1/2.

<sup>96</sup> S. Margaret Lee, Ph.D., *The Integration of Ethics and the Law in Clinical Practice: Acting as a Special Master in High Conflict Post-Divorce Child Custody Cases: How to be*

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*a Mediator, Therapist and Judge in an Ethical and Legal Manner*, ABA SECTION OF FAMILY LAW, SPRING CLE MEETING CONFERENCE BOOK (April 6, 2000).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> LYSTER, *supra* note 92, at 5/3.

<sup>100</sup> *Id.*

<sup>101</sup> RCW § 26.09.184(1)(e) & (f).

<sup>102</sup> *Id.* at 2/3.

<sup>103</sup> *Id.* at 2/2.

## **Representation for the Child in Custody Cases**

**T**here has long been confusion about the role of an attorney representing a child in child welfare and private custody matters, particularly with respect to who determines the positions taken in the litigation. While there is a movement in the direction of child-directed representation, there is still resistance, especially among judges, to abandon the more familiar guardian ad litem role in which the attorney advocates for the child's best interests as determined by the attorney. But even in a substituted judgment model, there is now consensus that the attorney should be guided by objective criteria, not merely the attorney's subjective view and experiences.

The profession is moving towards giving the child greater autonomy in directing legal representation to allow the child's own position and perspective to be given real advocacy and allow the judge, not the attorney, to evaluate all of the evidence in determining what is in the child's best interests. In representing the child, attorneys need to have a greater understanding of their need for multidisciplinary collaboration in fulfilling their role as counselors and advocates for their child clients.

In this chapter, we will explore the following:

- A Brief History of the Attorney's Role in Child Representation
- The ABA Standards of Practice for Lawyers Representing Children in Custody Cases
- Appointing Competent Counsel for the Child

## **A Brief History of the Attorney’s Role in Child Representation**

There have been several attempts over the years to clarify the confusion regarding the role of attorneys representing children in custody matters. Several organizations have promulgated standards and recommendations for representing children,<sup>1</sup> and there have been two invitational symposia to discuss and generate recommendations on representing children.<sup>2</sup> In addition, the National Conference of Commissioners on Uniform State Laws has recently promulgated a uniform act on representing children in child welfare and custody cases.<sup>3</sup> The main points of some of these documents are outlined below.

### **AAML Standards**

In 1994, the American Academy of Matrimonial Lawyers (AAML) adopted *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings* (AAML Standards). The AAML Standards take the basic position that children should not routinely be appointed attorneys in custody cases, but that when attorneys are appointed for “unimpaired” children, they should be client centered.<sup>4</sup> The AAML Standards recognize a “serious threat to the rule of law posed by the assignment of counsel for children [in] the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child’s best interests.”<sup>5</sup> Therefore, if the child is deemed “impaired,” a status presumed for children under the age of twelve, the attorney should only present evidence to the court and explain the proceedings to the child, but should not advocate any position at all.<sup>6</sup> The AAML Standards have been criticized for an artificial and impractical distinction between “impaired” and “unimpaired” children, and for abandoning all advocacy for younger children,<sup>7</sup> and were explicitly rejected by two sets of American Bar Association (ABA) Standards<sup>8</sup> and two symposia.<sup>9</sup>

### **ABA Abuse and Neglect Standards**

The ABA Abuse and Neglect Standards describe a role similar to that of an adult’s attorney, i.e., advocating the client’s expressed position, but also provide for advocacy of the child’s objectively determined legal interests in certain circumstances.<sup>10</sup> Recognizing that courts continue to appoint attorneys in a dual attorney/guardian ad litem role, the ABA Abuse and Neglect Standards strongly recommend abolishing such a role, but do provide some guidelines for an attorney who must serve in that capacity.<sup>11</sup>

### **NACC Revised Standard B-4**

Because of concerns that the ABA Abuse and Neglect Standards tipped the scale too far towards autonomy at the expense of beneficence, the National Association

of Counsel for Children (NACC) initially endorsed the ABA Abuse and Neglect Standards with reservation as to the ABA's Standard B-4, which deals with the attorney's position when the child cannot meaningfully participate or when the child's directions are deemed injurious to the child. The NACC later wrote its own revised version of Standard B-4, which directs the attorney to assume a substituted judgment role based on objective criteria when the child cannot meaningfully participate. The revised version would also require the attorney to request appointment of a guardian ad litem, a discretionary act under the ABA Abuse and Neglect Standards, if the child's wishes are seriously injurious to the child.

## **The ABA Standards of Practice for Lawyers Representing Children in Custody Cases**

The American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards) "apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases."<sup>12</sup> While emphasizing a client-directed model, the ABA Custody Standards also create the role of a "best interests" attorney," who is not bound by the child's directives.<sup>13</sup> The ABA Custody Standards envision a robust advocacy role for the best interests attorney, with the only (but very significant) difference between an attorney functioning in that role and one functioning in a client-directed role being that the best interests attorney may determine the position to be advocated,<sup>14</sup> with the related ability to use, without disclosing, client confidences.<sup>15</sup> The complete ABA Custody Standards can be found in the Appendix to this book.

### **The Attorneys' Roles**

The ABA Custody Standards contemplate two distinct types of attorneys being appointed in custody cases. The first is the child's attorney, defined as "[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client."<sup>16</sup> The second is the "best interests attorney," who "provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives."<sup>17</sup> The Standards stress that neither attorney should serve as a witness or play any other role in the case.

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but

instead should offer traditional evidence-based legal arguments such as other lawyers make. . . .

The Child's Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child's Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.<sup>18</sup>

The Standards clearly define the role and responsibilities of both the Child's Attorney and the Best Interests Attorney. These unique duties are outlined below.

### **Child's Attorney**

- The Child's Attorney must explain to the child in a developmentally appropriate way the events of the litigation, and any information that will help the child in the decision-making process.
- The Child's Attorney can express his or her assessment of the case and his or her opinion about the best position for the child to take. "However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child knows, and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been the most influential or have been confusing or glided over by the child."<sup>19</sup>
- The child determines the overall objectives of the case. The Child's Attorney is not required to consult with the child on matters in which he or she would not need to consult with an adult client or where the child's developmental level prevents the attorney from obtaining such direction, "as with an infant or preverbal child."<sup>20</sup>
- The Standards do not presume impairment, disability, or incompetency based on a child's age. Therefore, the Child's Attorney should make a separate determination under the Model Rules if he or she believes the child has "diminished capacity."<sup>21</sup>
- In the absence of expressed objectives by the child, the Child's Attorney "should make a good faith effort to determine the child's wishes."<sup>22</sup> If the

child cannot express any positions, the Child’s Attorney should represent the child’s legal interests or request that a Best Interests Attorney be appointed. However, “[t]he child’s failure to express a position is different from being unable to do so, and from directing the lawyer not to take a position on certain issues. The child may **have no** opinion with respect to a particular issue, or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client’s legal interests based on information the lawyer has, and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, or to remain silent with respect to that issue, or wants the point of view expressed only if the party is out of the room. The lawyer is then bound by the child’s directive.”<sup>23</sup>

- If the child’s expressed objective puts the child at “risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer’s opinion of the child’s interests,” the Child’s Attorney may request that a Best Interests Attorney be appointed. The Child’s Attorney should not disclose the reason for the request, unless the disclosure is permitted under the state’s ethics rules governing confidentiality.<sup>24</sup>
- “The Child’s Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child’s needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in the case, the necessity of the child’s direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child’s developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child’s Attorney is bound by the child’s direction concerning testifying.”<sup>25</sup>

### **Best Interests Attorney**

- The state ethics rules on confidentiality bind the Best Interests Attorney; however, the Best Interests Attorney “may also use the child’s confidences for the purposes of the representation without disclosing them.”<sup>26</sup> The comment accompanying this Standard uses the following example: If the child tells the attorney that his parent uses drugs, the attorney can find and present other evidence of drug use, but cannot disclose that he received this information initially from the child.<sup>27</sup>



- The Best Interests Attorney is tasked with explaining his or her role in a developmentally appropriate manner and conveying that he or she will 1) investigate and advocate the child’s best interests; 2) investigate the child’s views and report them to the court unless the child declines such reporting; 3) use the information from the child in determining the best interests; and 4) “will not necessarily advocate what the child wants as a lawyer for a client would.”<sup>28</sup>
- The Best Interests Attorney is charged with conducting an investigation which includes: 1) reviewing court files of the child, siblings, and other parties/household members, as well as case-related records of the child welfare agency or other service providers; 2) review the child’s social services records, as well as mental health records, drug and alcohol records, medical records, law enforcement records, school records, and other relevant records; 3) contact the parties’ attorneys and non-lawyer representatives; 4) contact and meet with parents, if their lawyers permit it; 5) interview other individuals significantly involved in the child’s life; 6) review relevant evidence personally, “rather than relying on other parties’ or counsel’s descriptions and characterizations of it”; and 7) follow all court proceedings affecting the child, the parties, and other household members.<sup>29</sup>
- The Best Interests Attorney is expected to assess the child’s best interests based on objective criteria as set forth by state law, inform the court of any facts that “seriously call into question the advisability of any agreed settlement,” and “should present the child’s expressed desires (if any) to the court, except for those that the child expressly does not want presented.”<sup>30</sup>

### **Guardian ad Litem**

The ABA Custody Standards do **not** address the role of a guardian ad litem in a custody case. The commentary to the Standards explains the reason for this deliberate omission.

The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things for all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving as a lawyer, and is not a party. This person can either

be a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.<sup>31</sup>

Therefore, although recognizing that an appropriately appointed guardian ad litem can add value to a custody case, the Standards only apply to attorneys appointed to act as attorneys in these cases.

### **Appointing Competent Counsel for Children**

Most jurisdictions recognize the discretion of courts to appoint lawyers as either: 1) a child's attorney, to serve in a traditional role, or 2) a guardian ad litem, to assist the court in determining the best interest of a subject child. Because the term "guardian ad litem" has become confused in many jurisdictions, the term "best interest attorney" has been created to describe the role of a lawyer serving in this second category.

Whether appointed as a child's attorney or as a best interest attorney, the lawyer should participate fully in the course of the litigation, including discovery, examination of witnesses, introduction of evidence, and legal argument. All lawyers for children should provide competent and diligent representation, which includes the following:

- Training in child advocacy;
- Thorough investigation of the issues;
- Active communication with the child, providing advice and counsel to the child;
- Ensuring protection of the child's legal rights;
- Preparation for resolution;
- Participation in conferences and settlement negotiations; and
- Participation in hearings and trial.

These lawyers should also seek appropriate services for the child and caretakers, and attempt to mitigate the harm caused by the litigation process by taking the following actions:

- Encourage alternate dispute resolution, where appropriate; and
- Work to expedite the proceedings.

While all of the duties mentioned above are important, getting to know and understand the child is arguably the most important aspect of the lawyer's duty to the child, regardless of the role assigned. Unfortunately, this aspect of child representation often gets buried beneath the named parties' objectives of representation. The lawyer for the child must constantly strive to remain focused upon the *child's* needs and view the situation from the *child's* perspective, rather than from the perspective of the parents. Only after gaining an authentic understanding of the child can the lawyer begin to address the child's needs in a manner that will truly benefit the child.<sup>32</sup>

Undertaking legal representation for a child requires extensive communication, significant trust, and a degree of intimacy with the child. Jean Koh Peters, a leading authority on the representation of children, refers to this process as understanding the "child-in-context."<sup>33</sup> Lawyers for children "must individualize every representation . . . so that the representation reflects the child-in-context and the child's unique view of the world."<sup>34</sup> In essence, this concept requires the lawyer to understand the child, on the child's own terms, consistent with all the facts known about the child by both the child and those closest to the child.<sup>35</sup>

In addition to understanding the importance of legal representation for children, it is imperative that judges examine their processes for the appointment of counsel for children. They should ask the following questions:

- Are they appointing representatives for children?
- Are these representatives attorneys or non-attorneys?
- What are the qualifications of the individuals being appointed?
- Have they received training on both legal and non-legal topics relevant to child advocacy?
- How are they being compensated?
- If they are not handling the case pro bono, is their compensation adequate to support the advocacy required by codes of professional responsibility?
- How is the provision of these advocacy services being monitored?

<sup>1</sup> See, e.g., Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995) [hereinafter AAML Standards]; American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995), available at [http://www.abanet.org/family/reports/standards\\_abuseneglect.pdf](http://www.abanet.org/family/reports/standards_abuseneglect.pdf) [hereinafter ABA Abuse and Neglect Standards]; Nat'l Ass'n for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001), available at <http://www.naccchildlaw.org/documents/naccrecommendations.pdf> [hereinafter NACC Recommendations]; American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (2003), available at [http://www.abanet.org/legalservices/probono/standards\\_of\\_practice\\_for\\_lawyers\\_representing\\_children.pdf](http://www.abanet.org/legalservices/probono/standards_of_practice_for_lawyers_representing_children.pdf) [hereinafter ABA Custody Standards].

<sup>2</sup> See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1303 (1996) [hereinafter Fordham Recommendations]. The Fordham Recommendations stated that the child's expressed wishes are always part of the best interests determination and the traditional client-directed model of representation can include consideration of the child's best interests in some instances. The Fordham Recommendations rejected a guardian ad litem role for the child's attorney to the extent that those duties are inconsistent with the attorney's role. See also *Recommendations of the UNLV Conference on Representing Children in Families*, 6 NEV. L.J. 592 (2006) [hereinafter UNLV Recommendations]. The UNLV Recommendations endorsed the Fordham Recommendations and identified practice guidelines for children's attorneys. For a more detailed description of both sets of recommendations, see Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 J. OF PUB. L. & POLICY 177, 183 - 189 (2006).

<sup>3</sup> See Nat'l Conference of Comm'rs on Unif. State Laws, *Unif. Representation of Children in Abuse, Neglect, and Custody Proceedings Act* (2007), available at [http://www.law.upenn.edu/bll/ulc/RARCCDA/2007am\\_final.htm](http://www.law.upenn.edu/bll/ulc/RARCCDA/2007am_final.htm). The Act identifies three roles for child representatives: the child's attorney (the traditional client-directed role), the best interests attorney (the role included in the ABA Custody Standards for a child's attorney who is not bound by the client's directives or objectives), and the best interests advocate (a new term to define "an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of the child").

<sup>4</sup> See AAML Standards, *supra* note 1, at §§ 2.2, 2.3.

<sup>5</sup> *Id.* at § 2.7 cmt.

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<sup>6</sup> *Id.* at §§ 2.7, 2.12, 2.13.

<sup>7</sup> *See, e.g.,* Ann Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 J. AM. ACAD. MATRIM. L. 57 (1995).

<sup>8</sup> *See* ABA Abuse and Neglect Standards, *supra* note 1, at B-3 cmt. (“Rather, disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.”); ABA Custody Standards, *supra* note 1, at Standard IV(C-1) cmt. (“These Standards do not presume that children of certain ages are ‘impaired,’ ‘disabled,’ ‘incompetent,’ or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.”).

<sup>9</sup> *See* Fordham Recommendations, *supra* note 2, at 1309-11 (recommendation IV(B)(2) sets forth a detailed methodology for determining the child’s legal interests in an objective manner and recommends presenting multiple options to the court if there is no definitively preferable option for the child); UNLV Recommendations, *supra* note 2, at 609 (recommendations in Part IV “expressly reject the notion that there should be a bright line rule based on age or any other generic factor de-marking when a child’s lawyer should treat the child as a traditional client or as an incapacitated client”).

<sup>10</sup> *See* ABA Abuse and Neglect Standards, *supra* note 1, at Standards B-4, B-5, cmts.

<sup>11</sup> *Id.* at Standard B-2, cmt.

<sup>12</sup> *See* ABA Custody Standards, *supra* note 1, at Standard II(A).

<sup>13</sup> *Id.* at Standard II(B)(2).

<sup>14</sup> *Id.* at Standard II(B)(1).

<sup>15</sup> *Id.* at Standard V(B).

<sup>16</sup> *Id.* at Standard II(B)(1).

<sup>17</sup> *Id.* at Standard II(B)(2).

<sup>18</sup> *Id.* at Standard III, cmt.

<sup>19</sup> *Id.* at Standard IV(B), cmt.

<sup>20</sup> *Id.* at Standard IV(C), cmt.

<sup>21</sup> *Id.* at Standard IV(C)(1) and cmt.

<sup>22</sup> *Id.* at Standard IV(C)(2).

<sup>23</sup> *Id.* at Standard IV(C)(2), cmt.

<sup>24</sup> *Id.* at Standard IV(C)(3).

<sup>25</sup> *Id.* at Standard IV(C)(4).

<sup>26</sup> *Id.* at Standard V(B).

<sup>27</sup> *Id.* at Standard V(B), cmt.

<sup>28</sup> *Id.* at Standard V(D).

<sup>29</sup> *Id.* at Standard V(E).

<sup>30</sup> *Id.* at Standard V(F).

<sup>31</sup> *Id.* at Standard II, cmt.

<sup>32</sup> DEBRA H. LEHRMANN, COURT-APPOINTED REPRESENTATION OF CHILDREN IN TEXAS FAMILY LAW CASES 5 (LexisNexis 2006).

<sup>33</sup> Jean Koh Peters is a clinical professor of law and supervising attorney in the Jerome N. Frank Legal Services Organization at Yale Law School. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 1-19 (LexisNexis 2001).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 3.



## **Child and Youth Developmental Considerations**

**F**or too long, children of separation and divorce have been without a voice. Historically, the needs of children were rarely accounted for in a way that ensured healthy growth and development following their parents' separation. Instead, parents have been permitted to “go to war” in order to “win” custody of their children. Research, however, now documents the potentially devastating consequences for children when they are treated as pawns in a bitter custody dispute, including an increased likelihood of clinical depression, delinquency, truancy, and teenage pregnancy.<sup>1</sup> There are, however, more healthy ways to divorce that would minimize the negative impact on both children and parents.

### **The Developmental Approach of This Chapter**

The model presented in this chapter, entitled *The Child and Family Focused Model of Decision Making*, provides a developmental framework for judges who must make critical, often painful, custody determinations based on the rather undefined “best interests of the child” doctrine. The model was developed by the National Family Resiliency Center, Inc. (NFRC) (formerly Children of Separation and Divorce Center, Inc.), based in both Columbia and Rockville, Maryland. COSD changed its name to National Family Resiliency Center, Inc. to reflect the agency’s broader, collaborative work with families and the court system. The developmental information contained within this chapter is based on extensive clinical and educational work at NFRC with more than 22,000 family members since 1983. The general theories of well-known developmental and attachment theorists such



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as Jean Piaget, Erik Erickson, Margaret Mahler, and John Bowlby also inform the model presented in this chapter.

*The Child and Family Focused Model of Decision Making* presented in this chapter will address the following concepts:

- What you should expect from a child of a certain developmental age in terms of the following:
  - ◆ self-concept or how positively the child views him or herself;
  - ◆ intellectual functioning;
  - ◆ interpersonal functioning; and
  - ◆ sense of safety and security.
- How separation, divorce, and other transitions may impact the child's development.
- What information you need to determine “parental fitness” or the ability to parent responsibly given the child's developmental needs.
- What age-specific, key factors you should consider prior to formulating a custody agreement.

It should be noted that, where domestic violence is at issue, you might need to implement additional safeguards to protect the victims of violence, as well as consider the use of experts in this area to ensure an outcome in the best interests of the child. (See **Chapter 4, Potential Parenting Impairments: Domestic Violence** and **Chapter 6, Recurring Issues in Child Custody Cases: Domestic Violence.**)

## Resources to Help Judges Apply the Model

As a supplement to the legal “best interests” doctrine, judges using the developmental model described in this chapter are not expected to become mental health or child development experts. Instead, you should rely on the information gathered by the following individuals:

- neutral evaluators;
- mental health professionals;
- mediators;
- best interest attorneys (BIA); and
- domestic violence and child abuse experts.

The model helps judges ask the right questions of these professionals, order the appropriate referrals and evaluations, and finally, make a determination based on a more complete picture of the child's specific developmental and special needs.

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Fortunately, many jurisdictions now have in place an interdisciplinary support system for families experiencing separation or divorce. This system may be a formalized family court or simply a network of professionals in the community. In fact, the concept of “collaborative” family law is becoming increasingly popular across the country. Under this approach, a multidisciplinary team of attorneys, financial experts, mental health professionals, and child specialists work with parents to help them make non-adversarial and developmentally informed decisions about their children following separation. This integration of services is not only better for families and children, but for judges as well. A judge can gather information from this network of professionals and may use these resources for referrals. Mental health professionals, attorneys, parents, and other professionals involved with a child can work as a team to assess the individual needs of a child.

You can promote this interdisciplinary approach to handling the child custody case with the following steps:

- Require domestic relations attorneys, including both counsel for parents and children, to attend trainings related to child development, family functioning, and domestic violence.
- Appoint GALs who have appropriate child development training to objectively gather information on behalf of the court and make recommendations as to the best interests of the child.
- Require parents to attend research-based parent education seminars with an interdisciplinary panel of presenters. For more information about these seminars, see **Chapter 4**.
- Request input from other neutral evaluators, such as mental health professionals who specialize in child custody issues and are not engaged by a parent, and ask them to make recommendations to the court.

Of course, you cannot be expected to predict the future developmental needs of children. By requiring the parties to focus on the child’s developmental needs, however, you involve the parents in a process that easily can be replicated outside of the courtroom. Provisions in the custody order can encourage the parents to discuss any changing developmental needs that may require schedule modification with mental health professionals and mediators.

The developmental model presented in this chapter also applies to custody determinations involving parents who have never been married and parents who

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are filing for a divorce. **Chapter 4** also discusses how a developmental approach to custody decisions can create effective long-term parenting plans.

### The Child Focused Decision-Making Model

In addition to the age-specific information presented in this chapter, you should also consider certain preliminary factors when deciding a custody case. Additional factors, including parental substance abuse, domestic violence, and mental illness, will be discussed in **Chapter 4 and Chapter 6**.

### The Child's Grief Process

It is difficult to determine what may be “in the best interests” of a child without first recognizing the child's grief process following a separation or divorce. Children experiencing a separation or divorce go through different stages of the grief process that may alternate between feelings of loss, denial, anger, anxiety, guilt, and relief. A child may become “stuck” in one of these stages, such as a prolonged inability to let go of a sense of anger or guilt over the parents' separation. If the evidence suggests that the child is having great difficulty adjusting to the separation, it is appropriate to insist on a referral to a mental health professional. Children may also benefit from participating in groups with other children grieving over their parents' separation and/or divorce.

Parents may be at a different stage in their own grief process and therefore may not be able to relate to what the child is experiencing. (For more information about the parent's grief process, see **Chapter 4**.) Moreover, the child's feelings of loss are usually quite different from a parent's sense of loss. The child's concrete losses may include the loss of contact with a parent, home, pet, neighborhood friend(s), and the extended family, as well as an awareness of a reduced standard of living. Sadly, many children also feel a fundamental loss of childhood innocence or the comforting belief that they will always be protected and taken care of by their parents. A child's sense of loss following the family's dissolution may last forever, but parents, the courts, and other professionals working with the family can do much to minimize or prevent further loss.

### Temperament

Research has confirmed that, while environmental influence is critical, we are born with certain innate temperamental traits.<sup>2</sup> Temperament is essentially the way we tend to behave in response to new people, places, and other stimuli. A child's temperament, often noted as early as infancy, may range from fairly easy and adaptable to highly sensitive, intense, and more negative in mood. Parents and other primary caretakers can usually readily describe some of the temperamental characteristics of a child before the separation. This baseline information about a child's temperament should be considered in tailoring the appropriate parenting schedule. Once you are aware of the baseline of a child's temperament, you can ask questions to gather evidence about the child's current behavior. The behavior

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during and after the separation, when compared with the baseline, may provide useful information. Consider the following scenarios:

- The parents of two-year old Brian describe his behavior in infancy as relatively calm and relaxed. Aside from occasional “meltdowns,” he was and continues to be relatively receptive to new faces and experiences.
- The parents of two-year old Sam remember having difficulty calming their son during infancy. He would cry for long periods of time. As a toddler, he is slow to warm up to new people, and often anxious and withdrawn in new situations.

Even if these two children may have otherwise reached developmental milestones at the same time, their different temperaments need to be considered in making a scheduling determination.<sup>3</sup> A parenting schedule that may work for Brian, who appears more adaptable to change, may provoke anxiety in a child like Sam, who may be less flexible.

### **Resiliency**

While this chapter notes the potential impact of divorce on development for each age group, it is not to suggest that all children experiencing a separation or divorce become dysfunctional. Many children surprise adults with their resiliency or their ability to “bounce back” from stressful transitions and continue to thrive in all areas of development. Again, this resiliency may be a function of temperament. Resiliency may also stem from certain environmental factors, such as a responsive support system of family, friends, and professionals. Likewise, how parents explain the divorce process and frame the change in either positive or negative terms play a role in the child’s resiliency. Indeed, one of the purposes of this book is to demonstrate how you can promote the child’s resiliency and coping skills during this major family transition.

### **Special Needs or Developmental Challenges**

This chapter focuses on what is considered “normal” development for each age group and what potential impact separation and divorce can have on development. Of course, there are many children who do not seem to “fit” the developmental expectations for a certain age group or developmental consideration due to certain special needs, including physical or emotional disabilities. In these cases, you will need even more information to adequately effectuate a child custody agreement designed to meet the special needs of the child.

To gather specific information about the nature of the child’s disability, you should obtain input from parents, special educators, physicians, physical

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therapists, counselors, and other professionals involved in the child's care. Obtain copies of any professional evaluations. You also will need the following information from these individuals:

- The date of onset of the disability and the prognosis.
- How experts believe the disability impacts the child's development.
- The level of each parent's involvement in working with the child and his or her disability; i.e., father attends physical therapy with a child twice per week.
- The resources available for the child to address the losses, anger, fears, and other emotions related to having a disability; i.e., the child attends weekly group therapy with peers diagnosed with the same disability.
- How the parents communicate about the child's needs, including issues of transportation, special assistance, or direct work with the child. See **Chapter 4, Co-Parenting Skills**.

## A Developmental Approach to Decision Making

### Infancy – Birth to 18 Months

An infant is a tiny, wholly dependent human being. Highly vulnerable, infants need parents or other primary caregivers to respond in a consistent and predictable manner to their multiple needs. With a secure attachment to a nurturing caregiver, infants gain a sense of trust and confidence in the world that is essential to future development. If the world, however, seems chaotic and unpredictable, the infant may instead become insecure and anxious.

#### Developmental Considerations

Infants are not simply blank slates. Genetic and environmental factors need to be considered to truly understand infants and their particular needs. Temperament, as discussed earlier, plays an important role in how an infant perceives and reacts to the world. But research also confirms that the infant clearly benefits from early stimulation and interaction from caregivers, some claim even in utero, for intellectual and emotional development. The soft, high-pitched “parentese” and patient repetition of words is critical to the infant's language development.

Infants are sensorimotor beings. That is, through their senses they learn to control and interact with their environment. What may seem like small achievements to adults are monumental to children at this stage of development. A parent or other primary caregiver should reinforce and celebrate each milestone,

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from tentative attempts to reach a mobile, to the shaking of a rattle, to turning over, to sitting up, to speaking first words and taking first steps.

Over the first three months of life, the infant usually forms an attachment to a parent, or to both parents, who have understood and consistently met their needs.<sup>4</sup> A primary caregiver is usually attuned at this time to the infant's particular pattern of eating, sleeping, changing, and playing. If this attachment is established, the infant can feel safe to trust others. Between eight and twelve months, however, the infant will typically experience bouts of "separation anxiety" or a fear of abandonment that tends to subside when the infant can cognitively grasp that the parent who seems to "disappear" will return.

*The infant needs twenty-four hour protection.* Attuned caregivers learn to distinguish cries of hunger, fatigue and pain, meet these needs, and protect the child from harm. In the first year, the infant needs frequent "well care" visits to the pediatrician to ensure proper growth and development. As infants become more mobile, parents and caregivers must constantly supervise and protect them from falling, putting dangerous objects in their mouths, and wandering off. The infant's environment should be adequately "baby-proofed" to prevent accidents.

In order for a parent to interpret a child's needs in a meaningful way, he or she must interact and connect emotionally in ways that convey that interaction to the infant. Such interaction requires validating the infant's feelings through speaking to them, holding them, and engaging them in ways that relate a parent's understanding.

### **How Divorce May Impact Development**

Infants tend to absorb household tension, which is often most acute at the time of separation and divorce, through the sounds they hear and how they are handled. During this stressful time, a parent may handle the infant more anxiously or may be too distracted to interact with the infant in a playful, stimulating way. As a result, the infant may have difficulty securely attaching to the parent. Likewise, separation and divorce may require a change in primary caregivers or a shift to several caregivers during the family crisis. Without a secure attachment to a primary caregiver, the infant may become anxious, listless, depressed, and withdrawn.

An infant's sense of stability and trust also may be threatened by frequent changes in environment. Changes in households may also mean varying amounts of intellectual stimulation. For example, a parent may, for financial reasons, be unable to provide safe toys, books, and colorful objects to stimulate the child. In such cases, an increase in child support should be considered, subject to guideline limitations. A parent who is not attuned to infant development may also discourage the child from exploring the environment or mouthing certain safe objects as part of an important tactile experiment. Likewise, a parent may

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underestimate the importance of interacting with the infant to encourage language development.

Gauging the impact of separation and divorce on the nonverbal infant involves careful observation. First, it is necessary to have a 'baseline assessment' of the infant's temperament from birth, usually revealed through parent and caregiver accounts of the infant's behavior prior to the separation. Testimony should then focus on any unusual changes in feeding, sleeping, and alert patterns that may be symptoms of stress. The infant experiencing stress, for example, is more likely to be irritable, harder to calm, and to react unpredictably to caregivers.

### Special Considerations

In order to make a custody decision about an infant, you will need to hear evidence on issues such as temperament, attachment, safety and security, and acute signs of distress. You may obtain this information through the parents' testimony, the child's attorney and/or guardian ad litem, or from a court-ordered evaluation and/or home study. You should gather as much information as possible from individuals who have observed interactions between the infant and each parent or other primary caregivers. With a thorough understanding of the following issues as they relate to a particular child, you can draft an appropriate parenting plan.

- **Temperament.** Understanding the child's temperament will provide better insight into the particular child's needs. As discussed earlier, some infants may demonstrate a high tolerance for stimulation and changes in environment from birth. Others may be considered "colicky" in these beginning months or simply unable to handle significant change.
- **Attachment.** By three months, it is usually apparent who are the infant's primary caregiver(s). Decisions should focus on preserving and maintaining these primary attachments. You may wish to refer the family for a professional evaluation to assess attachment. There are mental health professionals who specialize in attachment assessments.

At the same time, attachment theory should not be used to exclude an otherwise loving parent who has not been as consistently involved with an infant's daily needs prior to the separation.<sup>5</sup> Ideally, this parent can remain involved with short, frequent visits that can be adjusted later when the infant is developmentally ready or has formed a more secure attachment to the parent. The exact point at which an infant can handle overnight visits or shared physical custody, therefore, is variable and depends in large part on the infant's particular temperament and his or her need for a predictable, consistent environment. Some infants, for example,

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become anxious when there are shifts in environment and care giving.

- **Safety and Security.** The abilities of infants are sometimes underestimated. A child may learn to roll over, crawl, or reach for things at unexpected times, resulting in dangerous situations. It is never premature to have safety measures in place.
- **Acute Signs of Distress.** In acquiring the above information, you may hear testimony that an infant is showing signs of acute stress. If such signs of distress are apparent, you may need to consult with medical and mental health professionals, and may need the parents to obtain consultation as well. Such symptoms may include the following:
  - ◆ The infant is failing to thrive, i.e., the infant is extremely small for his or her age and is not reaching critical developmental milestones.
  - ◆ The infant has sleeping difficulties.
  - ◆ The infant has unusual feeding problems and/or rapid weight loss or gain.
  - ◆ The infant exhibits a lack of interest in people and the environment.
  - ◆ There is documented prenatal use of drugs or alcohol.
  - ◆ The infant shows a lack of attachment, is disinterested in people, and/or is unresponsive to nurturing gestures.
  - ◆ The infant is excessively irritable or hard to calm.
  - ◆ There is risk for HIV/AIDS or other sexually transmitted diseases.

### Parenting Considerations

Parenting an infant can be emotionally and physically exhausting. Often sleep deprived, parents must still respond to the infant's demands in a consistently loving way, while also attending to the outside pressures of work, household, and other family responsibilities. The stress associated with divorce can make this time even more chaotic and unsettling. Without adequate support, parents may find themselves in a vicious cycle: the infant may respond to the stress with more



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frequent, unpredictable demands, while the parents may be too depleted to respond to these demands in a predictable, patient way.

If there are transitions involved, however, it is critical that co-parenting skills and communication are addressed in addition to the questions below. (See **Chapter 4, Assessing Co-Parenting Skills.**) It is also important for parents of children in this age group to be screened for any other potential parenting impairment, such as domestic violence, mental illness, or substance abuse, given the vulnerability of an infant. (See **Chapter 4, Assessing Co-Parenting Skills.**)

### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- How did each parent react to the pregnancy? What kind of prenatal care and nurturing took place?
- How does the parent respond to the infant's demands for predictability in eating, sleeping, and bathing? If not the daily caregiver, how does the parent remain involved, such as in bedtime rituals, bathing, and feeding, yet avoid overstimulating the infant?
- Does the parent provide a safe and stimulating environment in which the infant can master new skills and experience a sense of competence? What child-proofing measures were taken in each home to allow the child to safely explore?
- Does the parent seem aware and excited about the infant's growth and acquisition of new skills?
- How is the parent's physical and psychological health, and what support system does he or she have?
- How many caretakers are involved with the infant and what criteria were used in their selection?
- Has the parent attended a research-based parenting skills training program?

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- If a parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of the treatment?
- Does the infant suffer from any particular medical or mental health problems? If so, how does each parent respond and adapt to the infant's special needs?
- How does each parent support the child's relationship with the other parent?

### **The Toddler-Preschool Aged Child (18 Months to 5 Years)**

There is a period of remarkable growth in physical and intellectual development roughly between the ages of eighteen months and five years. While there might be significant differences between an eighteen-month old and a four-year old, they share many of the same developmental milestones and potential reactions to separation and divorce.

#### **Developmental Considerations**

The toddler first begins to assert independence in many daily tasks, often with a strident "Me do!" While often exasperating for a parent, this assertion of autonomy is critical for a healthy self-concept in a toddler. Each success, from eating with a spoon to riding a tricycle, bolsters the toddler-preschooler's sense of initiative and purpose. These developmental milestones are critical to success in the elementary school years.

Rapid language development and imaginative play are the cornerstones of this age. While the toddler may first gesture to communicate, the preschooler may ask "Why?" and "What's that?" hundreds of times a day in an attempt to master more abstract concepts. Thinking, however, at this age is typically very egocentric and often "magical." Toddlers tend to believe that the world revolves around them and they have difficulty distinguishing between fantasy and reality. Preschoolers use imaginative play to test theories of reality and resolve issues of conflict and frustration.

For most of this developmental stage, the child's focus is on the parents or other primary caregivers. A toddler, for example, often experiences another bout of separation anxiety, particularly around the age of eighteen months. By preschool, however, the child's social sphere has expanded to include neighborhood playmates, babysitters, and teachers. While the toddler tends to engage in "parallel play" or simply plays alongside others, the preschooler begins to develop rudimentary social skills and interact with peers.

Safety is a major concern during the toddler-preschooler stage. Active and inquisitive, a child of this age needs almost constant supervision to avoid physical

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harm. With gentle guidance, children of this age derive a sense of security by learning to control impulses in toilet training, aggression, and general behavior. They also thrive on the predictability and consistency of family rituals and routines.

### **How Divorce May Impact Development**

The toddler-preschooler can be sensitive to even minor changes in routine or daily life, and therefore can have great difficulty adjusting to a separation or divorce. Because parents are the center of their universe, the toddler-preschooler often feels a profound sense of sadness and abandonment. It is not uncommon for children of this age to regress significantly during this time instead of reaching important developmental milestones. The child may start to “act out” or become excessively clingy.

The child’s limited language skills and egocentric thinking make adjustment to parental separation particularly difficult. Most children at this age do not understand the concept of “divorce.” It is also not uncommon for children this age to believe they are responsible for the separation because they were “bad” or misbehaved.

The child’s safety and sense of security also may be compromised at this time. As the child moves between households, there may be lapses in supervision, lapses in communication about safety issues, or inconsistent preventative measures. There also may be a loss in self-control as the child tries to adapt to changes.

### **Special Considerations**

In making a custody decision affecting a toddler-preschooler, you will need to hear evidence on the following issues:

- **Temperament.** A child can be particularly traumatized by changes in schedules, movement between households, and unpredictable contact with a parent. A lot, however, depends on the child’s temperament and adaptability. How has the child coped with transitions in the past? What has helped them adjust to change? Some children, for example, need a certain security object, such as a blanket or stuffed animal, to ease their anxiety over a transition.
- **Attachment.** The toddler-preschooler is still fully dependent on certain primary caregivers for most of their needs. Secure attachments may already be formed with a parent, grandparent, or other adult care provider. Focus on how the divorce will impact the child’s relationship with these caregivers at this time.
- **Safety and Security.** A toddler-preschooler may be more prone to accidents if his or her environment is not sufficiently

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child-proofed, if there is a lapse in supervision, or if the child is off schedule due to family changes.

- **Behavioral Concerns.** Through testimony from relevant witnesses, you may hear of particular behaviors that signal a need for more professional intervention. These issues must be taken into consideration when drafting an appropriate parenting plan. Each of the following behaviors suggest that a toddler-preschooler is having a difficult time dealing with the stress of the separation or divorce:
  - ◆ The child seems excessively clingy and anxious, especially during transitions.
  - ◆ The child has no interest in exploring the environment.
  - ◆ The child avoids eye contact, although this tendency may vary among cultures.
  - ◆ The child refuses to eat or has difficulty sleeping.
  - ◆ The child is having substantially more tantrums than is normal for the child.

### **In-Chambers Interview**

At this age, the court sometimes seeks additional information directly from the child. It is important to keep in mind the following when conducting these interviews:

- Be flexible and have limited expectations or agendas when trying to interview a toddler or preschooler. In many cases, an interview may not be possible for this age group. In particular, a toddler has limited language skills and likely would not be comfortable speaking with a judge without a parent present or nearby. Have a qualified evaluator observe the parent-child interaction.
- If you choose to meet with a child of this age, try to fit into the child's schedule as much as possible. For example, a meeting should be scheduled only when the child is well rested and fed.
- Prior to the meeting, allow the child to safely explore the environment. It may be helpful to have a few small toys or crayons and paper. Respect and acknowledge any security objects, such as a blanket or stuffed animal that the child brings to the interview.

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- Use simple words and brief explanations. At the same time, even toddlers may understand a lot despite the fact that they are not very verbal.
- Be aware of the child's difficulty understanding the concept of time and the sequence of events, especially if you discuss scheduled transitions between households. For example, even the idea of "the day after tomorrow" is a difficult concept. A four-year old, however, might understand the concept of "weekend" if it is explained as the days when Mommy and Daddy don't go to work.

### **Parenting Considerations**

Parenting a toddler-preschooler is difficult and at times trying. During a stressful family transition, such as separation and divorce, a parent may have less time, energy, and patience to handle an active, exploring toddler or inquisitive preschooler. Unfortunately, without parental encouragement, a child may not acquire the sense of autonomy and initiative needed for further healthy development.

Ideally, the parents will recognize the toddler-preschooler's need for predictability and consistency, and will work together to minimize changes that may threaten the child's sense of security following the separation and divorce. If the parents have agreed to share time with the child, therefore, it is critical that they are able to communicate effectively. (See **Chapter 4, Assessing Co-Parenting Skills.**) Of course, change is inevitable, and a parent must be able to handle any regression in a patient and understanding way.

### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- Does the parent carefully balance the child's need for independence and initiative with the need for emotional and physical nurturance?
- What kinds of learning opportunities does the parent create for the child to master both physical and mental tasks, including language development?
- If the parent is working, are day care arrangements carefully selected and monitored to ensure that a safe and stimulating environment is provided for the child?
- Does the parent provide sufficient opportunities for the child to socialize with other children and supervise these activities in order to help the child learn self-control and social skills?

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- Does the parent provide adequate supervision for the child? Has the parent, anticipating potential hazards at this age, carefully inspected and, if necessary, child-proofed areas in which the child will likely explore?
- Does the parent set expectations and rules that promote self-control and safety? Does the parent follow through in a consistent manner with consequences and rewards for the child's behavior?
- Does the parent set expectations and rules that promote self-control and safety? Does the parent follow through in a consistent manner with consequences and rewards for the child's behavior?
- Does the parent respect and attempt to maintain the child's need for routine and family ritual, and try to keep changes to a minimum, both between households and in general?
- Does the parent avoid demanding new levels of self-control and independence during times of increased stress? Does the parent respond to any regression and anxiety in a patient and understanding manner, yet still maintain appropriate standards of behavior and avoid yielding to the child's demands?
- Has the parent attended a research-based parenting skills training program?
- If a parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of the treatment?
- How does each parent support the child's relationship with the other parent?

### **The Early Elementary School-Aged Child (5 to 7 Years)**

Picture the first day of school for a child: the yellow school bus, the carefully arranged desks, the sharpened pencils. Often, it is the first time the child has spent many hours away from family or other primary caregivers. Venturing out into the broader community for longer periods, the child may be excited, intimidated, and perhaps overwhelmed. A sense of security and competency still depends on the return to a loving and warm home environment. Early elementary school-aged children, roughly between the ages of five and seven, can have a particularly hard time adjusting to changes in the comforting rituals of family life that often occur with a divorce.

#### **Developmental Considerations**

These are the skill building years that help the child develop a critical sense of self-competence. The early elementary school-aged child will proudly demonstrate tying shoes, riding a two-wheeler, and eventually reading and writing ability. A parent's physical presence and psychological support reinforces the child's sense of mastery and accomplishment. Without this "I can do it" attitude, the child will have difficulty progressing to the next stage of development in the later elementary school years.

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A child of this age still tends to judge situations rather superficially or from only one perspective. The world they perceive tends to be black and white with very few shades of gray. A strong sense of “fairness” or right and wrong emerges at this time. This rather rigid perception of the world and perceived social roles is usually evident in their imaginative play and interaction with new “playmates” or neighborhood and school friends.

In general, this age group exhibits more self-control and tends to follow through with established rules and consequences. Children of this age, however, are usually not able to conceptualize the complexity or potential danger of new situations and still need adult supervision. It is not uncommon for this age group to have nightmares and anxiety about both imagined and real dangers, and to need reassurance from parents.

### **How Divorce May Impact Development**

Still egocentric, a child at this age often will say or believe “It’s my fault that Mommy/Daddy left.” Sometimes they will even pinpoint a specific event, such as “I’m no good at soccer” or “Mommy/Daddy got mad at me the other day for not cleaning my room.” This kind of self-blame, of course, can have a negative effect on the child’s sense of competency and self-esteem.

Likewise, a child of this age tends to see only one dimension of a given situation, including their parents’ divorce. Steadfastly loyal, they are often quicker to condemn a parent they believe may have caused the separation. Their concrete thinking and tendency to have loyalty conflicts make them susceptible to parental suggestion or “brainwashing.”<sup>6</sup> Their sense of loyalty and increasing ability to empathize also makes them particularly at risk for being a “parental child” following the separation or divorce. A “parental child” tends to worry excessively about a parent’s well-being and will attempt to care for a parent to the exclusion of other age-appropriate activities.

Early elementary school-aged children also tend to cling to the hope that their parents will reconcile, even after parents start dating again or even remarry. Their perception of a parent’s significant other or a stepparent is usually polarized. As in many of their favorite movies at this age, people tend to fall in “good” or “evil” categories. (See **Chapter 4, Stepparenting/Significant Others Issues.**)

Children also are unsettled by inconsistencies in rules and supervision between households following a divorce. In their black and white world, this age group has difficulty handling shades of gray. “That’s not fair!” becomes the child’s mantra for dealing with perceived inequities or inconsistencies. They are likely to experience loyalty conflicts at this time and feel torn by their intense feelings for each parent. At the same time, however, they may be quite adept at manipulating a situation in their favor and playing off each parent.

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As mentioned earlier, it may be particularly difficult for a child of this age to adapt both to the transition into a more formal learning environment and to family change. The early elementary school-aged child still derives a sense of security in predictable family rituals and schedules. The common fears for this age group, including a fear of abandonment, can be exacerbated by the separation and further undermine their sense of security. “Who will take care of me if something happens to Mommy or Daddy?” Fear and anxiety may be particularly marked during transition times between households.

### Special Considerations

It is important to acknowledge the child’s perspective, yet look beyond the “black and white” to the shades of gray. For example, a child may have strong objection to a significant other or a stepparent even though in reality this person may offer critical support and understanding. Remember that children at this age often express a desire to see their parents back together despite all odds.

- **Be aware of suggestibility.** At this age, a child may be particularly prone to suggestibility or “brainwashing.” Seek a professional referral if necessary.
- **Simplify the schedule.** Make sure that the parenting schedule is stated simply so that the child can understand it. Unless the child is particularly flexible, it is probably not the age to try creative parenting arrangements. Like the preschooler, the early elementary school-aged child still derives a sense of security from predictability and consistency in family routines. It is a good age for parents to use calendars to help the child predict daily and weekly activities and transitions.
- **Minimize change.** As stated before, there is a lot of change already taking place in the life of an early elementary school-aged child. Too many changes that interrupt established interests and activities can undermine a growing sense of competency.
- **Behavioral concerns.** What a judge learns about certain behaviors a child demonstrates, and how each parent is responding to the behaviors, will assist the court in developing an effective custody agreement. The following suggest that the child is depressed and/or caught in an unhealthy pattern of family dynamics, and may require a referral to a mental health professional for either individual or group counseling:
  - ◆ The child is shuttling messages between the parents in the role of “messenger.”



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- ◆ The child seems despondent, cries excessively, and seems uninterested in any peer or school activities.
- ◆ The child seems excessively burdened by new responsibilities and tries to “take care of” a parent.
- ◆ The child speaks negatively about a parent in a way that is not age-appropriate, and seems to mimic one parent’s behavior and attitude.

### **In-Chambers Interview**

You may wish to conduct an in-chambers interview with a child of this age. The following are age-appropriate tips for a successful interview:

- Reassure the child that he or she is not responsible for the separation and divorce.
- Allow the child to share excitement about new skills and/or let him or her draw or play with a puzzle during the session. There are books that attorneys can read with young children.<sup>7</sup>
- Ask open-ended questions that are parent neutral: “Let’s talk about what you do when you are with each parent.” Ask the same questions about both parents.
- Acknowledge that a child of this age may be experiencing a loyalty conflict and reassure the child that it is not their responsibility to decide where they should live.
- Find out what activities are most important to the child. What activities give the child a sense of mastery and purpose? Their enthusiasm is usually apparent.
- Recognize the child’s sense of time at this age. Be as concrete as possible and speak in present terms. Relate a future event to an occasion or situation known to the child, such as “When school ends during the summer, you will live with your Mom/Dad.”
- Draw out a child’s feelings by using the third person or generalizing, such as “Some children feel sad when . . .”

### **Parenting Considerations**

Despite a growing sense of competence, early elementary school-aged children need very involved, nurturing, and supportive parents. This time can be demanding for any parent, particularly one experiencing the emotional upheaval of divorce and the increased responsibility of being a single parent. Yet without

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parental support, children of this age can miss social opportunities to interact with peers and/or lack the structure needed to meet the increased expectations of elementary school.

Because the early elementary school-aged child spends longer periods at school, you also may need evidence about the child from teachers and/or a school counselor to get a more complete picture.

### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- How is the parent involved in the child's community, school, and religious activities?
- Does the parent provide the child with time and a place to do homework, as well as provide assistance when needed?
- Does the parent communicate with teachers, coaches, and leaders?
- How does the parent handle academic difficulties that may require assessment, intervention, financial resources, and individual help?
- Does the parent model and reinforce important social skills, such as communication, problem solving, empathy, and conflict resolution?
- Does the parent arrange for the child to visit friends and have friends over?
- Does the parent demonstrate flexibility in the designated time with the child when the child has important peer activities and events, such as a birthday party?
- If the parent is working outside the home, has he or she arranged for before- and after-school care?
- Knowing a child of this age experiences loyalty conflicts, how does the parent assure the child of a loving relationship with the other parent?
- Has the parent attended a research-based parenting skills program?

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- If parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of the treatment?

### **The Older Elementary School-Aged Child (8 to 10 Years)**

As the child progresses through elementary school, there are new developmental challenges. This age group typically faces more challenging schoolwork and becomes more involved in school and community activities. At this age, friends and peer relationships serve to validate the child's sense of self-worth. The impact of separation and divorce, therefore, may be very different for a nine-year old than it is for a six-year old.

#### **Developmental Considerations**

According to Erickson, this is the critical age of "industry" or productivity as the child adjusts to more challenging schoolwork and increasing extracurricular activities. Often for the first time, an older elementary school-aged child is capable of assuming more responsibility and taking care of basic needs. Of course, they are by no means entirely self-sufficient; a child of this age is still heavily dependent on the parents' emotional and physical support. It is during this time that parents provide a critical model of productivity and gender identification.

Older elementary school children need a supportive learning environment at home as they face increasing academic challenges. The child must master abstract concepts, memorize material, complete homework assignments on a regular basis, and utilize organizational skills. Learning difficulties sometimes emerge at this time and need professional attention.

Not quite as dependent on parental approval, older elementary school-aged children start to gravitate toward a few close friends who serve as barometers of their own competency and who tend to validate their sense of self-worth. Despite the relatively egocentric thinking at this age, the older elementary school-aged child demonstrates increased empathy and caring in these more sustained relationships.

A child of this age can be active, curious, and sometimes mischievous. Although independent in many respects, the child still needs adequate adult supervision and reinforcement of rules, expectations, and consequences. It is also at this time that the child has more realistic fears about the safety of loved ones and the potential loss of one or both parents. They need reassurance to maintain a sense of security.

#### **How Divorce May Impact Development**

Because they are still rather egocentric, older elementary school-aged children may believe that they are somehow responsible for the separation and divorce. They may even believe they somehow "failed." This sense of failure may pervade their daily activities. Likewise, the changes often involved in divorce, such as a move or

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new financial worries, may mean the child must withdraw from certain peer activities they once enjoyed. Divorce, therefore, can significantly affect the older elementary school- aged child's sense of competency and productivity.

It is not uncommon for a teacher to notice that the child seems to have lost interest in school or has difficulty concentrating after the separation. It may be difficult to achieve a stable learning environment at home amidst the chaos of family separation. A parent may be too distracted to ensure the child completes homework and to monitor progress. There may be a lack of continuity and supervision between households.

In addition, important friendships may be disrupted by a move after the separation or divorce, or simply because of a parent's inability or unwillingness to host a child's friends or provide transportation. Again, these relationships are a critical part of social development.

Because older elementary school-aged children have developed some capacity for empathy, they are more likely to feel their parent's sadness and to worry about or attempt to take care of a parent. Because of their sense of loyalty and fairness, children at this age often feel pressured to make their relationships with each parent as "equal" as possible in terms of love, affection, and time. They become acutely aware of the dynamics of the parental relationship during the separation and divorce, and often eavesdrop on conversations as a way of feeling more in control.

A child at this stage of development may experience a host of worries about safety and security as family rituals and routines are disrupted. Preoccupied with his parent's safety and well-being, he may wonder "Who will take care of me?" The older elementary school-aged child will pick up on financial concerns as well, asking, "Will we have enough food, clothing, a home, etc.?"

### **Special Considerations**

The following issues should be considered in cases involving older elementary school-aged children:

- **Scheduling.** When drafting appropriate parenting plans, you must consider how best to keep a child's life organized. Ensure that a custody agreement allows for carefully orchestrated transitions to keep the child organized and on top of schoolwork. It is hard to feel competent and productive when assignments are lost or misplaced between households. At this stage, it is easy for children to fall behind in their schoolwork, leading to difficulty transitioning into middle school. How will parents help the child stay organized?

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- **Productivity.** How does the custody agreement allow for the child to feel the most productive? Is he or she energized by soccer? Inspired by art? In what ways will the separation and divorce impact these activities? Is there a way to ensure continued involvement in these activities, including with appropriate child support orders?
- **Recognize special friendships and relationships.** A child cannot be assured that these friendships can be sustained following a separation or divorce, but they should still be acknowledged and respected. If the court recognizes the developmental importance of these budding friendships, parents may try to find creative ways to foster them. (See **Chapter 4, Parenting Seminars.**)
- **Behavioral concerns.** Each of the following may warrant a referral to a mental health professional for either individual or group counseling:
  - ◆ The child seems to take care of a parent and to assume responsibilities that are not age appropriate.
  - ◆ The child has withdrawn from activities and appears apathetic.
  - ◆ The child cannot name any close friends or refers to friends in the past tense.
  - ◆ The child seems to be falling behind peers in school, i.e., child is still having difficulty learning to read.
  - ◆ The child is a “messenger” or seems caught in the middle.
  - ◆ The child is unable to discuss what activities he or she prefers with each parent out of a fear of disloyalty or betrayal.
  - ◆ The child seems very distressed about ongoing parental conflict.

### **In-Chambers Interview**

You may wish to conduct an in-chambers interview with a child of this age. The following are age-appropriate tips for a successful interview:

- Remember that children of this age, because of their sense of loyalty and fairness, may ask you to allow them to see parents for equal amounts of time. This option may be unworkable for a

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number of reasons, including the parent's inability to communicate effectively. Children are often relieved to hear that it is not their responsibility to make such a decision.

- For rapport building: Ask the child about favorite school subjects, extracurricular activities, or hobbies. What kinds of activities does the child like to do with a parent? What are the names of the child's friends?
- Ask the child what has changed since the separation. How has it affected friendships, activities, and schoolwork?
- Assess whether the child has assumed a parental role. How is time spent with the parent? What does the child do after coming home from school? Note if the child tends to take care of a parent or assumes too many responsibilities.
- Be aware that the child may surprise you with a fairly clear understanding of the divorce process from overhearing the parents' discussions. It may be fairly clear after interviewing the child and assessing co-parenting skills that the child is also a "messenger" or tends to shuttle notes and messages between parents. Sometimes the child encourages this dynamic as a way of feeling more empowered and productive. In any event, this situation is not appropriate for a child and should be noted with a "red flag" to be addressed by a mental health professional.

### **Parenting Considerations**

Parenting this age group often means being both a taxi driver and a cheerleader. The parent may feel somewhat sidelined by the child's increasing need to be with certain friends. At the same time, the child desperately needs the support of parents to feel productive, not only by providing transportation, but to be there to watch a game or to share in a school achievement. The parent also plays a critical role in helping the child overcome a sense of failure.

Parenting an older elementary school-aged child through a separation and divorce poses specific challenges. Their increasing ability to empathize makes them at special risk for experiencing loyalty conflicts, putting themselves in the middle of parental conflict, or siding with one parent over the other. Parents of this age group need to work hard to prevent their child from becoming so overly involved and worried about the family situation that they are unable to remain productive in school and other peer activities. Parents also must maintain and nurture important peer relationships if at all possible.

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### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- How does the parent encourage the child's need for productivity and self-reliance by supporting and facilitating involvement in activities?
- Does the parent seem to recognize the importance of peer friendships and foster these relationships?
- Is the parent aware of the child's academic progress, mastery of material, completion of homework, and any behavioral difficulties in school? How does the parent keep the child organized during the shift between homes and to school?
- Does the parent reserve time alone with the child and share the child's meaningful activities and interests?
- Does the child have sufficient "downtime" to relax and recharge or is the child overscheduled with activities?
- Does the parent acknowledge difficulties yet emphasize that the child need not feel responsible for the parent's well-being?
- How does the parent minimize loyalty conflicts or prevent the child from feeling compelled to take sides?
- Does the parent avoid dwelling on financial or legal concerns with the child or within the child's earshot?
- Does the parent adhere to a parenting schedule as discussed with the child and does the parent arrive promptly?
- How does each parent support the child's relationship with the other parent?
- Does the parent discuss the child's concerns about death or injury to a parent and options for care of the child?
- Has the parent attended a research-based, parenting skills training program?

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- If a parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of the treatment?

### **The Middle School-Aged Child (11 to 13 Years)**

Developmentally, the middle school years can be awkward and sometimes even painful for a child. Eager for approval and validation from peers, the middle school-aged child tries desperately to “fit in” with the crowd. Tumultuous change, both internally and externally, is the trademark of this age. Given these rapid changes, the further upheaval caused by separation and divorce in the family can be particularly traumatic for the younger adolescent.

#### **Developmental Considerations**

The middle school-aged child experiences a great deal of awkwardness as multiple changes occur at different rates. A middle school-aged girl may look like a fifteen-year old without the emotional development of an older adolescent. With further changes in sexual development, intellectual growth, and interpersonal growth, the middle school-aged child often feels caught between wanting to grow up quickly and fearing what is going to happen next.

Adolescents at this stage of development are very self-scrutinizing. Enormous energy is invested in peer relationships and the struggle to “fit in” and belong. Awareness of any differences with the “in” crowd is extremely painful. Unfortunately, the need to be accepted often supersedes the need to be considerate and empathic. With a supportive home base, however, children at this age can still feel acceptance and comfort despite the superficial and often harsh peer interactions that characterize this period.

As peer relationships take center stage, middle school-aged children appear to relegate their parents to minor, supporting roles in their lives. Sometimes, they may even wish the parents were invisible, particularly in the presence of peers. While loath to admit it, however, the child still desperately needs parental support and guidance through these difficult years.

Children of this age like to exercise their newly developing abstract reasoning skills and may appear rather argumentative. With so many changes taking place in their lives, middle school-aged children also tend to be rather forgetful, disorganized, and impulsive at times. Despite sailing through elementary school, some children may have learning problems that emerge in middle school and need appropriate attention.

It is not uncommon at this age for the younger adolescent to be left alone for longer periods of time. Judgment, however, is variable and safety may be challenged by the need for peer acceptance. Children this age may still fear being alone but may not admit it. If not adequately supervised, the younger adolescent



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may be vulnerable to experimentation with alcohol, drugs, early sexual relationships, and truancy.

### How Divorce May Impact Development

Acutely self-conscious, middle school-aged children often feel ashamed and embarrassed by their parents' divorce and will mask their feelings by saying, "It's not my problem, I'm cool with it." Despite the high divorce rate, they often feel isolated and alone. They may fear peer rejection and withdraw from age-appropriate activities.

Unlike many younger children, middle school-aged children are somewhat less likely to blame themselves for the separation and divorce because they can reason more abstractly. They rarely, however, understand the complexity of their parent's relationships. Instead, they tend to have a rigid conception of the relationship and may hold one parent more responsible for the failure of the marriage.

The sense of disorganization that children this age normally experience is often compounded by the upheaval of the separation and divorce.<sup>8</sup> Assignments and favorite articles of clothing are frequently lost between shifts in households. The child may now have difficulty even finding a consistently quiet place to study and get organized.

Juggling even more responsibilities after a separation, parents may overestimate the middle school-aged child's independence and leave him alone for longer periods of time, sometimes to care for younger siblings. The child, wanting to appear mature, may mask feelings of insecurity or fear. Likewise, unsupervised time may leave the younger adolescent susceptible to unhealthy peer influences, such as drugs, alcohol, sex, and truancy.

### Special Considerations

There are many issues to consider with a middle school-aged child, including the following:

- **Empathize.** As the judge, it is important to keep the concerns of the child at the forefront. Try to remember your own middle school years. You may readily identify with the awkwardness of this age and the consuming influence of peers. These reflections will assist the court in formulating effective custody agreements. This attitude may in turn be passed on to the parents.
- **Minimize change.** This age is already riddled with change both internally and externally. An abrupt move, reduced standard of living, and other dramatic changes following a separation or divorce may overwhelm a middle school-aged child. If transitions between households are made, ensure that parents communicate and help the child stay organized.

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- **Neutralize absolute thinking.** It is not uncommon for a child at this age to have strong opinions about the separation and exactly which parent is to blame. Stepparents and significant others introduced to the child will receive the same treatment, labeled as good or bad. Recognize that the child gains a sense of control over change and unsettling ambiguity by seeing things in black and white terms. Instead of taking statements at face value, however, probe beneath the surface. If the child expresses feelings of anger towards one parent, ask the child to share an example of a situation when he or she has experienced this emotion most strongly.
- **Behavioral concerns.** Each of the following behaviors may necessitate a referral to a mental health professional:
  - ◆ The younger adolescent seems withdrawn and uninterested in peer activities.
  - ◆ The younger adolescent has excessive responsibilities and has assumed a caretaker role.
  - ◆ The younger adolescent is spending too much unsupervised time alone.
  - ◆ The younger adolescent is falling behind in school, failing to complete assignments, or is truant.
  - ◆ The younger adolescent and/or peer group is experimenting with recreational drugs, alcohol, or other destructive behaviors.
  - ◆ The younger adolescent dramatically shifts peer groups and drops old friendships.

### **In-Chambers Interview**

An in-chambers interview may be appropriate with children of this age. You may want to consider the following points:

- Explain the role and the purpose of the interview clearly. Children of this age tend to exaggerate their sense of responsibility. They may assume that in talking to you they are being asked to make a definitive decision about what will happen to them following the separation or divorce.
- Assess whether the younger adolescent is assuming too many adult responsibilities following the separation and may be at risk for

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becoming a “parental child.” The child may even be encouraging this unhealthy dynamic because it gives them a sense of control.

- How does the younger adolescent report progress in school and homework completion? Is there a consistent place in each household in which the younger adolescent can work independently yet still have a parent available for help?
- How organized does the younger adolescent feel? Does he worry excessively about losing something or forgetting to transport something between households? Does he feel like he has enough privacy?
- How much time does the younger adolescent spend unsupervised in each home and how comfortable is he or she with these arrangements?
- What kind of peer activities does the younger adolescent participate in? How does he or she spend time with friends? Is the time spent with friends unsupervised or is an adult nearby?

### **Parenting Considerations**

The middle school years typically pose a challenge for parents. Seemingly overnight, their relatively eager-to-please child awakens to question every family decision and take issue with standing house rules. Peers seem to replace the parents as authority figures. With as much patience as they can muster, parents need to view these challenges as part of normal development and gently steer their child through this awkward age. Separation and divorce can make the job of parenting the middle school-aged child even more difficult.

### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- Is the parent able to contain hostility and negative discussion about the separation in the presence of the child? Does the parent recognize the younger adolescent’s sensitivity to criticism at this stage of self-doubt?
- Is the parent aware of the child’s need for close peer relationships and their intense interest in belonging to a peer group? How flexible and supportive is the parent of peer relationships and activities?

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- Is the parent aware of the child's school functioning? Is the parent involved with teacher conferences? Is the parent aware of any special learning needs and addressing them?
- How does the parent help the child remain organized and have a predictable study area and time, particularly between households?
- How does the parent include the younger adolescent in setting limits, deciding consequences, and ensuring enforcement?
- Does the parent know the younger adolescent's friends and friends' parents? How does the parent utilize this network to address and handle any safety concerns?
- How does each parent support the child's relationship with the other parent?
- Has the parent attended a research-based parenting skills training program?
- If a parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of treatment?

### **The Adolescent or High School-Aged Child (14 to 18 Years)**

This age is typified by the phrase “one foot out the door, one foot in the door.” One moment, the adult-looking adolescent seems ready to conquer the world and to live independently. At other times, the vulnerable child emerges, still needing safety, security, and unconditional love from family. Despite being older and taller, adolescents can experience the impact of divorce just as acutely as any other age group. Given the developmental paradox of adolescence, you must balance the adolescents' need for independence with the potential vulnerability and specific needs of this age group.

#### **Developmental Considerations**

At this stage of development, the adolescent has normally achieved a sense of identity in relation to family, peers, teachers, and employers. While their future in the broader world is unclear, however, they still must make major decisions, particularly about college and careers, which will impact the rest of their lives.

Cognitively, the adolescent can see multiple aspects of a problem and creatively solve them, as well as brainstorm, analyze, and synthesize events and situations. At the same time, however, they are more likely to be risk takers when evaluating decisions. In addition, some adolescents may need specialized help with learning

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difficulties that interfere with cognitive ability and result in inconsistent or poor school performance.

Socially, adolescents no longer need a huge peer group in order to feel accepted. They instead tend to have a few close friendships, including more intimate and romantic encounters. Typically, the adolescent will move away from rigid cliques and socialize with friends from different peer groups. If exposed to healthy role models during their development, adolescents are capable of empathizing with others, resolving relationship problems, and expressing emotions.

Despite increasing independence, however, adolescents still need supervision to ensure their safety and security. They need to be active participants in the discipline process and included in family discussions of rules and limit setting.

### **How Divorce May Impact Development**

As with all children, adolescents may experience a sense of abandonment and rejection following a separation that negatively impacts their self-esteem. Adolescents may struggle to maintain a sense of identity in the face of family upheaval and new relationship patterns. As a result, they may lack confidence to assert independence in the outside world. Likewise, without guidance, support, and input from significant others, adolescents may fail to fully evaluate the consequences of their choices and make impulsive decisions concerning their future.

On a more positive note, adolescents usually have the cognitive ability to understand the true complexity of what happened between their parents without the tendency to pin blame on either one. The emotional impact, however, can still interfere with intellectual functioning. It is not uncommon following a separation for the adolescent to have difficulty concentrating in school or even attending school because of family upheaval. Often reminded “child support ends at eighteen,” the adolescent may abandon future goals and aspirations or put them on hold indefinitely. Likewise, if learning difficulties are not addressed, the adolescent may enter adulthood with a sense of failure and hopelessness.

Adolescents often assume an adult caretaker role in the family after a separation, taking care of both the parents and the younger siblings. Suppressing their own needs, they may withdraw from their own peer group and outside support system. Adolescents may also have an unhealthy perception of relationships because of exposure to parental conflict. It is not uncommon for adolescents to become threatened and insecure about their own sexuality when they see parents entering new relationships following the divorce.

Adolescents experience an intense grief process following separation or divorce and yet are often less closely supervised because of the family upheaval. This combination of factors makes them more vulnerable to substance and alcohol use and abuse, unhealthy sexual behaviors, and other “acting out” behaviors. Some

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adolescents, for example, may feel rejected by a parent and search for other outside relationships as alternative sources of love and intimacy. This search can increase the adolescent's risk for teenage pregnancy and/or contracting certain sexually transmitted diseases. Adolescents who have experienced parental rejection may also be more prone to remain in abusive relationships and buy into the belief that they are somehow "less than deserving."

### Special Considerations

It is important that adolescents feel heard during the legal proceedings. You will want to consider several issues, including the following:

- **Strike a balance.** An adolescent should express his or her views via testimony, a court-appointed attorney, or an in camera interview. At the same time, however, you should make clear that it is not their responsibility to make a decision about what is in their best interests. Respect the adolescent's cognitive ability and independence, yet understand that it is a vulnerable time and the adolescent still needs significant protection.
- **Look beyond the façade.** To really understand a particular adolescent's needs, it is critical to look beyond courtroom demeanor and static assessments of behavior. Adolescents experiencing the grief process following separation and divorce may exhibit a range of emotions, from intense anger to profound sadness. Academic reports and psychological assessments noting trends in performance and behavior are most valuable.
- **Put safeguards in place.** Adolescents, more so than any age group, are the most likely to be overlooked during the divorce process because of their adult-like characteristics. Their future, however, hangs in the balance and should not be dismissed simply because they are approaching legal age. As stated above, adolescents experiencing the emotional roller coaster of parental separation may be more susceptible to engaging in unhealthy behaviors. Research indicates that they are also more prone to clinical depression than younger children of divorce.<sup>9</sup> It is critical, therefore, that appropriate support, such as counseling, structure, and supervision be in place at this time.
- **Probe beneath the surface.** For example, it is not uncommon for adolescents to request to live and be closer to a particular parent, especially before leaving home and setting out on their own. Sometimes the adolescent wants to be closer to the same sex parent or feels more validated and supported by one parent. Sometimes the adolescent is simply trying to evade one

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parent's closer supervision and discipline. Distinguish between normal developmental needs and the adolescent's best interests.

- **Behavioral concerns.** Each of the following requires a referral to a mental health professional for either individual or group counseling:
  - ◆ The adolescent remains extremely angry and acts out anger.
  - ◆ The adolescent seems apathetic and has no plans for the future.
  - ◆ The adolescent appears extremely anxious about the future following the divorce.
  - ◆ The adolescent is sleeping a lot and has no interest in peer activities.
  - ◆ The adolescent has assumed a parental role following the divorce and is taking care of a parent and/or younger siblings.
  - ◆ There are indications that the adolescent has resorted to recreational drugs, alcohol, or other destructive behaviors.

### **In-Chambers Interview**

When conducting an in-chambers interview, consider the following strategies:

- Find a way to show respect for the adolescent's independence, such as a choice of when to meet or where to sit during an interview.
- Ask the adolescent to take you through a typical day in his or her life. What kinds of responsibilities does he or she have in and outside the home? What kind of encouragement and support does he or she receive to be independent and responsible?
- How does the adolescent see the future: "Where do you hope to be next year at this time; two years down the road; five to ten years down the road?" How does each parent support these goals? Note the adolescent's body language during the interview. Does he or she seem weighted down or optimistic about the future?
- Adolescents are usually acutely aware of how future plans may be affected by school performance. Assess how the adolescent is doing in school without making them feel more pressured.

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Instead ask general questions about what courses the adolescent is taking and what interests them.

- How does the adolescent perceive his or her parents' relationship? How does this perception affect the adolescent's relationships outside the family? Who does the adolescent spend the most time with outside the family and how do they spend their time together?

### **Parenting Considerations**

Parenting an older adolescent or high school-aged youth requires a delicate balance. On one hand, the older adolescent is still a child inside an adult body. The parent needs to be there to comfort, support, and guide the adolescent into adulthood and through the maze of difficult life decisions. On the other hand, the parent needs to permit independence for the sake of the adolescent's future growth and development.

Divorce often disrupts the adolescent's sense of security and rootedness at this critical juncture. As a result, there is a risk that the adolescent may either withdraw into the family situation or become prematurely independent. A parent, for example, may be unable to "let go" and give the adolescent an appropriate level of independence because the divorce compounds the sense of loss. It is critical for the parent to promote the adolescent's independence while still offering guidance and setting limits.

### **Information Needed to Assess Parenting in Relation to Developmental Needs**

The following information should be obtained from parents, mental health professionals, court-appointed evaluators, teachers, physicians, and other professionals involved in meeting the physical, educational, and psychological needs of a child:

- How does the parent express unconditional love through time spent with the adolescent, affection, and acknowledgement of the adolescent's milestones?
- Does the parent support the adolescent's participation in age-appropriate activities, to include financial, transportation, and psychological support? Does the parent attend events that the adolescent wants the parent to attend?
- How well informed is the parent of the adolescent's school attendance, standardized and special testing, and history of report cards? Is the parent aware of changes in academic performance?
- How does the parent reassure the child that the parent will be supportive of the child's future? Does the parent help the



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adolescent evaluate and assess decisions about the adolescent's future and help the child plan financially?

- If the parent has a new adult relationship, is he or she introduced to the adolescent with discretion and sensitivity? Does the parent set age-appropriate and relationship-appropriate boundaries between the parent's partner and the adolescent?
- What rules and consequences has the parent established? How is the adolescent included in discussions about discipline? Is the parent there when the adolescent is supposed to return home?
- How does the parent discuss sexuality, healthy relationships, and other factors that may impact the adolescent, such as substance abuse, sexually transmitted diseases, and gangs?
- How does each parent support the adolescent's relationship with the other parent?
- Has the parent attended a research-based parenting skills training program?
- If a parent is diagnosed with a substance abuse disorder or psychiatric disorder, has he or she sought treatment? If so, what has been the outcome of the treatment?

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- <sup>1</sup> JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (Ticknor and Fields 1989); Andrew J. Cherlin, et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the States*, 252 *SCIENCE* 1386, 1386-89 (1998); Paul Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 *THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE* 143, 150-51 (1994).
  - <sup>2</sup> WILLIAM B. CAREY & SEAN C. MCDEVITT, *COPING WITH CHILDREN'S TEMPERAMENT: A GUIDE FOR PROFESSIONALS* (Basic Books 1995).
  - <sup>3</sup> JANET R. JOHNSTON ET AL., *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (Free Press 1999) (children with more difficult temperaments may not adapt as well to a visitation schedule with frequent transitions between households).
  - <sup>4</sup> *See generally* JOHN BOWLBY, *A SECURE BASE: PARENT - CHILD ATTACHMENTS AND HEALTHY HUMAN DEVELOPMENT* (Brunner Mazel 1988).
  - <sup>5</sup> *See generally* MARGARET MAHLER, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION* (Basic Books 1989).
  - <sup>6</sup> *See, e.g.*, STANLEY S. CLAWAR & BRYNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* (American Bar Association 1991).
  - <sup>7</sup> RISA J. GARON, *SNOWMAN: A KID'S GUIDE TO COMING TO TERMS WITH SEPARATION AND DIVORCE* (Children of Separation and Divorce Center, Inc. 2000).
  - <sup>8</sup> *See generally* Allan L. Reiss et al., *Brain Development, Gender, and IQ in Children: A volumetric imaging study*, 119 *BRAIN* 1763, 1763-74 (1996); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 *PNAS* 8174, 8174-79 (2004).
  - <sup>9</sup> *See generally* MARGARET MAHLER, *ON HUMAN SYMBIOSIS AND THE VICISSITUDES OF INDIVIDUATION: INFANTILE PSYCHOSES* (International Universities Press 1968).



## Parenting Considerations

The previous chapter addressed parenting considerations specifically related to each stage of development. The discussion below, however, focuses more generally on how to assess the parent-child relationship, the impact of potential parenting impairments, and co-parenting skills. In doing so, we avoid the use of the terms such as “fit” or “unfit,” or even reference to potential “custodian.” This type of language serves to polarize the custody proceeding as a contest resulting in a clear winner and loser, when in fact both parents may play important roles in their child’s future development. As the discussion of co-parenting below demonstrates, in most cases, children are best served through the development of meaningful relationships with both parents. As also noted in the previous chapter, where issues of domestic violence are involved in a custody case, you might need to consider additional safeguards and the use of experts in domestic violence to best serve the needs of the child.

### Assessing the Parent-Child Relationship

#### The Parent’s Grief Process

Following a separation, divorcing parents experience a grief cycle of emotions ranging from love, anger, sadness, fear, and guilt. Many have described the divorce as akin to a death in the family. They may feel a loss of their identity or the roles that they assumed as an intimate partner, provider, and nurturer.<sup>1</sup> It can be very unsettling for a parent to now be referred to as “the former spouse,” or for many, “the absent parent.” The adversarial court process compounds their sense of loss because it appears that there can only be one “winner.”

When people are in crisis or have experienced a traumatic event, they are usually counseled not to make any decisions about major aspects of their life. The divorce process, however, requires parents to make a host of critical life decisions. As their attorneys rattle off a list of legal considerations, the client-parent may be

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in a state of psychological numbness or a state of rage, depending on the corresponding stage of the grief process. Neither of these emotional states is conducive to decision making, particularly when the decisions affect their children.

How parents handle emotions inevitably impacts on their parenting abilities during this family transition. Many parents are forced to shift to “survival mode.” Distracted and overwhelmed, a parent may not be able to meet the multiple tasks related to the developmental needs of their children during this time. It is critical to understand the parent’s grief process, determine the parent’s stage of grief, and consider the stress of this family transition when assessing “parental fitness.” Once parents have a sufficient support system, including referrals for professional help, and have some time to deal with their grief, a more accurate assessment of parenting skills can be made. Mental health professionals can often make these preliminary determinations as to how a parent is coping. One parent’s coping skills may be poor immediately following their separation. However, that same parent may return to the court for assistance with a modification in a custody arrangement with much improved coping and parenting skills.

At the same time, you may need to take preventative measures to ensure that the parent’s grief process does not put the child at risk. A parent “stuck” in the anger stage, for example, may negatively impact the child’s self-concept and perhaps even the child’s sense of safety and security. Parents who resort to alcohol or drugs in order to “numb” their emotions during this time also may be endangering their children. Similarly, a parent whose sense of profound loss leads to clinical depression may need professional help in order to parent effectively. For more information regarding substance abuse and mental health issues, see **Potential Parenting Impairments** below.

Courts must also be sensitive to the recovery process of an abused parent. Prolonged anger can help heal the wounds of domestic violence. Efforts to curb or minimize this anger can interfere with healing and encourage continual abusive behavior.

### **Attachment**

Judges often ask how they can assess the level of “attachment” within a parent-child relationship. Attachment theory, as it is called, grew out of the recognition that infants have an innate ability to form enduring emotional bonds or “attachments” to caregivers who consistently respond to their needs.<sup>2</sup> While mothers are often the infant’s first primary attachment figure, infants and young children who are given sufficient time to interact with both parents usually form equally strong attachments to both.

Although a somewhat fancy term, assessment of “attachment” involves the same parenting considerations described in **Chapter 3**. That is, how consistently does

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the parent respond to the child's various developmental needs? As children grow, their attachments to certain adults may alternatively strengthen or dissipate, depending on the nature of their contacts and their developmental needs. The process usually takes time; a parent or other caregiver, for example, with whom the child has not previously formed an attachment, cannot expect to have an instantaneous relationship. Sometimes it may be traumatic for a child to separate from a parent who is primarily responsible for the child's emotional and physical needs. At other times, however, the child may actively seek other attachment figures because of certain developmental needs.

The child's attachment to siblings also must play a role in the court's determination of what is in a child's best interests. Research indicates that courts very rarely grant custody of one child to one parent while granting custody of another child to the other parent.<sup>3</sup> This reluctance to separate siblings is due to legitimate concerns that the children will suffer the additional loss of attachment to their siblings. Children benefit from stability and continuity at all stages of development.

### **Changes in the Parent-Child Relationship**

Separation and divorce can have a dramatic effect on the nature of the parent-child relationship. As noted in **Chapter 3**, the stresses of the divorce process can make parents less accessible to their children, both mentally and physically, and may result in less quality time together. Conversely, some parents experience a relief from the conflict that plagued their married life and are finally able to focus on improving their relationship with their child or perhaps forming a relationship for the first time.

As discussed in **Chapter 3**, there is a risk, particularly in certain age groups, for an unhealthy parent-child dynamic to develop following a separation and divorce. For example, a younger "parental child" may worry excessively about the parent and attempt to take care of him or her. An older adolescent may also assume many of the responsibilities of the former spouse, including being a close confidante to the parent. Unless the parent prevents these unhealthy dynamics from occurring, the child's development may be harmed.

Another unhealthy parent-child interaction that may occur after a divorce is when one parent attempts to control a rather suggestible child's feelings toward the other parent. Again, the adversarial process tends to promote this kind of manipulation of the parent-child relationship.<sup>4</sup>

### **Stepparents and Significant Others**

Many parents become involved with a new partner following separation and divorce, creating another factor in the decision-making process. Specifically, what impact does this significant other or stepparent have on the child's development?

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Does the new relationship tend to promote or hinder the child's self-concept and sense of security following the separation and divorce?

While children often express happiness for their parents, they can experience a complex range of emotions that are based on divorce-related losses, such as the fear of losing the sense of closeness to a parent. Instead of acknowledging these feelings, many parents set up unrealistic expectations for the relationship between the child and stepparent or significant other in an effort to create a new sense of family. Again, the child's reaction depends in large part on the child's stage of development and what impact the divorce has had on the child. The following are important questions to consider:

- How long has it been since the divorce?
- How many prior relationships has the parent had and how involved was the child in each relationship?
- What opportunities has the child had to develop a relationship with the new partner?
- Have the parent and new partner been able to accept the child's feelings of loss that have been rekindled by the new relationship?
- Does the child's other parent support the child having a relationship with the significant other or stepparent?
- Does the parent still spend sufficient one-on-one time with the child without the significant other or stepparent?

### Parenting Considerations

**Chapter 3** presented age-specific parenting considerations in order to make clear the relationship between parenting responsibilities and the child's developmental needs. These considerations represent a neutral and child-focused way to assess parenting ability. The child is an individual with particular needs and the parents must demonstrate to the court how best they can meet those needs.

Historically, of course, custody determinations have not been particularly neutral or child focused. The judicial process does not take place in a vacuum. Rather, certain presumptions, biases, and prejudices have come into play and often control the outcome of the proceeding. Even our fairly evolved concept of the "best interests of the child" is susceptible to these societal influences. It may be that the lack of "bright line" rules in this area of law makes judges uncomfortable and therefore more likely to reach for prevailing societal assumptions of what makes a good parent. In any case, you need to be especially aware of your own values,

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attitudes, and beliefs and how those views may consciously or unconsciously impact the custody determination. See **Chapter 1, Addressing Bias.**

At some point in time, each of the following has been considered a controlling factor in custody determinations. We know now, however, that none of these factors should be determinative and, in some cases, not even a consideration. Instead, the “best interests of the child” doctrine, as informed by the developmental model presented in **Chapter 3**, should remain the focus of the proceeding.

### **Gender**

Despite a long history in family law of maternal preference, courts have moved towards a gender-neutral stance in custody determinations. This shift does not mean, however, that gender should never be a consideration in custody proceedings. At certain points in a child’s development, the child has a need to identify and spend more time with a parent of a particular gender. For example, preschoolers and early elementary school-aged child are increasingly aware of gender differences and learn to identify with the same-sex parent. They also begin to internalize parental values related to gender. The child’s positive sense of self may be compromised if a parent with whom he or she spends significant time tends to “bad-mouth” the same-sex parent or make derogatory remarks about that parent’s gender.

This process of gender identification continues into adulthood. For example, it is not uncommon for adolescents experiencing more intimate relationships with the opposite sex to want to discuss these relationships with the same sex-parent.

### **Religion, Culture, and Ethnicity**

Race, culture, and ethnicity should never control the outcome of a custody proceeding. For further discussion of race and ethnicity issues, see **Chapter 1, Managing the Child Custody Case.** Unfortunately, there are cases in which a parent was denied custody or visitation on the basis of his or her “nontraditional” or minority religious or cultural beliefs or practices. Unless these beliefs or practices somehow put the child at risk, however, these factors should have no bearing on the assessment of parenting ability.<sup>5</sup>

There is no social science research to support the contention that the child will be harmed or unduly confused by exposure to different religions, ethnic, or cultural practices. Indeed, such exposure to their parents’ diverse backgrounds may have a positive effect on their development and may be critical to their sense of identity.<sup>6</sup> With this exposure in childhood, adolescents can make a more informed choice about their preferences in these areas.



### **Sexual Orientation**

Although unquestionably a controversial topic in the field of family law today, the sexual orientation of parents is another factor that should not play a role in assessing parenting ability. Based on available research, gay and lesbian parents are no less likely than heterosexual parents to foster supportive and stable environments for their children.<sup>7</sup> No data exists to support a bias against homosexual parents. The questions in **Chapter 3** that relate to parental fitness apply equally to both homosexual and heterosexual parents.

You should not ignore, however, the impact that a parent's sexual orientation may have on a child. The discretion with which a parent engages in sexual activity when a child lives in the home can still be considered in most states, particularly when the child is cognizant of the nature of the parent's relationships. As with heterosexual parents, you will need to consider how the parent's sexual behavior impacts on the individual child in determining whether a parent has made inappropriate choices about their own sexual activity. If there is no apparent negative impact, it should not be considered a factor in the custody determination.<sup>8</sup>

### **Socioeconomic Status**

Socioeconomic factors should not be a factor when evaluating parenting ability. It is not uncommon, of course, for the separation or divorce to result in a disparate standard of living between two parents. One parent's ability to reside in a more affluent neighborhood or provide a child with more physical luxuries, however, is not relevant to custody decisions. Furthermore, a better way to address economic disparity can be through child or possibly spousal support and property distribution.

### **Potential Parenting Impairments**

While many problems may potentially diminish a parent's capacity to parent effectively, this section will highlight the most prevalent concerns, including mental illness, domestic violence, substance abuse, and chronic illness. Again, the focus should be on how a particular impairment affects the child's development or puts the child at risk. It is not a foregone conclusion that parents confronting one or more of these issues are therefore incapable of meeting the developmental needs of their children.

### **Mental Illness**

Research has expanded our understanding of the biochemical causes of affective disorders such as clinical depression and manic depression.<sup>9</sup> This increased understanding of mental illness has led to a rise in the number of reported cases and the number of individuals on medication to treat such illnesses. The psychological impact of separation and divorce can also paralyze some parents,

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who may or may not have an underlying affective disorder, but still need intervention to help them cope.

It is not uncommon in more bitter custody disputes for a parent to hurl the allegation that the other parent is “mentally ill” and therefore “unfit.” Before taking this contention seriously, of course, an independent licensed evaluator must make a diagnosis. If a parent has been diagnosed with an affective disorder, you may still need further professional advice on the nature of the illness, the treatment necessary, and to what extent, if any, it may affect parenting ability.

There is still a stigma associated with mental illness in our society. Many parents may be reluctant to reveal information regarding mental health issues or may even try to conceal this information. There are also difficult legal and ethical issues posed when the court or a parent tries to obtain treatment records of the other parent.

Mental illness alone should never be determinative of parental ability. Much depends on how the parent is utilizing and benefiting from medical treatment and other forms of intervention, including psychotherapy. Parents who avail themselves of this assistance should be viewed in a positive and responsible light when assessing parenting ability. The focus should remain on the ability of the parents to work together to foster healthy parent-child relationships and not a judgmental assessment of a parent’s mental illness.

### **Domestic Violence**

Research demonstrates that a child is at risk for physical and psychological abuse when there is domestic violence in the home.<sup>10</sup> Often a separation or divorce will escalate the abuser’s behavior. It is therefore critical that the emotional and physical safety of the child and the abused parent be the primary focus in decision making. Basic decisions first need to be made about appropriate shelter and services for the abused parent and child, and holding the abuser accountable.

#### **Tips for Dealing with Cases Involving Mental Illness**

- **Obtain a complete mental health history from treating professionals.**
- **Determine if the parent is consistently taking prescribed medication.**
- **Determine if the parent is consistently attending any recommended therapy sessions.**
- **Assess whether the child can cope with and understand mental health issues in light of his/her development.**
- **Determine how the parent diagnosed with mental illness is assisting the child with understanding the illness.**
- **Determine how the other parent is assisting the child with understanding his/her former partner’s illness.**
- **Avoid stereotypes about particular illnesses.**

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After initial safety concerns are addressed, you need to assess the particular family's pattern of domestic violence and how it impacts each family member. The parent who has been abused may experience post-traumatic stress syndrome and may exhibit symptoms of hysteria, depression, fear, and anxiety. As a result, the victim may have diminished parenting capacities and will need a support system to handle some of the parenting responsibilities following the separation.

The child also may experience post-traumatic stress syndrome and will need appropriate professional intervention. In **Chapter 3**, we noted that children often model their parents' behavior. A child may imitate the violent behavior he/she has seen, or empathize and identify with the abused parent. The child may then become anxious, fearful, aggressive, and/or depressed.

Finally, you need to focus on the parent who was abusive and to what extent he or she should be involved in parenting. You will need to rely on expert opinion to determine whether or not the parent can be rehabilitated. For additional discussion of domestic violence, see **Chapter 6**.

### Tips for Dealing with Domestic Violence Cases

- Always view SAFETY as the #1 issue: if safety cannot be assured, then there may need to be supervised visitation or no contact at all with the abusive parent.
- Avoid generalizations: look at each family and individual as unique.
- Obtain a history of abuse for each parent separately. Learn about the frequency, type, and severity of the violence.
- Assess current parenting capacity, using development-based questions.
- Determine how the parent is protecting the child and if the court could install further protection.
- Assess how the child is coping with what has transpired.
- Find ways to avoid potential conflict, i.e., have scheduled pick-ups and drop-offs at different times.
- Be attuned to cultural differences, i.e., families in which domestic violence is more likely to be hidden.

### Substance Abuse

A parent who resorts to drugs or alcohol on a daily basis and in amounts that impair functioning can pose a significant risk to a child. If the substance abuse problem existed before the separation, it may have been that one parent compensated for the substance-abusing parent or was driven to self-medicating by domestic violence. Following the separation, the child may spend more time alone with the parent who has a substance abuse problem.

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You should request a qualified specialist certified in alcohol and drug abuse to evaluate the parent to determine the extent of the illness and the potential impact on the child. At a minimum, you will need the following information in order to determine whether parenting is compromised by a substance abuse problem:

- The nature and quality of the parent's supervision of the child. For example, is there a risk that the parent drinks while supervising the child? Does the parent ever black out when with the child?
- Reports from significant others about drinking or drug use and whether they tend to confirm or disagree with the parent's self-reporting.
- The extent of the parent's support system in seeking and completing treatment, and participating in post-treatment, e.g., support groups.
- The specific history of substance use/abuse in the parent's family.
- The parent's testimony or admission as to ever having a substance abuse problem.
- How long the parent has been abusing substances.
- Whether or not the parent is currently receiving treatment and what progress is being made, as determined by treatment specialists working with the parent.
- Whether or not the parent has been known to drink or abuse drugs and drive. If the parent has had one or more drunk driving convictions, when was each conviction and what was the corresponding sentence? If there is continued concern about the parent's sobriety, you may consider ordering the parent to undergo random alcohol and drug screening, such as urine screens and/or breathalyzer tests, and regular attendance at AA meetings.
- Does the child express reservations about driving or being alone with the parent?
- Have children been given alcohol while visiting?

For more information on this topic, see **Chapter 6**.

## **Chronic Illness**

The news of a parent's possibly life-threatening or chronic medical illness affects all members of the family. Both parents and children experience a complex range of emotions and must be allowed to grieve. Children may have strong reactions and feelings that they may not be able to articulate fully. Both parents and children may benefit from referrals to mental health professionals in order to deal with these complicated issues.

In the case of HIV/AIDS, this need may be even greater due to the continuing stigma and prejudice that exist today. It is important to note, however, that a parent's HIV infection should not be a reason in itself to deny custody or visitation.<sup>11</sup> As with any chronic illness, the judge must first determine through factual evidence how a particular parent's HIV infection affects a child.<sup>12</sup>

Typically in the case of a chronic illness, a parent's energy level fluctuates at different times of the day or week and more parenting support may be needed at those times. Some chronic illnesses may not initially or perhaps ever impact the parent's ability to be an effective caregiver, especially given current medical advancements. Parents affected by HIV, for example, are living longer and without complications despite their initial diagnosis of terminal illness.

The course of a particular chronic illness, however, is unpredictable and it is critical that the court help the family focus on the parent's current capabilities rather than the "what ifs?" In this respect, the parent's illness should not be a factor in itself for denying someone an opportunity to parent. You can assess a parent's ability to assist a child at different developmental stages with understanding and coming to terms with illness, death, and dying.

## **The Co-Parenting Relationship**

### **Co-Parenting vs. Conflict**

Research confirms that there is a healthy way to divorce and to minimize the potentially negative impact on children. Whether or not parents can "co-parent" effectively (e.g., there is no domestic violence, they live close to each other, they can cooperate) is a critical determinant of the long-term adjustment of a child following a separation or divorce. Specifically, parents must learn to conceptualize their relationship following the separation as more of a cooperative business relationship or partnership with a focus on raising their children. Parents need to communicate on a regular basis in a child-focused and constructive way. To "co-parent" is to participate in a fluid and ongoing analysis of the ever-changing needs of a child. This arrangement is independent of any legally constructed definition of a particular custody arrangement.

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Judges usually observe a continuum of conflict among parents during custody proceedings. On one end are parents who have divorced amicably, learned to set their differences aside, and can effectively co-parent. On the other end are parents who may be physically or verbally abusive to each other, especially during transition times. Somewhere in the middle are parents who make the child a detective, “bad mouth” the other parent in front of the child, and threaten to keep the child. The greater the conflict, the greater the need to assess the safety of the child and to exercise judicial control by minimizing the contact between the parents. Shared or joint custody arrangements, for example, are not a viable option if the parents’ interactions remain highly conflicted or they are unable to learn basic co-parenting skills. The risk to the child is too great.

You can tailor appropriate referrals based on the level of conflict between the parents. The range of services the parents might benefit from includes parent education classes (see below), anger management and conflict resolution sessions, mediation, and ongoing counseling. (Some of these services, however, may be inappropriate in cases involving domestic violence.) A key factor in promoting constructive solutions for parents is to have parents be accountable through the use of court reports indicating the degree of compliance with the referral.

### **Assessing Co-Parenting Skills**

The following questions are designed to assess how effectively parents communicate and work together to raise their children. You can gather information based on these questions from court testimony and independent neutral evaluators. These questions refer to all age groups. Refer to **Chapter 3** for more specific age-related parenting considerations.

- How often do parents set aside time to discuss the issues affecting the child?
- How do the parents treat each other when upset or angry?
- Do parents communicate directly instead of making the child a messenger and/or detective?
- Are parents able to communicate in front of the child without fighting?
- Do parents avoid “bad mouthing” each other in front of the child?
- In what ways does each parent support the child’s relationship with the other parent, including regular visitation and child support payments?

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- How flexible is each parent about modifying the parenting schedule once in a while to account for special events in the child’s life, such as birthday parties?
- If parents both attend school functions or other special events, where does each parent sit and how do they handle attending events at the same time?
- What common criteria do parents have concerning safety?
- Have both parents investigated and discussed child care arrangements?
- Do the parents communicate with each other to provide consistent discipline or rules and consequences in each home?
- Do the parents ensure safety by communicating about important medical needs and appointments?

### **Parenting Seminars: Learning to Co-Parent Effectively**

Attendance at parenting seminars for separating and divorcing parents has proven to be an extremely effective way for some parents to learn how to “co-parent.”<sup>13</sup> Typically, the seminars follow a model similar to the one presented in **Chapter 3** by first giving an overview of normal developmental expectations and the potential impact of separation and divorce on children’s development. Ideally, an interdisciplinary team would present the material. The presence of a judge at these seminars can be pivotal. He or she can demystify the court process and shatter the myth that a custody proceeding means war. Attorneys who present at seminars also help highlight the need for a flexible co-parenting plan that adapts to the changing needs of the child. The Appendix contains some examples of research-based parenting seminars.

Parents ambivalent or even resentful of being mandated to attend these seminars often become very receptive once they realize how profoundly their behavior can impact their children either positively or negatively. The mental health professionals, judges and attorneys who present at the parenting seminars also reinforce the idea that loving parents are the real experts of their children’s needs. In a safe and supportive environment, the parents can learn to communicate in a more child-focused and constructive manner. Many of these parents then draft their own “parenting plans” based on their knowledge of their children’s developmental and special needs.

### **Special Topic: Relocation**

In this transient society, it is not uncommon for judges to have to consider the impact of a parent’s wish to relocate following a separation or divorce. Despite

## PARENTING CONSIDERATIONS

the distance, some parents who must relocate for various reasons are able to continue co-parenting quite effectively and to communicate frequently about a child's needs. There are some parents, however, who may be seeking to “escape” from co-parenting responsibilities and to minimize the child's contact with the parent, or to protect themselves or a child from an abusive parent. This topic is also addressed in **Chapter 6**.

The critical determinant, of course, when considering the issue of relocation is what impact it will have on the child and his or her development. Applying the model presented in **Chapter 3**, you should consider the following factors:

- How critical is the relocation, e.g., is it in “good faith”?
- Can relationships be maintained with the parent who is left behind?
- Are there safety issues?
- What has the nature of the child's relationship been with each parent prior to the divorce and post-divorce?
- What is the temperament of the child? For additional discussion of temperament, see **Chapter 3**.
- What is the developmental stage of the child and how will relocation impact or affect the child's development psychologically, intellectually, interpersonally, and in terms of safety and security? See **Chapter 3**.
- How willing is each parent to accommodate these developmental needs?
- What is the nature of the co-parenting relationship in setting aside a consistent time to talk only about each child's needs and what each parent's responsibility is to meet those needs?



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- <sup>1</sup> ROBERT EMERY, MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT (Sage Publications 1988).
- <sup>2</sup> JOHN BOWLBY, A SECURE BASE: PARENT - CHILD ATTACHMENTS AND HEALTHY HUMAN DEVELOPMENT (Basic Books 1988). *See also* **Chapter 3, Infancy**.
- <sup>3</sup> Lori Kaplan, Linda Ade-Ridder & Charles B. Hennon, *Issues of Split Custody: Siblings Separated by Divorce*, 16 J. OF DIVORCE AND REMARRIAGE 253 (1991). *See also* Lori Kaplan, et al., *Splitting Custody of Children Between Parents: Impact on the Sibling System*, 74 FAMILIES IN SOCIETY 131 (1993).
- <sup>4</sup> STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN (American Bar Association 1991). *See also* Daniel Hynan, *Interviewing Children in Custody Evaluations*, 36 FAM. & CONCILIATION COURTS REV. 446 (1998).
- <sup>5</sup> *See, e.g.,* *Palmore v. Sideri*, 466 U.S. 429 (1984); *Harris v. Harris*, 343 So. 2d 762 (Miss. 1997). *See also* JEFF ATKINSON, HANDLING RELIGIOUS ISSUES IN CUSTODY AND VISITATION DISPUTES (American Bar Association 1992).
- <sup>6</sup> Carolyn R. Wah, *Mental Health and Minority Religions: The Latest Weapon in Custody Battles*, 17 INT'L J. OF LAW & PSYCHIATRY 331, 338-39 (1994). *See also* Carolyn R. Wah, *Evaluating "Nontraditional" Religious Practice in Child Custody Cases*, 35 FAM. & CONCILIATION COURTS REV. 300 (1997).
- <sup>7</sup> In 1998, the ABA adopted policy stating that custody and visitation should not be restricted based on sexual orientation. *See also* Judith Fowler, *Homosexual Parents: Implications for Custody Cases*, 33 FAM. & CONCILIATION COURTS REV. 361 (1995)(noting that "[r]esearch has failed to show differences between children raised by lesbian and heterosexual mothers"); Candan Duran-Audintug & Kelly A. Causey, *Child Custody Determination: Implications for Lesbian Mothers*, 25 J. OF DIVORCE AND REMARRIAGE 59 (1996)(countering judicial assumptions with current research); Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. OF SOC. ISSUES 29, 41 (1996)(noting that "fears that children of gay and lesbian parents suffer deficits in personal development appear to be without empirical foundation").
- <sup>8</sup> In most jurisdictions, the issue of homosexuality is irrelevant unless shown to have an adverse effect on children. Kathryn Kendall, *The Custody Challenge: Debunking Myths About Lesbian & Gay Parents and Their Children*, 20 FAMILY ADVOCATE 21 (1997).
- <sup>9</sup> *See, e.g.,* U.S. DEP'T OF HEALTH & HUM. SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999).
- <sup>10</sup> *See* JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (The Free Press 1997).

**P A R E N T I N G   C O N S I D E R A T I O N S**

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<sup>11</sup> Carol Levine, *AIDS and Changing Concepts of Family*, 68 THE MILBANK QUARTERLY 49-53 (1990).

<sup>12</sup> *Id.*

<sup>13</sup> See Barry B. Frieman, Howard M. Garon & Risa Garon, *Parenting Seminars for Divorcing Parents: One Year Later*, 33 J. OF DIVORCE AND REMARRIAGE 129-143 (2000).



## Expert Help with Custody Cases

**Y**ou, the judge, and nobody else, will decide what custody arrangement is in the child's best interests. That is not a question that can be ceded or delegated by mediation, stipulation, or arbitration.<sup>1</sup> But you certainly may ask for help.<sup>2</sup> In complex cases you will seek out experts with well-honed skills and experience to distinguish facts from allegations.

How will you choose experts? When you look at the facts presented in the early stages of a case you will ask, "What is missing here? What do I need to know to fully understand the child's needs?" Once you draft questions that contain your concerns, it will be obvious whether or not you need an expert's help, and if you do, what sort of expert can best respond. Answers to your questions will come from interviews, home visits, school, criminal and employment records, and sometimes mental health or medical evaluations. What you hope, of course, is that one expert can accomplish all of the delegated tasks.

After reports are submitted, you still have to decipher their relevancy to the best interests question before the court. If these reports are solid enough – that is, if your questions are able guides, the expert's skills match your needs, and the data is reliable – you have support for your best interests decision.

This chapter describes a three-part process for working with experts: (1) framing questions; (2) picking experts; and (3) assuring relevancy.

## Framing the Questions – What Specialized Information Do You Need About the Child?

The questions you frame for one case are likely to be different from those that arise from the facts of another case. If you have a set of standard questions that you ask in most cases (for example, “Is this adult capable of caring for and nurturing the child?”), you may wish to attach supplemental questions that go to the heart of each particular case. Standard questions can be a useful way to keep track of a variety of concerns, but they also can be so broad as to force the expert’s recommendation into an “either/or,” “win/lose” roll of the die, for example “Which parent can provide the best care for this child?”<sup>3</sup>

Solve the problem of relevancy from the very beginning by assuring that there is a tight fit between the best interests issue before the court and the questions you submit to the expert. Your questions will be a road map – often the expert’s only contact with the judge, the only clue about how to craft the investigation, develop interview questions, choose tests, and cast the court report. If the data in the court reports is not relevant, the fault might be traced right back to the questions you submitted. It is better to raise a red flag and tell the expert what is really bothering you. Identify issues of concern or those that lack clarity. For example:

- Does this child’s physical handicap require a special set of parenting skills?
- Does the father have a problem with alcohol that will interfere with his care and nurturing of the child?
- Given the mother’s history of mental health problems, is it advisable to limit the amount of time the child spends with her or place other conditions on visits?
- Will it harm the youngest child to be separated from her brothers and sisters, if her primary custody is with her mother and theirs is with their father?
- Is there a history of domestic violence and, if so, what will enable the abused parent to feel safe and parent effectively?

The more specific your questions, the more responsive the answers are likely to be.

Your process for submitting questions to an expert will be influenced by such factors as: whether yours is a Daubert state that specifies the way a judge examines expert evidence,<sup>4</sup> the extent to which you invite the lawyers to participate in

## EXPERT HELP

crafting the questions, and the traditional civil process in your court. As you will be building on the expert's recommendations in your determination of the child's best interests, you probably will wish to take a strong hand in drafting the questions.

The questions you frame point straight to the tasks to be done. In every case there will have to be an assessment of the child's needs. You will always want to know whether Mary has reached developmental milestones appropriate for her age, whether James has physical, mental, or emotional handicaps, what Sally's relationship is with her brothers and sisters, whether there are adults in the extended family who are significant support figures, what Albert's wishes are in regard to either parent – that sort of thing. One cannot make a best interests judgment without a full picture of the child.<sup>5</sup>

In most cases you will want to know what sort of environment the potential custodians can offer. You will be looking for safety, health, emotional nourishment, and tender loving care. Material well-being is the least important factor. The best way for you to understand the child's future environment is to dispatch a trained person to look at the potential homes. This person will report not just on shelter, but also on the likely family dynamics within the home. An evaluator's checklist would contain many elements of interest to you, for example:

- How many persons would live in the home?
- Who would be home during hours when the child is there?
- What would be the arrangements for day care and transportation?
- What are the extended family's relationships with the child and potential custodian?
- What agreements would govern visits from the other parent?

You may wish to examine the chosen evaluator's checklist to assure that it covers the standard domains that interest you. Beyond a checklist, however, your specific questions about the family will guide the expert to include interviews with significant family members, neighbors, and community resource people who would support the family through day care, schools, cultural, and religious organizations.

Are there times when you would not need a home study? Possibly. Facts about the homes may be part of the case record already. Or the parents may have stipulated to living arrangements. Even then, a cautious judge, aware that a child's best interests can be starkly different than the parents' litigious interests, will want to understand the home environments.

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Sometimes mental and behavioral assessments of the potential custodians are indicated. In hostile divorces, where allegations of “domestic violence,” “neglect,” “sexual abuse,” and “substance abuse” are alleged, the judge needs facts. Mental health and behavioral assessments, supplemented by interviews, behavioral observations, and a thorough study of the historical record, are the usual tools. If physical handicaps are at issue, a medical assessment may also be indicated.<sup>6</sup>

So a judge will need at least one task performed, and perhaps several:<sup>7</sup>

|   |   |
|---|---|
| <b>ALWAYS</b>                           | <b>ASSESSMENT OF CHILD’S NEEDS</b>                          |
| <b>USUALLY</b>                          | <b>HOME STUDIES OF POTENTIAL CUSTODIANS</b>                 |
| <b>AS REQUIRED BY FACTS/ALLEGATIONS</b> | <b>MENTAL HEALTH, BEHAVIORAL ASSESSMENTS; MEDICAL EXAMS</b> |

## Picking Experts – What Skills Does the Expert Need to Answer Your Questions?

### The Three Skill Sets

There are three basic skill sets in the pool of experts from which most judges draw: clinical social workers, psychologists, and psychiatrists. You will be choosing experts whose skills match the tasks you need performed.

Clinical Social Workers with masters’ degrees (MSW) have particular expertise in social and family systems as they affect an individual, and social services and programs that are resources for the family. Doctoral level psychologists have particular expertise with respect to psychological testing, standardized assessment of psychopathology, intellectual and behavioral functioning, and academic achievement. Psychiatrists are physicians who can distinguish physical disorders with emotional manifestations from psychiatric disorders. They can analyze neurological impairment and administer psychopharmacological treatments.

The degree to which these basic skill sets are enhanced by two other factors can make the difference between a mediocre and genuinely helpful, credible report. The first value-added factor is training and experience in family issues, particularly mental health and social resources. Through specialized education in family matters, the social worker and psychologist may have earned a Ph.D. and the

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psychiatrist may have gained a family-based competency. There are family-focused training programs for each discipline, as well as cross-professional training. A desirable way to specialize is through experience, for example by devoting at least 25% of one’s time to a family or child-based practice. Some experts will have published or taught in the field. In cases involving domestic violence, at least 25% of one’s time should be devoted to these issues.

The second value-added factor is forensic training and experience. Opportunities to be trained in forensic skills are limited, so experience will count for a great deal. The important point is whether the expert knows how to serve the interests of the court, frame recommendations in ways relevant to the legal issues, and provide reports that have evidentiary value.<sup>8</sup>

For all three disciplines, you would consider a state license as mandatory and board certification (which amounts to a national license) as an impressive addition to credentials.

Some judges prefer to appoint an advocate for the child, who might be an attorney or trained in another discipline. Such a guardian or advocate may act as a case manager, analyzing whether experts are needed to provide specialized information and, if so, petitioning the judge to appoint them. On occasion, the judge may ask the guardian, or advocate, to perform all or some of the child custody evaluation, particularly if the case is a simple one. It is always prudent to choose for this position someone who has knowledge of child development, as well as experience working with children and their families, because the facts and recommendations gathered may well be challenged.<sup>9</sup> Some states appoint child representatives or attorneys to represent children in contested custody cases. These child representatives or attorneys for children cannot be “experts” in these cases because they cannot testify or otherwise present reports to the court.

| <b>THREE SKILL SETS</b>   |  |  |
|---|--|--|
| <b>CLINICAL SOCIAL WORKERS</b>  | <b>PSYCHOLOGISTS</b>   | <b>PSYCHIATRISTS</b>   |
| <b>MSW</b>  | <b>Ph.D or Psy.D</b>   | <b>M.D. or D.O.</b>  |
| Social and family systems affecting the individual; social services and programs  | Psychological testing; verbal and behavioral therapies and interventions | Distinguishing physical disorders with emotional manifestations from psychiatric disorders; neurological |
| Based on Randy Otto, Ph.D., Presentation to West Palm Beach County, FL Juvenile Court, Feb. 19, 1998. Sponsored by ABA Juvenile Justice Center, Juvenile Law Center and Youth Law Center. |  |  |



| <b>FAMILY AND FORENSIC FACTORS</b>   |  |
|--|--|
| <b>FAMILY AND CHILD FOCUS</b>  | <b>FORENSIC FOCUS</b>  |
| <b>EDUCATION, TRAINING, EXPERIENCE, PUBLICATIONS, APPLYING PROFESSIONAL SKILLS IN SERVICE OF FAMILIES</b>  | <b>EDUCATION, TRAINING, EXPERIENCE SERVING THE COURT AND OTHER MEMBERS OF THE JUSTICE SYSTEM</b> |
| Based on information from Kirk Heilbrun, Ph.D., <i>Child Custody Evaluation: Critically Assessing Mental Health Expert and Psychological Test</i> , 29 FAM. L. Q. 63 (1995). |  |

Opinions from the bench about the wisdom of delegating tasks to experts vary greatly. So does the process for obtaining information through others. Some judges routinely ask for a child custody evaluation in all but the simplest cases. Others feel strongly that the judge must not hide behind experts when it comes to making a judgment about what is in the best interests of the child.<sup>10</sup>

In some jurisdictions, custody evaluations are performed by a social services or forensic agency. Once the agency receives the referral for an evaluation, decisions about which expert to assign and what tasks to accomplish are made within the organization. The judge then considers the court report that summarizes the gathered data.

The norm, however, is for the judge to decide early in the case what information is needed to make a best interests decision, and what sort of expert can find the facts. The complexity of the case will dictate whether a social worker, psychologist, or psychiatrist is needed, or whether best interests can be determined with the help of a skilled child advocate, or even extracted by the judge from the record and witness testimony.

In a relatively simple case, e.g., one child with two parents who have mediated an agreement that looks on its face to be satisfactory, you may feel comfortable with a clinical social worker or child advocate to assess the child's needs, interview the parents, and visit the two homes.

Suppose, however, that the father has accused the mother of abusing cocaine. The mother, in turn, alleges that the father is cold and remote, with occasional outbursts of violent rage. Clearly you will want psychological assessments of these potential caretakers, and you will pick a psychologist with demonstrated ability in forensic assessment and knowledge of domestic violence and substance abuse issues.

If the mother is depressed and the father alleges that she is therefore incompetent to care for the child, or if the father's strange behavior might be attributable to illness, or the child has experienced dissociative episodes, a psychiatrist would be an expert who could analyze both the medical and mental health aspects.

To summarize, whenever there are substantial allegations of mental or emotional problems, you will need a clinical expert to help you discern the impact on the child. In addition, most judges agree that divorces with a high quotient of conflict, anger, and familial violence also require clinical analysis. Some judges also find it useful to call on a clinician if outside adults have significant roles to play in the child's life, like grandparents, stepparents, and companions.<sup>11</sup>

Can one expert handle all the tasks: the child's needs assessments, home studies, and mental and/or behavioral assessments? In all likelihood, yes. A clinical practice, referred to as "child custody evaluations," has grown up around family disputes. Professional associations such as the American Psychological Association (APA),<sup>12</sup> the American Academy of Child and Adolescent Psychiatry (AACAP),<sup>13</sup> and the Association of Family and Conciliation Courts (AFCC),<sup>14</sup> as well as some courts,<sup>15</sup> have developed guidelines for their practitioners. The guidelines cover a comprehensive service: interviews, home investigations, observations of family dynamics, administration of tests if necessary, and reports to the court. A 2001 survey of psychologists indicated that the typical child custody evaluation took about 26.4 hours (excluding court testimony and conversations with lawyers), and the average fee was \$3,335.00.<sup>16</sup> Notwithstanding the existence of such guidelines, there is no accepted formula for conducting a child assessment and evaluation. Courts must decide the outcome based on all of the evidence of what is in the child's best interests.

A value in having one expert perform and manage the child custody evaluation is the greater likelihood of a cohesive report and a better opportunity to test reliability of the data.<sup>17</sup> It also is less confusing to the parties and perhaps less expensive. Parties who are dissatisfied with a court-appointed expert's recommendations can obtain their own expert and attempt to enter additional, more agreeable opinions into evidence.

### **Ethics and Conflicts**

In order to avoid conflicts, two issues must be decided at the outset of the case. First, the judge must decide whether to appoint the experts or leave that task to the parties. The court may benefit from the parties' recommendations, but court-appointed experts usually have the highest credibility for a judge, and often for all the parties. The profession's guidelines require neutrality whether it is a party or a court that hires them,<sup>18</sup> a difficult tenet to fulfill when the hiring party is aggressively pushing for a particular outcome. Psychologists prefer to work for the court, rather than one of the parties.<sup>19</sup> A court appointment is consistent with forensic practice and the best interests of the child.

Second, there is an ethical issue that judges and lawyers may miss unless it is pointed out. Experts are not to be drawn from professionals who are treating family members because treatment requires the treating professional to be invested in a particular patient outcome. Forensic experts, on the other hand, serve the court, not the patient. They bring a fresh view of the issues, a neutral outlook. Does that mean that a professional with forensic skills may not also maintain a treatment practice? No. It simply means that the chosen professional should not have been involved in treating the family who is before the court. Of course, a party might offer a treating professional's analysis as additional evidence. The court would consider the treatment context in weighing the evidence.<sup>20</sup>

## **Assuring Relevancy – The Nexus Between the Child Custody Evaluation and the Best Interests Legal Issue**

### **Elements of the Investigation**

With the judge's questions in hand as a road map, the chosen expert puts together an investigation that should follow guidelines for custody evaluations published by the expert's professional association. Elements in the investigation are likely to be similar, whether the expert is a clinical social worker, psychologist, psychiatrist, or child advocate. However, the amount of time spent on various elements, and more importantly, the lens through which they are viewed, are different. A typical investigation by any evaluator includes the following:

- Interviews with parents and other potential custodians, separately and together (however, in cases of domestic violence it may be dangerous to interview parents together).
- Interviews with the child, separately and in a family setting.
- Interviews with collateral important people: e.g., teachers, grandparents, neighbors.
- Home visits.
- Examination of records: e.g., school, criminal, medical, mental health, court.

The **social worker** is likely to do much of the work in the field, often talking to neighbors face-to-face, examining the physical household, and visiting school. Training in social services prepares the investigator to view the child and family as members of social systems – school, employment, households, church, community – and to observe how individuals respond to those environments. A

**child advocate** also can do the fact gathering for the court. However, in all likelihood, a child advocate will not have the training necessary to draw certain types of conclusions.

The **psychiatrist** will be focused intensely on interviews, many of which will take place in his or her office, rather than in the field. A psychiatrist is especially trained to observe and draw conclusions from behavior, speech, and interactions. Absent a judge's specific request, a psychiatrist may decide not to observe family members in their homes. Diagnoses need not be part of the process according to the profession's AACAP guidelines, because the purpose is not to make a psychiatric diagnosis, but conduct a custody evaluation. Psychiatrists have expressed doubt through AACAP that psychological tests are helpful in any but the most puzzling mental health cases, and then only to support an opinion that the psychiatrist arrived at through interviews and observations.<sup>21</sup>

A **psychologist** will do one thing differently than a social worker or a psychiatrist. There will nearly always be the component of psychological tests. Judges often want tests because the results seem like hard data in a realm of otherwise soft information. However, the rub is this: *There is no test for parental capacity.* Mental health professionals know that.<sup>22</sup> For some reason, judges and lawyers tend not to know that. Furthermore, there is no test for determining who is a batterer, a battered victim, a child sexual abuser, or a victim of sexual abuse.

Some judges keep asking psychologists: "What is the parenting capacity of this adult?" The only credible answer that a psychologist could give would be based on multiple sources of information: interviews, direct observations, review of records, self-reports, and finally, standardized psychological tests.

Over and over again, psychologists are warned by their profession's leaders to treat test results as hypotheses that must be checked with data from other sources. The APA guidelines state that the psychologist must use multiple methods of data gathering and never overinterpret clinical or assessment data.<sup>23</sup> Testing can provide information relevant to the threshold issue of mental or emotional disturbance or personality functioning. Usually, that data is not directly relevant to the legal issue.<sup>24</sup>

Nevertheless, psychologists find much gold as they mine tests for information. What they are looking for are personality traits that could bear on good parenting practices, even while not amounting to evidence of actual parenting styles. Tests that are mined for this information are from either the "objective" category (that is, tests that yield statistics that can be interpreted according to standardized methods) or "projective" (for example, tests that call for more free form responses like sentence completion or interpretation of drawings, and are subjectively interpreted).

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By far the most popular test – almost universally used by psychologists as part of child custody evaluations – is the Minnesota Multiphasic Personality Inventory, 2<sup>nd</sup> Edition (MMPI-2).<sup>25</sup> It is an objective personality test that asks the participant to answer “yes” or “no” to hundreds of questions in a variety of fields: family, health, sexuality, etc. There are built in checks to catch attitudes like “faking good” and “faking bad.” Scoring is standardized.

Another test often administered to both children and adults is the Rorschach inkblot. It has a standardized, computerized scoring method, the Exner Comprehensive System. Many psychologists state that no other test so successfully reveals children’s vulnerabilities and adult anger and conflict.<sup>26</sup>

A third commonly administered personality test, in versions for both adults and children, is the Thematic Apperception Test (TAT). Participants are instructed to look at stimulating pictures and tell a story.

Intelligence (I.Q.) tests may supplement personality tests. However, critics argue that I.Q. is not typically a major factor in ability to parent.<sup>27</sup> A couple of tests have been developed to measure parenting ability in custody situations – e.g., the Bricklin series of tests for parents and children and the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT) – but these are not widely used nor yet well-established in the field.<sup>28</sup>

### AREAS OF ASSESSMENT

- CONTINUITY AND QUALITY OF CHILD’S ATTACHMENTS
- CHILD’S PREFERENCES
- PARENT ALIENATION
- CHILD’S SPECIAL NEEDS
- EDUCATION
- GENDER ISSUES
- SIBLING RELATIONSHIPS
- PARENT’S PHYSICAL AND PSYCHIATRIC HELP
- PARENT’S WORK SCHEDULES
- PARENT’S FINANCES
- STYLES OF PARENTING AND DISCIPLINE
- CONFLICT RESOLUTION
- SOCIAL SUPPORT SYSTEMS
- CULTURAL AND ETHNIC ISSUES
- ETHICS AND VALUES
- RELIGION

From American Academy of Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluations*, 36 (10) J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 57S – 68S (1997).

The expert you choose to fill in your picture of the child’s needs will exercise discretion in picking the tasks. There almost certainly will be personal bias in

interpreting the facts. That is true whether the expert is a social worker, psychiatrist, or psychologist. The conscientious investigator will reduce opportunities for distortion by delineating between facts and opinions, and by using standardized, validated, reliable tools widely accepted in the profession.

A **child advocate** also can do fact gathering. However, the child advocate will not be trained to draw conclusions that require the type of trained expertise that a social worker, psychiatrist or psychologist will possess. Further, if the child advocate is a “child representative” or “attorney for the child” they are not allowed to testify or otherwise present reports to the Court, so they cannot be considered “experts.”

### **The Expert's Report**

You have had the most influence on the expert's work through your carefully drafted questions. Another area where you may be able to improve relevancy of the expert's work to your concerns for the child is in the form of the report. Many judges will not have this opportunity: the format may be standardized by an agency that does all child custody evaluations or the evaluator may serve too many judges to go out of the way to please one, and so forth. But if you frequently work with the same corps of evaluators, you may be able to develop a policy about what elements should be in your court reports.

The goal of a report is to provide information about the child's needs. Data in the report should inform and support your decision about what custody arrangement is in the child's best interests. It follows that crucial domains relating to the child's life, with particular attention to those you highlight in your questions, should be investigated.

Unless you specifically ask the expert to do so, recommendations about what custody arrangement is in the child's best interests should be avoided. It is your job to make that decision. Any categorical statements like “It is my professional judgment that Sally should live with her father” are likely to ignite a firestorm of challenges. Moreover, as there are no tools that yield hard data about parenting capacity, any flat statements about the ultimate question will be vulnerable to attack. There are easier ways to develop a basis for the best interests decision. Experts can be asked to describe the possible impact on the child of various custodial arrangements. For example:

- Robert can walk to school from his father's house.
- While the mother completes in-patient drug treatment, other living arrangements would have to be made for Susie.

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- Given the father's poor impulse control, as indicated in the test and his statements during the second interview, a family therapy intervention is recommended.

Any custody evaluation performed by a psychologist that involves psychological tests will require an explanation about how the results correspond to the judge's referral questions. One psychologist has developed a process for relating test results to legal issues when preparing a court report. Psychologists who have a protocol like this to help them focus on the court's concern improve their chances for showing relevancy and, at the very least, provide a basis for deeper discussion when the case reaches the courtroom.

### HOW TO ESTABLISH A NEXUS BETWEEN TEST RESULTS AND LEGAL ISSUES

1. IDENTIFY THE OVERALL PURPOSE OF THE CUSTODY EVALUATION AS WELL AS SPECIFIC CONCERNS THAT WERE REFERRED FOR TESTING.
2. SPECIFY PROCEDURES AND TESTS USED DURING EVALUATION.
3. DISCUSS ANY DEVIATIONS FROM STANDARD USE OF TESTS AND PROCEDURES, OR OTHER CONCERNS ABOUT THE SOUNDNESS OF RESULTS AND/OR THE EVALUATOR'S ABILITY TO INTERPRET THEM RELIABLY.
4. SPECIFY THE RELATIONSHIP BETWEEN ANY DIAGNOSTIC STATEMENTS AND ISSUES THAT ARE RELEVANT TO THE EVALUATION SUCH AS PARENTING CAPACITY, CO-PARENTING CAPACITY, EFFECT OF THE CONFLICT ON THE CHILD, POTENTIAL MUTABILITY OF THE CONFLICT, AND SPECIFIC LONG-TERM MANAGEMENT AND/OR THERAPEUTIC NEEDS.
5. EXPLICATE THE RELATIONSHIP OF TEST DATA TO OTHER SOURCES OF INFORMATION.

Based on Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L. Q. 97, 108-09 (1995).

## Court's Assessment of Report

If the hard work of cross checking and interpretation has not been done in the report, it will have to be done by the judge and the parties' attorneys after the report is received. Some judges believe that background reports (for example raw test data, risk assessment checklists, interview notes, and social service reports) should be attached, so that the court report can be compared to its sources. Others think it is dangerous, as some material—particularly mental health reports—may needlessly cause pain and embarrassment.<sup>29</sup>

Many kinds of omissions are easy to spot, especially if you have a checklist of domains you want covered. Bias is more difficult to locate. It often creeps into

the crack between data and opinion. In a poorly drafted report, the first thing that may strike your eye is overinterpretation of the data. Perhaps the report describes how a test revealed a tendency in the mother toward impulsiveness. The author may leap from that result to a warning about how the mother's impulsiveness could endanger her daughter. An accurate interpretation, however, might be that 68% of people with the trait of impulsiveness are vulnerable to losing their tempers when under pressure. The mother might not even fall within that percentile, and there certainly would be nothing in the test result to indicate a direct danger to the daughter. The APA guidelines specifically warn against overinterpretation.<sup>30</sup>

Short of becoming a psychologist, how does a judge open a door into the complex world of psychological tests, at least wide enough to ask the right questions? Here are four different ways to probe the relevancy of tests. All have been developed by psychologists to increase the evidentiary value of tests. You may find one or more compatible with your style of inquiry.

**METHOD ONE: STANDARD INQUIRY.** The usual formula is to inquire if each test is standardized, reliable, and validated. *Standardized* means uniformity of procedure in administering and scoring the test. The test's manual will give exact instructions for both. Scores are compared with "norms." Norms are based on populations who may take the test, for example urban blacks or children between six and sixteen years. Age, gender, race, geographical, and socio-economic biases may be found in the test. If the person tested is not represented in the norms, the results may be flawed.<sup>31</sup>

*Reliable* means consistency of scores obtained by the same person when retested or given an equivalent test. A reliability coefficient is published for all widely administered tests. A coefficient of 1.0 would be perfect reliability. Absence of reliability would be .00. A reliability coefficient of at least .80 is recommended.<sup>32</sup>

*Validity* is the degree to which a test measures what it purports to measure. A test that has been in use for a long time, widely administered, and researched with published results, as is true of the MMPI, would have an established validity. A new test might be standardized and reliable, but not yet proved valid.<sup>33</sup>

**METHOD TWO: MERITS OF EACH TEST.** Psychologist Kirk Heilbrun has developed criteria that describe legal relevancy of test results in child custody decisions. His criteria are gaining a foothold among custody evaluators. Several of the criteria can be used by judges and lawyers to help discern the credibility of test results. For example:<sup>34</sup>

- The test must be commercially available and adequately documented in two sources: (1) the Mental Measurement Yearbook<sup>35</sup> and (2) an



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accompanying manual describing the test's development, its psychometric properties, and procedure for administration.

- It must have been proved to be reliable. (Heilbrun recommends a published reliability coefficient of at least .80.)
- It should be relevant to the legal issue or to a psychological construct underlying the legal issue. Whenever possible, relevance should be supported by validation research published in peer-reviewed journals.
- Standard administration should be used, with testing conditions as close as possible to the quiet, distraction-free ideal.
- Results of the test should not be applied toward a purpose for which the test was not developed. (For example, an intelligence test should not be used to prove psychopathology.)
- Response style should be assessed. If the response is *malingering*, *defensive*, or *irrelevant*, rather than *reliable/honest*, other data sources may have to be emphasized or the test results discounted.

**METHOD THREE: FIVE SOURCE CROSS-CHECK.** Picking up on the APA's recommendations for multiple sources of data gathering,<sup>36</sup> Jonathan Gould proposes that all psychologists use the same five sources of information for an investigation:<sup>37</sup>

- structured interviews;
- self-reported data;
- standardized psychological tests;
- collateral interview data and record review; and
- direct observational data.

You may wish to inquire whether all five categories of information were investigated, what each revealed relevant to the court's concerns, and whether when cross checked they supported one view or contained contradictions.

**METHOD FOUR: NEXUS TO LEGAL ISSUES.** Vivienne Roseby's five elements that establish a nexus between test results and legal issues, outlined above, can also be used as a basis for in-court queries.<sup>38</sup> Using her protocol, the following questions could be posed:

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- Describe how the tests you administered relate to the referral questions.
- Describe the purpose of each test and the procedures used to administer it.
- Do you have any concerns about the soundness of the results?
- Describe any special issues revealed by the test that relate to the court's concerns for the child.
- How do the test data relate to other sources of information in your investigation?

Using any of these methods, a judge may dig like an archeologist to the heart of the evaluation to extract, at last, data that will point to the child's best interests.

### **Conclusion**

Energy for change is growing in both the legal and mental health communities. The trends are toward greater standardization and neutrality in child custody evaluations. There is growing awareness that a child custody evaluation is more comprehensive and child-focused than a parental capacity evaluation; that both parents and all children should be evaluated; that the evaluator should distinguish among statements that are clinical judgments, research-based statements, or philosophical opinions;<sup>39</sup> and, finally, that the expert's work can be a strong foundation for the custody decision, but it is the judge, not the expert, who determines the legal best interests of the child.

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- <sup>1</sup> ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* 226 (West 1993).
- <sup>2</sup> SANDRA MORGAN LITTLE, *CHILD CUSTODY AND VISITATION*, 24-6, 24-7 (2000). Almost half the states permit court-appointed experts by statute. In many other states it can occur through evidence rules.
- <sup>3</sup> Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L. Q. 97, 98 (1995).
- <sup>4</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993). This case requires a federal judge (consistent with the Federal Rules of Evidence) to ensure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. If expert evidence is offered and objected to, the judge may have to hold a separate evidentiary hearing. Some states have adopted *Daubert*, as well as specific rules about the process judges must follow. See G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939 (1996).
- <sup>5</sup> See **Chapter 3: Child and Youth Developmental Considerations.**
- <sup>6</sup> See **Chapter 4: Parenting Considerations.**
- <sup>7</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 303-05 (Robert J. Levy ed., West 1998).
- <sup>8</sup> Kirk Heilburn, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L. Q. 63, 64-66 (1995).
- <sup>9</sup> FED.R.EVID. 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."
- <sup>10</sup> Bill Swann, *The Dangers in Using Court-Appointed Experts in Child Custody Cases*, 27 JUDGE'S J. 17, 18 (1988).
- <sup>11</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, *supra* note 7, at 303-05.
- <sup>12</sup> American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 29 FAM. L. Q. 51 (1995).
- <sup>13</sup> American Academy of Child and Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 575-685 (Supp. 1997).
- <sup>14</sup> Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations* (2006), available at [http://www.afccnet.org/resources/standards\\_practice.asp](http://www.afccnet.org/resources/standards_practice.asp).
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- <sup>15</sup> CALIFORNIA RULE OF COURT 5.220, COURT ORDERED CHILD CUSTODY EVALUATIONS (2007).
- <sup>16</sup> Marc. J. Ackerman and Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 FAM. L. Q. 565, 583 (1996).
- <sup>17</sup> Roseby, *supra* note 3, at 108.
- <sup>18</sup> American Psychological Association, *supra* note 12, at guideline 4.
- <sup>19</sup> Ackerman & Ackerman, *supra* note at 16, at 583.
- <sup>20</sup> Heilburn, *supra* note 8, at 69-70; American Psychological Association, *supra* note 12, at guideline 7.
- <sup>21</sup> American Academy of Child and Adolescent Psychiatry, *supra* note 13, at guideline C-7, C-8.
- <sup>22</sup> Roseby, *supra* note 3, at 105; Heilburn, *supra* note 8, at 72; American Academy of Child and Adolescent Psychiatry, *supra* note 13, at guideline C-8.
- <sup>23</sup> American Psychological Association, *supra* note 12, at guidelines 11 & 12. *See also* Roseby, *supra* note 3, at 107; Jonathan W. Gould, *Scientifically Crafted Child Custody Evaluations*, 37 FAM. & CONC. COURTS REV. 159, 170 (1999).
- <sup>24</sup> Heilburn, *supra* note 8, at 73.
- <sup>25</sup> Ackerman & Ackerman, *supra* note 16, at 572.
- <sup>26</sup> Roseby, *supra* note 3, at 104-05.
- <sup>27</sup> MacGriffith and Stephan Schweissing, *Critical Analysis of Parental Responsibility Evaluations*, 29 COLO. LAW 63, 64 (2000).
- <sup>28</sup> American Academy of Child and Adolescent Psychiatry, *supra* note 13, at guideline 8.
- <sup>29</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, *supra* note 7, at 317-18.
- <sup>30</sup> American Psychological Association, *supra* note 12, at guideline 12.
- <sup>31</sup> MARC J. ACKERMAN & ANDREW W. KANE, PSYCHOLOGICAL EXPERTS IN DIVORCE ACTIONS 332 (Aspen Publishers 2004).
- <sup>32</sup> *Id.* at 339; Heilburn, *supra* note 8, at 73-78.
- <sup>33</sup> *See* ANNE ANASTASI, PSYCHOLOGICAL TESTING 6-9 (Prentice Hall 7th ed. 1997).
- <sup>34</sup> Heilburn, *supra* note 8, at 73-78.
- <sup>35</sup> BUROS INSTITUTE OF MENTAL MEASUREMENTS, MENTAL MEASUREMENT YEARBOOK (Buros Institute of Mental Measurements 17th ed. 2007).
- <sup>36</sup> American Psychological Association, *supra* note 12, at guideline 11.
- <sup>37</sup> Gould, *supra* note 23, at 161-62.

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<sup>38</sup> Roseby, *supra* note 3, at 108-09.

<sup>39</sup> AMERICAN BAR ASSOCIATION FAMILY LAW SECTION & THE JOHNSON FOUNDATION, HIGH-CONFLICT CUSTODY CASES: REFORMING THE SYSTEM FOR CHILDREN, CONFERENCE REPORT AND ACTION PLAN 3-4 (2000).

## Recurring Issues in Child Custody Cases

While some custody cases may be quite straightforward, others will involve more complicated issues. For example, due to various factors, some parents may need to participate in supervised visitation. In another family, the custodial parent may receive a new job offer in a city across the country after years of being in the same city as the noncustodial parent. Mental illness may affect a parent's ability to visit with a child, and domestic violence may make visitation problematic or unadvisable. This chapter is devoted to some of the recurring issues you may experience when deciding child custody cases or considering whether to modify custody orders.

### Visitation

Custody determinations affect visitation arrangements and schedules. In keeping with the trend toward use of child-friendly terminology in divorce, visitation today is often referred to as access or parenting time. The two standard statutory approaches to visitation arrangements are the "best interests of the child" and the "entitlement" approach. The best interests of the child approach presume that visitation is a *privilege* bestowed on a noncustodial parent when contact with the party is in the child's best interests.<sup>1</sup> The Florida statute sets forth a detailed list for judges to consider when deciding best interests. This list includes, but is not limited to, the following: 1) whether the parent is "more likely to allow the child frequent and continuing contact with the nonresidential parent"; 2) "[t]he love, affection, and other emotional ties existing between the parents and the child"; 3) the ability of the parents to provide "food, clothing, medical care . . . and other material needs"; 4) "[t]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity"; 5) the parents' moral fitness; 6) the parents' mental and physical health; 7) the child's home, school, and community record; 8) the child's "reasonable preference" if the court determines "the child to be of sufficient intelligence, understanding, and experience to express

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a preference”; and 9) evidence of domestic violence or child abuse, or evidence “that any party has knowingly provided false information to the court regarding a domestic violence proceeding.”<sup>2</sup>

By contrast, the entitlement approach presumes that noncustodial parents have a right to visitation.<sup>3</sup> This right can be restricted only after a finding that visitation would endanger the child.<sup>4</sup> Other states use a combination approach.

### **Types of Visitation Orders**

Visitation orders range from highly flexible to highly specific or restrictive. Visitation arrangements should be determined according to the particular circumstances of the case. For example, in custody cases involving domestic violence, specific orders are best so that they are more easily enforceable by courts and the police.

Orders that explicitly provide for reasonable visitation allow great flexibility. Success of such arrangements depends on frequent and productive communication between the parents, and a willingness to be flexible and respectful of parent-child relationships. Therefore, if disagreements frequently arise, or the parties are unwilling to compromise, reasonable visitation should not be specified in the order.

Providing a specific visitation schedule is an alternative to ordering reasonable visitation. The needs of the child should be paramount when creating the visitation schedule, while the parent’s scheduling needs should be considered as well. A specific visitation schedule can reduce the need for contact between parents and is easier to enforce than reasonable visitation.

Since the schedule is designed to provide notice to the parents of the visitation guidelines and specification, it is inherently less flexible. Therefore, specific visitation schedules create problems if unforeseen circumstances alter the parent or child’s needs. A provision that addresses potential modifications could be included.

In situations of high conflict, a restriction such as supervised visitation may be appropriate. Supervised visitation requires that a third party be present during the visit to ensure the safety of the child. This restriction allows the child to maintain a safe relationship with the visiting parent. However, if supervised visits cannot ensure the safety of the child or custodial parent, denial of visitation may be appropriate.

## RECURRING ISSUES

### VISITATION ORDERS

#### SPECIFIC SCHEDULE

Created based on the needs of the particular child but considers parents' scheduling needs as well.

##### Benefits

- Reflects complexity of parenting needs.
- Reduces need for contact and agreement between parents.
- Relatively easy to enforce.
- Provides notice to parents of guidelines about the arrangement.

##### Disadvantages

- Inflexible or less flexible (although can include provision for modification).
- Difficult to create (without court order) if parents are unwilling to cooperate.

#### SUPERVISED VISITATION

Contact between noncustodial parent and child which takes place under the supervision of a neutral third party observer.

##### Benefits

- Allows parent-child relationship to continue.
- Promotes safety of the child and custodial parent.

##### Disadvantages

- Not every jurisdiction has organized supervised visitation programs.
- May be difficult to find a neutral third party to provide adequate supervision.

#### REASONABLE VISITATION

Boilerplate language that allows parties to determine specific visitation routines.

##### Benefits

- More flexible than a fixed schedule.
- Works better if parents cooperate.

##### Disadvantages

- Requires good communication between parents.
- Disagreements frequently arise.
- Does not provide a mechanism to solve disagreements.
- More dangerous in cases of domestic violence.

#### DENIAL OF VISITATION

Complete denial of contact between the child and the noncustodial parent.

##### Limitations

- Should not be ordered unless the situation indicates that any level of contact between the parent and child would be detrimental to the child's interests or well-being or would seriously jeopardize another family member.

##### Factors to Consider

- History of visitation.
- Attitude of noncustodial parent toward the child.
- Interest in child and his/her activities.
- Relationship between the parents.
- Existence of the problem substantiating claimed unfitness.
- Specific instances of conduct.
- Corroboration of incidents indicating unfitness.
- Domestic violence.



### **Denying or Restricting Access**

As a general rule, access should be denied or restricted only if it is likely to endanger the child's physical or emotional health.<sup>5</sup> The most common situations involve including domestic violence and child abuse. Today, most states require courts to consider the safety of domestic violence victims and their children when making visitation decisions.<sup>6</sup> Both the National Council of Juvenile and Family Court Judges<sup>7</sup> and the American Bar Association have reached similar conclusions.

If measures can be taken to enhance the safety of children and the custodial parent during periods of visitation, access may be restricted and not denied. Subject to limitations in your state law, courts might:

- Order the exchange of the child to occur in a protected setting.
- Order supervised visitation (and consider assessing the fee against the perpetrator).
- Order the perpetrator of violence to attend counseling.
- Order the perpetrator to abstain from the possession or consumption of alcohol before (24 hours) and during visitation.
- Prohibit overnight visitation.
- Require a bond for the safe return of the child.<sup>8</sup>

In more extreme cases, and subject to the limitations of your state law, courts might even consider visitation by telephone, audio or videotape, photographs, letters, and other means of communication.

### **Supervised Visitation Models**

Highly contested custody disputes create tension between the promotion of parent-child relationships and the protection of children. Issues such as allegations of child abuse, domestic violence, and alcohol or drug dependency complicate visitation orders. Supervised visitation creates a viable option when concern is raised about the child's safety. Ordering supervision ensures children protection without permanently severing the parent-child relationship.

Supervised visitation programs provide several types of services, including one-on-one visitation (which can include off-site monitoring), exchange visitation, multiple family group visitation, and therapeutic supervision.<sup>9</sup> A more restrictive form of visitation is required when concern is raised over child safety or parental manipulation of the child. One-to-one visitation, which provides for the presence of a supervisor during the entire visit, is the most restrictive service offered.<sup>10</sup> The

## RECURRING ISSUES

supervisor is present for the entire visit, and is able to observe all activity and hear all conversation.<sup>11</sup>

A less restrictive visitation service is exchange supervision.<sup>12</sup> This service only provides supervision during the transfer at the start and end of visits.<sup>13</sup> Exchange supervision is appropriate when the risk to child safety is less severe.<sup>14</sup> Additionally, exchange supervision can be used when the child is upset about the transfers.<sup>15</sup>

Other forms of supervised visitation include multiple family group visitation and therapeutic supervision. Multiple family group visitation typically occurs at a visitation center. The supervisor monitors several families and likely will not see all interactions or hear all conversations.<sup>16</sup> Therapeutic supervision uses trained mental health professionals to provide supervision and work with the family to promote improvement in family relationships.<sup>17</sup>

If no supervised visitation program is in place in a particular jurisdiction, the visitation order must coordinate the resources that are available to meet the child's needs. The first objective is selecting a supervisor. An appropriate supervisor must be someone who can remain neutral in the situation and adequately monitor the visiting parent.<sup>18</sup> While it is important that the custodial parent trust the supervisor, it is also important that the visiting parent does not have an antagonistic relationship with the supervisor.<sup>19</sup> Supervisors are generally either friends and family members or community members.

Since family and friends are often emotionally invested in the present situation, community members may provide more neutral

### FAMILY OR FRIEND SUPERVISOR

1. Is the individual neutral?
  - Will the supervisor report adequately and honestly about the visiting parent's behavior?
  - Is there animosity between the supervisor and visiting parent?
  - Is the supervisor afraid of the visiting parent?
2. Can the supervisor protect the child?
3. Is the individual adequately mature to supervise?
4. Will the supervisor be present during the entire visit?
5. Is the supervisor available and willing to supervise?
6. The supervisor should NOT be chosen if the custodial parent has concerns about his or her qualifications.
7. The supervisor should NOT be the custodial parent.

Adapted from Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229-52 (1995) and NANCY K.D. LEMON, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 57-68.

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supervision. If domestic violence or child abuse is the reason for the supervision, friends and family members should not be chosen as supervisors.<sup>20</sup> Some potential sources for “neutral” supervisors include churches, community groups, childcare facilities, schools, child protective services, and mental health professionals. However, at times they are also threatened, so orders must protect their interests as well.

After the supervisor is selected, he or she must be instructed on how to monitor the visitation.<sup>21</sup> The order should specifically state the responsibilities of the supervisor.<sup>22</sup> Copies of the responsibilities and visitation agreement should be given to the supervisor and both parents.<sup>23</sup>

Among the supervisor’s responsibilities, mandated observation notes or regular communication with the custodial parent should be required.<sup>24</sup> It is important that the supervisor be willing to communicate about the visit to ensure the child’s safety. Additionally, the supervisor should be informed about the reason for the supervision.<sup>25</sup>

In many cases, initial visits should be restricted to short, daytime visits in public places.<sup>26</sup> Provisions that mandate abstinence from alcohol and controlled substances prior to the visit should be included.<sup>27</sup> Such restrictive provisions should include notice of the possible consequences that could occur if the provision is violated.<sup>28</sup> Additionally, perpetrators of domestic violence should be required to attend a batterer’s intervention program.<sup>29</sup>

Finally, the order must include the procedure for visitation exchanges.<sup>30</sup> If allegations of domestic violence have been raised, the visitation exchange must be monitored to ensure the safety of the child and the custodial parent.<sup>31</sup>

PLANNING FOR VISITATION EXCHANGES

1. Parents should NOT have contact with each other unless a third party is present.
2. The visiting parent may pick the child up from school or day care. The school or day care center should approve the arrangement. Such an arrangement is NOT appropriate if the parent has a history of being late for return or pick up.
3. When using a public location as the exchange point, you should ensure that the third party is there, the parents agree to remain at an established distance from each other, and the visiting parent arrives first and leaves only after the custodial parent and child have left.
4. The custodial parent's address should ALWAYS remain confidential.
5. If a safe exchange does not appear possible, then the necessary alternative is to deny contact between the visiting parent and the child.

Adapted from Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229-52 (1995) and NANCY K.D. LEMON, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 57-68 (1995).

### Psychiatric Illness of Noncustodial Parent

Supervised visitation is an appropriate consideration in some situations when a parent suffers from a psychiatric illness. Courts must consider the prognostic outlook and the medical treatments associated with the parent's illness.<sup>32</sup> While denial of all visitation rights should not be based solely on the presence of a mental illness,<sup>33</sup> the court should consider several factors when deciding the visitation schedule or whether visitation should be supervised.

The first factor to consider is the "nature and general course of the disorder."<sup>34</sup> Similar to the assessment of parental fitness for custody determinations, the court must evaluate the impact of a mental disorder on the parenting skills in visitation arrangements. If a parent's illness will have a significant impact on parental abilities, the court may consider whether the child's interests will best be served in the protective setting of supervised visitation.<sup>35</sup>

Another factor to consider in determining visitation orders is the "parent's conception of his or her disorder."<sup>36</sup> Supervised visitation ensures a safe environment if the parent is not compliant with medical regimes.<sup>37</sup> The court also should consider if the parent is aware of the impact the disorder may have on the child.<sup>38</sup> Additionally, precautions should be taken to ensure the child's safety if the parent involves the child in the symptoms or delusions of the disorder.<sup>39</sup>

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The effect the symptoms have on “parenting abilities” also should be considered.<sup>40</sup> This factor includes evaluation of the parent’s ability to connect with the child and control symptoms.<sup>41</sup>

### QUESTIONS TO CONSIDER WHEN EVALUATING “NATURE AND COURSE” OF PSYCHIATRIC ILLNESS

- Is the disorder recurrent or a single incident?
- Is the disorder likely to go into remission or is it progressive and deteriorative?
- What is the usual course of the disorder and the effectiveness of treatment?
- How does the disorder affect parenting function?

NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 187-89 (1998).

Finally, the impact the disorder has on the child should be weighed against the benefits that visitation would provide.<sup>42</sup> The court must consider the ability of the child to understand his or her parent’s illness.<sup>43</sup> Further, the presence of individuals in the child’s life who can help the child understand the disorder should be considered.<sup>44</sup> Others involved in the child’s life will aid in protecting the child’s well-being during visits.<sup>45</sup> For additional discussion of this topic, see **Chapter 3, Mental Illness**.

### **Allegations of Substance Abuse/Dependency**

While a parent may have been denied custody because of substance abuse, the parent should not usually be denied all visitation rights based solely on this factor.<sup>46</sup> Visitation, however, may be restricted.<sup>47</sup> Supervised visitation may be appropriate to ensure that the child is protected from a dangerous or unhealthy environment. Restrictions on the parent’s driving with the child or access to firearms may be appropriate. In California, for example, courts can order persons seeking visitation or custody to undergo drug and alcohol testing.<sup>48</sup>

If the substance abuse interferes with the parent’s ability to provide care or supervise the child during the visit, restricted visitation is appropriate.<sup>49</sup> Arrests for drug charges and association with drug users and dealers may indicate that the parent does not have the ability to provide unsupervised care for the child.<sup>50</sup>

To ensure the child’s safety, the order may specify that the parent should abstain from possession or consumption of alcohol or other controlled substances prior to and during the visits.<sup>51</sup> Additionally, the court can condition visitation on compliance with an alcohol or drug treatment program, and restrict where the child is taken.<sup>52</sup> The order should clearly state that violation of these provisions

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might lead to suspension of visitation rights or a complete denial of physical contact with the child.

### QUESTIONS TO CONSIDER WHEN EVALUATING PARENT'S CONCEPTION OF PSYCHIATRIC DISORDER

- What is the parent's degree of "awareness/insight" regarding the disorder?
- Is the parent compliant with treatment? What are potential effects of noncompliance?
- What is the extent of the parent's "control over symptoms"?
- To what degree does the parent involve the child in symptoms or delusions?
- Is the parent sensitive to the impact of the disorder on the child?

### QUESTIONS TO CONSIDER WHEN EVALUATING PARENTAL ABILITY/IMPACT OF PSYCHIATRIC DISORDER ON CHILD

- Is the parent able to relate to the child?
- Is the parent able to control symptoms? Is the child in any danger if the parent is unable to control symptoms?
- Is the parent able to provide for basic needs, including safety, during visit?
- What is the child's age and developmental level?
- Is the child able to distinguish between fantasy and reality?
- Does the child blame himself or herself for the disorder? Does the child personalize the parent's statements?
- What is the child's history with the parent's illness?

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## Interference with Custody Orders and Threats of Abduction

In balancing the need to protect children from possible abduction by a noncustodial parent with the need to foster parent-child relationships, restrictions on visitation are appropriate when certain risk factors are present.<sup>53</sup> First, you should consider whether high risk factors for abduction are present.<sup>54</sup>

### HIGH RISK FACTORS FOR ABDUCTION

- Prior custody violations.
- Clear evidence of plans to abduct includes combination of the following:
  - Parent is unemployed.
  - Parent is without emotional or financial ties in the area.
  - Parent has divulged plans to abduct and has resources to survive in hiding.
  - Parent has support of extended family and underground networks to stay hidden.
  - Parent has liquidated assets and maximum draw against credit cards.
  - There is history of domestic violence.

Janet R. Johnson & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions*, 36 FAM. & CONCILIATION COURTS REV. 392-409 (1998).

Restrictions on visitation also are appropriate when obstacles to locating and returning abducted children are great.<sup>55</sup> Such obstacles include the potential to take the child to other jurisdictions that are uncooperative in returning and locating children of parental abductions.<sup>56</sup> If there is potential that the parent will move the child to a foreign jurisdiction that is not party to The Hague Convention, the threat is even greater.<sup>57</sup> Parents worried about the threat of abduction should consider steps to protect the child, such as informing the diplomatic mission of the ex-spouse's native country that the custodial parent has not agreed to apply for a visa or passport for the child and clarifying with the child's school who is authorized to pick up or transport the child.<sup>58</sup>

In addition to enforcing supervised visitation, the court may mandate that the noncustodial parent post bond prior to visitation to create further barriers against abduction.<sup>59</sup> Finally, restriction on visitation also is appropriate when the abduction has the potential to substantially harm the child.<sup>60</sup>

Abduction could cause substantial harm to the child if the parent has a history of abuse or violence, has a serious mental or personality disorder, or has had little or no prior relationship with the child.<sup>61</sup>

## Third - Party Visitation

Parties other than parents may have the legal right to request an order granting visitation with the child. The United States Supreme Court addressed third-party visitation rights in *Troxel v. Granville*. In a plurality opinion, the Court found a Washington state third-party visitation statute unconstitutional "as applied." In this case, the trial court had granted visitation rights to the paternal grandparents, over the objection of the mother, based on a state statute that gave any person at any time standing to seek court-ordered visitation.<sup>62</sup> With no fewer than six

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different opinions (plurality opinion, two concurrences, and three dissents), the decision's impact was unclear. As one commentator noted:

The core of the plurality's decision was quite simple and limited: given that parents enjoy constitutional protection of their child-rearing decisions, the state may not intervene without giving "some special weight" to a fit parent's decision . . . . Because it analyzed the statute "as applied," it left room for gradual development in the law of third party visitation. . . .<sup>63</sup>

Notwithstanding some confusion arising from the multiple decisions in *Troxel*, third-party visitation still lives.<sup>64</sup> As a result of *Troxel*, states have refined their third-party visitation law through statutory revisions and judicial opinions interpreting the statutes. When compared to all other third-party petitioners, grandparents have the most protected visitation rights. All 50 states have statutes addressing a grandparent's right to visitation.<sup>65</sup> While many statutes refer to the child's best interests, there is a wide variation between states on the interpretation of those interests, the balance of the parent's rights, and resulting restrictions on visitation.<sup>66</sup> The starting point for all third-party visitation requests, therefore, is your relevant state statute(s).

It is also important to determine under your state's statute and case law what, if any, other third parties may be entitled to request visitation. For example, California law specifically allows for reasonable visitation by stepparents, siblings, and children,<sup>67</sup> as well as "any other person having any interest in the welfare of the child."<sup>68</sup>

## Relocation

In an increasingly mobile society, custody cases increasingly involve relocation of the custodial parent. There are numerous reasons why a custodial parent may want to move with the child(ren): a new job, education to help obtain a better job, remarriage, to be close to family who can help with child care, to escape a controlling or violent ex-spouse.<sup>69</sup> Attorneys, judges, child and family advocates, and mental health specialists have been struggling for years to develop child-sensitive approaches to resolving relocation cases that also appropriately weigh each parent's interests.<sup>70</sup>

Relocation cases involve various competing interests, including the following:

- The child's right to stability and meaningful regular contact with both parents after a divorce.
- The custodial parent's right to move on with his or her life after a divorce without the interference and potential costly burden of litigation.



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- The noncustodial parent's right to continue to have meaningful contact with his or her child after a divorce.

Most states require the custodial parent to notify the noncustodial parent of the intent to relocate. If the noncustodial parent does not agree, the custodial parent must seek the court's intervention. (It should be noted that noncustodial parents are free to move at any time without the acquiescence of the custodial parent or court intervention.)<sup>71</sup> While states generally consider the "best interests of the child" in deciding whether to permit the move, courts have struggled to give substance to this language within the difficult context of relocation cases. There is no single uniform approach to resolving relocation cases, and it is important to become familiar with the relevant statutes and case law of your particular jurisdiction when making a decision.

Generally, some states put the burden of proof on the custodial parent seeking the move to show relocation is in the child's best interests,<sup>72</sup> while other states put the burden on the parent opposing the move to demonstrate the move is not in the child's best interests.<sup>73</sup> A third, middle-ground approach has evolved, which allows the relocation of the custodial parent with the child if the custodial parent has a legitimate reason for the move and the move is consistent with the best interests of the child.<sup>74</sup> How the child's best interests are determined varies based on the relevant statute and the resulting case law interpreting that statute, but generally requires a balancing approach. One author has noted that "judges and child custody evaluators need to recognize the risk of those biases [presumptions for or against the move] and set them aside when reaching conclusions about whether or not a specific child in a specific family moves with his or her parent."

Some of the most frequently cited cases involving relocation set forth factors for courts to consider when deciding a relocation case. In *D'Onofrio v. D'Onofrio*,<sup>75</sup> the New Jersey Superior Court set forth five factors to consider:

- Whether the move will improve the quality of life for both the custodial parent and the child.
- Whether the motives of the relocating, custodial parent are in good faith and not simply intended to frustrate the noncustodial parent's visitation.
- Whether the relocating, custodial parent will comply with the new visitation orders once he or she relocates.
- Whether the noncustodial parent's motives for opposing the move are in good faith or simply to avoid paying support.

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- Whether a realistic visitation schedule can be created which will foster the relationship between the children and the noncustodial parent.

Courts often rely upon the factors cited by the New York Court of Appeals in *Tropea v. Tropea*.<sup>76</sup> These factors are:

- The parents' reasons for seeking or opposing the move.
- The quality of the relationships between the child and the parents.
- The impact of the move on the quantity and quality of the child's future contacts with the noncustodial parent.
- The degree to which the child and custodial parent's lives will be enhanced by the move.
- The feasibility of maintaining the relationship between the child and the noncustodial parent through suitable visitation.

Relocation cases are heavily fact dependent, and each case must be carefully considered in light of the many factors outlined above and/or others applied by a particular state. You also may wish to consider the input of other professionals involved in the case.

### FREQUENTLY LISTED FACTORS IN RELOCATION CASES

- |   |  |
|---|--|
| • Age of the child(ren)   | • Child's wishes   |
| • Distance of proposed move                                     | • Professional assessments   |
| • Genuine interests of parents in litigating relocation dispute | • Impact on child if custodial parent is denied permission to relocate                     |
| • History of past interference                                  | • Alternative visitation plans available with the move                                     |
| • Impact of move on child in relation to extended family        | • Domestic violence and safety issues, and the effect on parenting by the custodial parent |

## Domestic Violence

### The Effects of Domestic Violence on Children

Each year, it is estimated that between 3.3 million and 10 million children witness domestic violence.<sup>77</sup> The effects of domestic violence on children who witness abuse are well documented.<sup>78</sup> In many instances, the children become victims as

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well.<sup>79</sup> More than half of men who physically abuse their female partners also beat their children, and children of battered women are “up to 15 times more likely than children overall to be physically abused and neglected.”<sup>80</sup>

Children who intervene to protect a parent in a domestic dispute often suffer physical harm.<sup>81</sup> Teenage sons are frequently hurt when they enter a violent dispute in an effort to save their mothers from further harm.<sup>82</sup> In addition, in homes where the violent spouse is the father, girls are more likely to become victims of sexual abuse.<sup>83</sup> The reckless violence of abusers, though directed at intimate partners, often inadvertently results in physical harm to their children.<sup>84</sup> The most serious injuries are inflicted on the youngest children, who sustain injuries such as broken bones and concussions.<sup>85</sup>

Children who witness their fathers abuse their mothers, even if not physically harmed, can suffer serious psychological injuries and behavioral problems from their exposure to violence.<sup>86</sup> Contrary to the beliefs of their parents, one study indicated that approximately 80 percent of the children surveyed reported that they knew of the physical abuse occurring.<sup>87</sup> Children who live in homes where there is violence are often recruited into a family conspiracy of hiding the abuse.<sup>88</sup> Child witnesses quickly learn the family rule requires “keeping the secret.”<sup>89</sup> Children who break the silence and disclose the abuse often painfully learn that the abuser finds yet a new reason to further harm them or their mother.<sup>90</sup>

The chart below sets forth the various effects of violence on children:<sup>91</sup>

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| EMOTIONAL EFFECTS  | BEHAVIORAL EFFECTS  |
|--|---|
| <ul style="list-style-type: none"><li>• Terror when witnessing abuse.</li><li>• Anxiety at the threat of another attack.</li><li>• Rage at the abusive parent.</li><li>• Anger at the mother for not being able to stop the abusive parent or to protect them.</li><br/><li>• Guilt and shame about the family.</li><li>• Depression and grief when the family is separated or in transition.</li></ul>  | <ul style="list-style-type: none"><li>• Injury and possible death.</li><li>• Developmental delays and learning disabilities.</li><li>• Regressive behavior.</li><li>• Aggressive and acting out behavior.</li><li>• Stress-related somatic complaints.</li><li>• Role reversal.</li><li>• Early substance abuse.</li><li>• Running away, truancy, juvenile delinquency.</li><li>• High risk for suicide.</li><li>• Boys are at high risk for committing sexual assault crimes and becoming abusive adults.</li><li>• Girls are at risk for becoming involved with abusive partners.</li><li>• Delinquency.</li><li>• Teen pregnancy (both sons and daughters affected).</li></ul> |
| <h3>COGNITIVE EFFECTS</h3> <ul style="list-style-type: none"><li>• Anger equals violence.</li><li>• Violence is a way that powerful people get what they want.</li><li>• Adults break promises and are not to be trusted.</li><li>• Victims are responsible for the abuse because they have been bad.</li><li>• You will get hurt if you tell anyone the truth about what you experience at home.</li><li>• Men are domineering, controlling, and frightening. Women are bad, helpless, ineffective, and deserving of punishment.</li><li>• You are on your own. No one will believe you or can protect you.</li><li>• In any relationship, if you do not control others, they will control you.</li></ul> |   |

Children exposed to domestic violence, especially boys, are more likely to become abusive themselves.<sup>92</sup> In fact, approximately 30 percent of children who witness domestic violence become perpetrators of abuse.<sup>93</sup> Children who witness domestic violence may see violence as a way to resolve problems or cope with stress.<sup>94</sup> They learn firsthand how violence is used to gain control or power over others.<sup>95</sup> These child witnesses have a greater likelihood of engaging in criminal behavior and an increased likelihood of engaging in a violent relationship.<sup>96</sup> In addition, children who witness domestic violence are at risk of developing serious psychological trauma and may suffer from an array of symptoms and syndromes, including post-traumatic stress disorder.<sup>97</sup>

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The following chart sets forth various behaviors associated with children who witness domestic violence:<sup>98</sup>

| BEHAVIORS ASSOCIATED WITH WITNESSES OF DOMESTIC VIOLENCE  |   |
|---|---|
| <b>INFANTS</b>  | <b>TODDLERS</b>   |
| <ul style="list-style-type: none"><li>• Injury to body</li><li>• Poor health</li><li>• Fretful sleep pattern</li><li>• Lethargy</li><li>• Physical neglect, e.g., diaper rash, sores</li><li>• Vaginal or rectal discharge, e.g., often associated with sexual abuse</li><li>• Excessive crying</li><li>• Failure to gain weight</li></ul>  | <ul style="list-style-type: none"><li>• Injury to body</li><li>• Frequent illness</li><li>• Shyness, withdrawn behavior</li><li>• Low self-esteem</li><li>• Reluctance to be touched</li><li>• Difficulty in preschool or daycare, e.g., aggressiveness, biting, hitting, difficulty sharing</li><li>• Poor speech development</li><li>• Separation difficulties, e.g., clinging, yelling, hiding, shaking</li><li>• Failure to gain weight</li></ul>   |
| <b>SCHOOL-AGE CHILDREN</b>  | <b>TEENAGERS</b>  |
| <ul style="list-style-type: none"><li>• Injury to body</li><li>• Frequent illness</li><li>• Psychosomatic complaints</li><li>• Hitting, stealing, lying</li><li>• Nightmares</li><li>• Nervous disorders, e.g., stuttering, tics</li><li>• Lack of motivation</li><li>• Poor grades</li><li>• Depression</li><li>• Need to be perfect</li><li>• Withdrawal</li><li>• Attention seeking</li><li>• Sophisticated knowledge of sex</li><li>• Substance abuse</li><li>• Regression, e.g., thumb-sucking, bed-wetting</li><li>• Protective of mother</li><li>• Assuming parental role with younger siblings</li><li>• Difficulty with siblings</li><li>• Identification with aggressor</li></ul> | <ul style="list-style-type: none"><li>• Injury to body</li><li>• Loss of childhood</li><li>• “Perfect” child or “caretaker”</li><li>• Helplessness</li><li>• Anger at the abused parent, e.g., loss of respect</li><li>• Identification with aggressor</li><li>• Isolation, e.g., fearful of bringing friends home</li><li>• Delinquent behavior, e.g., running away</li><li>• Difficulty with siblings</li><li>• Heightened suicidal or homicidal thoughts</li><li>• Substance abuse</li><li>• Sexual acting out</li><li>• Need to protect victim, parent, or siblings</li><li>• Assuming role of parent</li></ul> |

It is critical to accurately assess the risk to children from abusive parents. You should gather information from multiple sources, including “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

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relevant events.”<sup>99</sup> Two commentators have proposed comparing the gathered facts against the following 13 points:

- Level of physical danger to the mother.
- History of physical abuse towards the children.
- History of sexual abuse or boundary violations towards the children.
- Level of psychological cruelty to the mother or the children.
- Level of coercive or manipulative control exercised during the relationship.
- Level of entitlement and self-centeredness.
- History of using the children as weapons, and of undermining the mother’s parenting.
- History of placing the children at physical or emotional risk while abusing their mother.
- History of neglectful or severely under involved parenting.
- Refusal to accept the end of the relationship, or to accept the mother’s decision to begin a new relationship.
- Level of risk to abduct the children.
- Substance abuse history.
- Mental health history.<sup>100</sup>

You must also consider whether the child has been the direct victim of domestic violence,<sup>101</sup> has witnessed violence, or has been exposed to it, i.e., is living in a home where violence is taking place even if he or she has not actually seen or heard it. A thorough assessment is critical; the failure to accurately assess the risk to children can result in a custody decision that exposes children to additional violence.

### **Domestic Violence and Child Custody Disputes**

A significant percentage of contested custody cases are in families where domestic violence occurs. Patterns of domestic violence often begin, persist, or escalate during child custody battles, as the most dangerous time for a victim of domestic violence is when she leaves her abuser.<sup>102</sup> National studies show that a separated

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woman is three times more likely than a divorced woman, and 25 more times likely than a married woman, to be victimized by her spouse.<sup>103</sup> In order to maintain control over their wives, abusive spouses may use threats to seek custody in order to maintain control or other tactical advantages.<sup>104</sup> Following the separation, abusers discover that they can manipulate and control the spouse with threats.<sup>105</sup>

Custody disputes can be a litigation tactic that allows the battered woman to be revictimized.<sup>106</sup> A father may threaten to sue for custody, seek modification, or oppose relocation as a bargaining tool. He may discover that his wife may be willing to forego rights to child support and alimony in exchange for custody.<sup>107</sup> For example, one study indicated that women reduced their requests for resources during negotiations when they were afraid that they might lose custody.<sup>108</sup>

To clarify often false claims made in child custody determinations involving domestic violence, the ABA Commission on Domestic Violence has explored the myths surrounding domestic violence and custody, and published *10 Myths about Custody and Domestic Violence and How to Counter Them* in 2006. This two-page summary is available as an appendix to this edition.

Child custody determinations in almost every state require the judge to apply a two-step analysis.<sup>109</sup> First, the judge must assess the fitness of the parents. Then, the judge must design a custody arrangement that is in “the best interests of the child.”<sup>110</sup> Almost all states have legislation that makes domestic violence a factor that the courts must consider when awarding custody or visitation,<sup>111</sup> and many require that courts make findings of fact regarding evidence of domestic abuse prior to awarding custody and visitation.<sup>112</sup> Many states have created presumptions regarding domestic violence, e.g., “that it is not in the child’s best interest to be in the custody of a domestic violence perpetrator.”<sup>113</sup> About half of the states have created a rebuttable presumption against the awarding of custody or visitation to parents who have a history of domestic abuse.<sup>114</sup> To overcome this presumption, the abuser would have to show the custody would be in the best interests of the child. Some states that have adopted a joint custody presumption have negated the preference in cases where there is domestic violence.<sup>115</sup>

Even if your state statute does not have a rebuttable presumption against custody, there are three reasons to support a finding that a batterer is an unfit custodian: “First, the abuser has ignored the child’s interests by harming the child’s other parent. Second, the pattern of control and domination common to abusers often continues after the physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.”<sup>116</sup>

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In its recently published *Judicial Checklist*, the ABA Commission on Domestic Violence advocates for custody evaluations by experts when domestic violence is at issue:

Custody evaluations must be performed by experts who have had appropriate training in domestic violence and who understand:

- How domestic violence affects adult and child safety.
- How the perpetration of domestic violence (not acts of self-defense) may reflect on parental fitness.
- That domestic violence may encompass physical, sexual, or emotional abuse or threats of abuse to the children.
- When it is appropriate to limit the perpetrator's access to the child(ren), based on the abuser's history and pattern of abuse.<sup>117</sup>

### CUSTODY AND VISITATION DECISION MAKING IN CASES INVOLVING DOMESTIC VIOLENCE

Peter Jaffe, Claire Crooks, and Nick Bala provided a detailed analysis of potential "parenting arrangements" in cases involving domestic violence, with indications and contraindications explained.

- Co-Parenting
- Parallel Parenting
- Supervised Exchange
- Supervised Access
- No Contact

Peter G. Jaffe, et al., *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, reprinted by permission in National Civil Law Custody Institute Conference Materials (June 21-22, 2007) (sponsored by the ABA Commission on Domestic Violence and the National Institute for Trial Advocacy).

Though liberal visitation is generally awarded to noncustodial parents, many states have crafted legislation to address the risks posed by visitation with a violent parent.<sup>118</sup> Some states have made the safety of the child and custodial parent a factor to be considered in visitation awards, while others promote supervised visitation.<sup>119</sup> Supervised visitation, though sometimes critical to ensure the safety of the abused spouse and child, may be too expensive for low-income families or



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may be logistically unreasonable.<sup>120</sup> You should explore the availability of community programs that may be designed to carry out supervised visitation orders.<sup>121</sup>

No discussion of domestic violence is complete without reinforcing the importance of domestic violence training for judges, mediators, counsel for minors, and child custody evaluators. When dealing with mental health professionals, you should not assume they have received this training.<sup>122</sup>

### **Friendly Parent Provisions**

Over the years, some states have used “friendly parent” provisions that permit courts to favor the more cooperative parent (who also may be more inclined to favor shared parenting) when deciding child custody issues.<sup>123</sup> In effect, the “friendly parent” provisions place battered spouses at risk of losing if they strongly oppose a joint arrangement.<sup>124</sup> These provisions exacerbate the abused parent’s efforts to keep their children from witnessing or experiencing physical abuse and are not appropriate in cases of domestic abuse or where a child has been abused by one of the parents.<sup>125</sup> Consequently, many states and courts refuse to apply this presumption in cases involving domestic violence.

Related to the Friendly Parent Provision is the controversial issue of Parental Alienation Syndrome. Under this theory, a parent who “bad mouths” another parent in front of the child, or “brain washes” the child to turn against the other parent, is considered to be not acting in the child’s best interests. This theory is highly controversial and has largely been discredited as bad science.<sup>126</sup> In domestic violence cases, it can be dangerous. Domestic violence victims, often for the safety of their children and themselves, take active steps to minimize contact and relationships with the abuser. To punish them for doing so, by giving favorable custody or visitation treatment to the abuser, is counterproductive and can be dangerous. For these and other reasons, it is critical that mental health professionals involved in custody disputes, e.g., those conducting custody evaluations and substance abuse assessments, are knowledgeable about domestic violence.

### **Allegations of Sexual Abuse**

In highly contested custody disputes, allegations of sexual abuse may arise.<sup>127</sup> Before the hearing, the custodial parent may seek restrictive visitation orders, limiting the contact between the child and the accused parent.

Sexual abuse is often hard to detect. Determinations concerning preschool-aged children are especially difficult because young children may have difficulties articulating incidences of abuse.<sup>128</sup> Therefore, limitations on visitation are appropriate if the allegations appear to have “some reasonable basis.”<sup>129</sup> Amendments to visitation restrictions can be made in light of new findings.<sup>130</sup>

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Supervised visitation is often awarded in cases where the parent is found to have molested a child.<sup>131</sup> While the accused parent generally prefers to be supervised by a friend or family member, those close to the accused parent “may not be appropriately vigilant or supportive of the child.”<sup>132</sup> Appointing a professional or disinterested third party as the supervisor may be preferable.<sup>133</sup>

Since investigations into sexual abuse allegations of younger children are often inconclusive, the court must develop a visitation arrangement designed to foster a healthy parent-child relationship while protecting younger children. Such an arrangement might include, for example, provisions for shorter visits with no overnight stays.

### QUESTIONS TO CONSIDER WHEN CONFRONTED WITH SEXUAL ABUSE, CHILD ABUSE, OR DOMESTIC VIOLENCE ALLEGATIONS

- How old is the child?
- Is there sufficient evidence of danger to the child’s physical and emotional health?
- Would unsupervised visitation have a detrimental impact on the child?
- Was the investigation conclusive?
- Would supervised parental contact benefit the child?
- What approach of care does the supervised program implement?

Sandra K. Hewitt, *Therapeutic Management of Preschool Cases of Alleged but Unsubstantiated Sexual Abuse*, 70 (1) CHILD WELFARE 59, 61-64 (1991).

## Mediation

Family law statutes across the country are increasingly incorporating mandatory mediation requirements for child custody disputes.<sup>134</sup> Mediation has been promoted as a favorable alternative to litigation because it allows both parents to actively participate in the design of the custody arrangement.<sup>135</sup> Yet, effective mediation depends upon voluntary participation and a presumption that each party has equal bargaining power and an equal stake in the outcome.<sup>136</sup> In cases involving domestic violence, the abusive relationship presents an uneven playing field. The victim of domestic violence often lacks sufficient resources to obtain legal counsel and may readily sacrifice economic entitlements for custody of the children.<sup>137</sup> Some states, recognizing that mediation may not be a viable option for cases involving domestic violence, have specifically excluded such cases from mandatory mediation requirements.<sup>138</sup>

## RECURRING ISSUES

Even where mediation in custody cases involving domestic violence has not been excluded, “[m]ediation should not be ordered over the objection of an alleged victim.”<sup>139</sup> When determining if there is an appropriate circumstance for mediation, you need to do the following:

- Screen for domestic violence (mediators should also routinely screen).
- If the victim requests mediation, take steps to ensure the safety of the victim and children, such as requiring separate sessions or allowing a support person to attend mediation with the victim.
- Use mediators specially trained in domestic and family violence.<sup>140</sup>

## RECURRING ISSUES

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- <sup>1</sup> Margaret Tortorella, *When Supervised Visitation is in the Best Interests of the Child*, 30 FAM. L. Q. 199, 201 (1996). Some states that follow the “best interest” approach are Connecticut (CONN. GEN. STAT. ANN. § 46b-59); Florida (FLA. STAT. ANN. § 61.13(2)); N.C. GEN. STAT. § 50-13.2 (b)); Texas (TEX. FAM. CODE ANN. § 153.002); Utah (UTAH CODE ANN. § 30-3-5(5)(a)). Two states that follow the “entitlement” approach are Illinois (ILL. REV. STAT. CH. 750, para. 5/607(a)) and Kansas (KAN. STAT. ANN. § 60-1616(a)).
- <sup>2</sup> FLA. STAT. ANN. § 61.13(3); *see also* N.D. CENT. CODE § 14.09.06.2(1).
- <sup>3</sup> Tortorella, *supra* note 1, at 201.
- <sup>4</sup> *Id.*
- <sup>5</sup> *See, e.g., Hendrickson v. Hendrickson*, 603 N.W.2D 896 (N.D. 2000).
- <sup>6</sup> *See, e.g.,* LA. REV. STAT. ANN. § 9:364.
- <sup>7</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §§ 402, 405 (1994).
- <sup>8</sup> *Id.* at § 405.
- <sup>9</sup> Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 299, 234 (1995); California Center for Families, Children & the Courts (CFCC), *Supervised Visitation: A Look at the Research Literature* 1 (March 2000)(available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/svupdate.pdf>).
- <sup>10</sup> Straus, *supra* note 9, at 234.
- <sup>11</sup> CFCC, *supra* note 9, at 1.
- <sup>12</sup> Straus, *supra* note 9, at 234.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> CFCC, *supra* note 9, at 1.
- <sup>17</sup> *Id.*
- <sup>18</sup> NANCY K.D. LEMON, DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL CURRICULUM 58 (1995).
- <sup>19</sup> Straus, *supra* note 9, at 234-35.
- <sup>20</sup> LEMON, *supra* note 18, at 67.
- <sup>21</sup> LEMON, *supra* note 18, at 67.
- <sup>22</sup> LEMON, *supra* note 18, at 67.
- <sup>23</sup> Straus, *supra* note 9, at 249.
- <sup>24</sup> Straus, *supra* note 9, at 250.
- <sup>25</sup> Straus, *supra* note 9, at 250.

## RECURRING ISSUES

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<sup>26</sup> LEMON, *supra* note 18, at 68.

<sup>27</sup> LEMON, *supra* note 18, at 68.

<sup>28</sup> LEMON, *supra* note 18, at 68.

<sup>29</sup> LEMON, *supra* note 18, at 68.

<sup>30</sup> Straus, *supra* note 9, at 251.

<sup>31</sup> LEMON, *supra* note 18, at 68.

<sup>32</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 187 (1998).

<sup>33</sup> *See* 11 ALAN M. GOLDSTEIN, HANDBOOK OF PSYCHOLOGY 193 (Irving B. Weiner ed. 2003)(While a parent’s mental disorder is a critical consideration in a custody determination, it should not be “dispositive” unless it is “relevant” to the parent’s ability to care for the child and has “a negative influence” on the child.)

<sup>34</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, *supra* note 32, at 187.

<sup>35</sup> *Id.* at 191.

<sup>36</sup> *Id.* at 189.

<sup>37</sup> Tortortella, *supra* note 1, at 208.

<sup>38</sup> NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY, *supra* note 32, at 191.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 192.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 193.

<sup>45</sup> *Id.*

<sup>46</sup> *See generally Parent’s Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 20 A.L.R. 5<sup>th</sup> 534 (1995).

<sup>47</sup> Tortortella, *supra* note 1, at 209-10.

<sup>48</sup> CAL. FAM. CODE § 3041.5; *see also* California Administrative Office of the Courts, Center for Family, Children & the Courts, DRUG AND ALCOHOL TESTING IN CHILD CUSTODY CASES: IMPLEMENTATION OF FAMILY CODE SECTION 3041.5/FINAL REPORT TO THE CALIFORNIA LEGISLATURE (July 2007).

<sup>49</sup> Tortortella, *supra* note 1, at 209-10.

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<sup>50</sup> *Id.* at 210.

<sup>51</sup> LEMON, *supra* note 18, at 68.

<sup>52</sup> LEMON, *supra* note 18, at 68.

<sup>53</sup> Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions*, 36 FAM. & CONCILIATION COURTS REV. 392, 405 (1998).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> BARBARA STARK, INTERNATIONAL FAMILY LAW: AN INTRODUCTION 201 – 203 (2005).

<sup>59</sup> Lemon, *supra* note 18, at 68.

<sup>60</sup> Johnston & Girdner, *supra* note 53, at 405.

<sup>61</sup> Johnston & Girdner, *supra* note 53, at 409.

<sup>62</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>63</sup> Barbara Bennett Woodhouse, *Protecting Children’s Relationships with Extended Families: The Impact of Troxel v. Granville*, 19 CHILD LAW PRACTICE 66, 70 (2000).

<sup>64</sup> *See, e.g., In re G.P.C.*, 28 S.W.3d 357 (Mo. Ct. App. 2000)(third-party visitation order upheld, distinguishing state statute and facts of case from those of *Troxel*); *Brice v. Brice*, 754 A.2d 1132 (Md. Ct. Spec. App. 1999)(while court overturned grandparent visitation award under *Troxel* in a factually similar case, the court rejected claim that the third-party visitation statute was facially unconstitutional).

<sup>65</sup> *Troxel*, 530 U.S. at n.1; *see also* Victoria Roth, *Grandparents’ Right to Visitation*, 1 ELDER’S ADVISOR 51, 52 (1999); *see generally* Brent Bennett, et al., *To Grandmother’s House We Go: Examining Troxel, Harrold, and the Future of Third-Party Visitation*, 74 U. CIN. L. REV. 1549 (2006).

<sup>66</sup> *See, e.g.,* ARK. CODE ANN. § 9-13-103 (statute establishes “rebuttable presumption” that parent’s decision to deny or limit grandparent visitation is in child’s best interest; grandparent can rebut presumption if he or she has “established a significant and viable relationship with the child” and visitation is in the child’s best interest; statute defines “significant and viable relationship” and best interest considerations); CAL. FAM. CODE §§ 3103(a), 3104(a)(grandparent visitation is permitted if in child’s best interest; rebuttable presumption visitation is not in child’s best interest if parents agree grandparents should not be granted rights; court must find 1) preexisting relationship between grandparent and child that has “engendered bond” rendering visitation in the child’s best interest and 2) “balances” child’s interest

in visiting grandparent with parents' right "to exercise parental authority"); FLA. STAT. ANN. § 752.01(visitation permitted if in child's best interest and 1) parents' marriage dissolved, 2) parent deserted child, or 3) child born out of wedlock; factors to be considered in best interest determination include grandparents' willingness to encourage close relationship between child and parent(s), quality/length of relationship between child and grandparent, preference of child if mature enough to express preference, mental/physical health of grandparent and child, and other factors as "necessary" in particular case); NEB. REV. STAT. § 43-1802 (grandparent can petition for visitation if parent(s) deceased, parents divorced, or parents never married but paternity has been established; court requires evidence of "significant beneficial relationship" between grandparent and child, that visitation is in child's best interest, and visitation does not "adversely interfere" with parent-child relationship); WIS. STAT. ANN. § 767.43(3)(court may grant grandparent visitation if all of the following found: 1) child is "nonmarital" child whose parents have never married; 2) paternity has been determined if paternal grandparents are bringing petition; 3) child has not been adopted; 4) grandparent has maintained or attempted to maintain relationship with child; 5) grandparent is not "likely to act in a manner" contrary to parents' decisions; and 6) visitation is in child's best interests. *See also To Grandmother's House We Go*, *supra* note 63, at note 90.

<sup>67</sup> CAL. FAM. CODE §§ 3101(a), 3202(a); *see also* WIS. STAT. ANN. § 767.43(3)(allows visitation by "grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship).

<sup>68</sup> CAL. FAM. CODE § 3100(a); *see also* VA. CODE ANN. § 20-124.2 ("any other person with a legitimate interest" in the child can petition for visitation).

<sup>69</sup> Courts must be sensitive to domestic violence as a reason a custodial parent may wish to relocate. While this is a less developed area of law than relocation for economic considerations, courts are beginning to uphold relocation on this basis.

<sup>70</sup> For detailed discussion of relocation issues, see RELOCATION ISSUES IN CHILD CUSTODY CASES (Philip M. Stahl et al. eds. 2006)(copublished simultaneously as 3 J. OF CHILD CUSTODY No. 3/4 (2006); Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Partnering*, 41 FAM. L. Q. 105 (Spring 2007); Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L. Q. 281 (Summer 2006).

<sup>71</sup> Glennon, *supra* note 70, at 106 ("Custody relocation doctrine limits the geographic mobility of parents who are custodial or majority-time residential parents . . . , a restriction not placed on noncustodial parents or minority residential parents."), citing *Leoni v. Leoni*, 2005 WL 3512658, at 2 (Conn. Super. Ct. Nov. 29, 2005).

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- <sup>72</sup> See, e.g., ALA. CODE § 30-3-169.4 (unless objecting party is found to have committed domestic violence or child abuse, rebuttable presumption that change of residence is not in best interest of child; party seeking change has initial burden to rebut, if burden met, it shifts to opposing party); LA. REV. STAT. ANN. § 9:355.13 (“relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child”).
- <sup>73</sup> See, e.g., CAL. FAM. CODE § 7501 (custodial parent has “right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child”); WASH. REV. CODE ANN. § 26.09.520 (“There is a rebuttable presumption that the intended relocation of the child will be permitted.”)
- <sup>74</sup> See, e.g., COLO. REV. STAT. § 14.10.129(2)(c)(court must consider whether modification is in the “best interests” of child, including list of factors to be considered); FLA. STAT. ANN. § 61.13.
- <sup>75</sup> 144 N.J.Super. 200, 365 A.2d 27 (1979).
- <sup>76</sup> 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996).
- <sup>77</sup> Sharmilla Lawrence, National Center for Children in Poverty, DOMESTIC VIOLENCE AND WELFARE POLICY: RESEARCH FINDINGS THAT CAN INFORM POLICIES ON MARRIAGE AND CHILD WELL-BEING 5 (2002); see also Betsy McAlister Groves, Barry Zuckerman, Steven Marans & Donald J. Cohen, *Silent Victims: Children Who Witness Violence*, 269 (3) JAMA 262 (1993).
- <sup>78</sup> See *Symposium Issue, Domestic Violence and Children*, 9 FUTURE OF CHILDREN (Winter 1999) for extensive information on this topic. In a recent study of Michigan low-income preschool children, nearly half had been exposed to at least one incident of family violence. These children experienced post-traumatic stress disorder symptoms, including bed-wetting and nightmares. The study also indicated they were at greater risk of having allergies, asthma, stomach problems, headaches, and influenza. Sandra Graham-Bermann & Julie Seng, *Violence Exposure and Traumatic Stress Symptoms as Additional Predictors of Health Problems in High-Risk Children*, 146 J. OF PEDIATRICS 309 (2005).
- <sup>79</sup> LOU BROWN, FRANCOIS DUBAU, & MERRITT MCKEON, STOP DOMESTIC VIOLENCE: AN ACTION PLAN FOR SAVING LIVES 109 (St. Martin’s Griffin 1997).
- <sup>80</sup> Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273, 279 (1995).
- <sup>81</sup> Martha Matthews, *Addressing the Effects of Domestic Violence on Children*, YOUTH LAW NEWS, July-August 1998, at 1.
- <sup>82</sup> Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, CLEARINGHOUSE REVIEW, April 1996, at 1115.



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<sup>83</sup> Zorza, *supra* note 80, at 279.

<sup>84</sup> Zorza, *supra* note 82, at 1115.

<sup>85</sup> *Id.*

<sup>86</sup> Research indicates that exposure to domestic violence has negative effects on children, including depression, withdrawal, somatic distress, aggression, and delinquency. O’Sullivan, et al., *Supervised and Unsupervised Parental Access in Domestic Violence Cases: Court Orders and Consequences* 5, Final Technical Report submitted to the National Institute of Justice (March 2006); Zorza, *supra* note 82, at 1116.

<sup>87</sup> BROWN, et al., *supra* note 79, at 110; Mary A. Kernic, et al., *Behavioral Problems Among Children Whose Mothers are Abused by an Intimate Partner*, 27 CHILD ABUSE AND NEGLECT 1231, 1239 (2003).

<sup>88</sup> Zorza, *supra* note 82, at 1116.

<sup>89</sup> Dorothy J. Thormaehlen, L.C.S.W.-C. & Eena R. Bass-Feld, M.A., A.T.R., C.P.C., *Children: The Secondary Victims of Domestic Violence*, 43 MD. MEDICAL J. 355 (1994).

<sup>90</sup> Zorza, *supra* note 82, at 1116.

<sup>91</sup> THE MAYOR’S DOMESTIC VIOLENCE COORDINATING COMMITTEE (DVCC) AND THE DVCC WORKGROUP, DV 101/DV 200: A TRAINING FOR DOMESTIC VIOLENCE PROFESSIONALS 21 (1999).

<sup>92</sup> Zorza, *supra* note 80, at 279.

<sup>93</sup> Thormaehlen & Bass-Feld, *supra* note 89, at 355.

<sup>94</sup> Zorza, *supra* note 80, at 279.

<sup>95</sup> *Id.*

<sup>96</sup> Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, THE JUDGE’S J. 40 (Fall 1997).

<sup>97</sup> Zorza, *supra* note 82, at 1116-17.

<sup>98</sup> Thormaehlen & Bass-Feld, *supra* note 89, at 356-57 (developed by SADVC, Inc., Baltimore County).

<sup>99</sup> Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children From Batterers* 1, ABA COMMISSION ON DOMESTIC VIOLENCE QUARTERLY E-NEWSLETTER (July 2006)(available online at <http://www.abanet.org/domviol/newsletter/vol4/assessingrisktochildren.pdf>).

<sup>100</sup> *Id.* at 5 – 10.

<sup>101</sup> “Physical abuse is only one tactic among many used by batterers to enforce their control over a victim. Other methods include emotional abuse, psychological coercion, isolation, economic control, immigration status-related abuse, sexual assault, and stalking or harassing behavior.” AMERICAN BAR

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ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, JUDICIAL CHECKLIST 1 (2008)(available online at [http://www.abanet.org/domviol/publications/187815-ABA\\_Checklist-FINAL.pdf](http://www.abanet.org/domviol/publications/187815-ABA_Checklist-FINAL.pdf))(hereinafter “JUDICIAL CHECKLIST”).

- <sup>102</sup> BROWN, et al., *supra* note 79, at 104-05.
- <sup>103</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (NCJ – 154348, August 1998).
- <sup>104</sup> BROWN, et al., *supra* note 79, at 106.
- <sup>105</sup> Zorza, *supra* note 82, at 1117.
- <sup>106</sup> BROWN, et al., *supra* note 79, at 107.
- <sup>107</sup> *Id.* at 106.
- <sup>108</sup> *Id.*
- <sup>109</sup> Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058-59 (1991).
- <sup>110</sup> *Id.* at 1059.
- <sup>111</sup> As of 1997, 44 states and the District of Columbia require courts to consider domestic violence in custody cases. National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Cases: An Analysis of State Codes of Legal Practice*, 29 FAM. L. Q. 197 (1998).
- <sup>112</sup> Howard Davidson, *The Impact of Domestic Violence on Children*, ABA REP. TO THE PRES. OF THE ABA 13 (1994).
- <sup>113</sup> Matthews, *supra* note 81, at 2.
- <sup>114</sup> For an updated summary of the state law regarding custody cases involving domestic violence, see *Child Custody and Domestic Violence by State* (available online at <http://www.abanet.org/domviol/docs/Custody.pdf>).
- <sup>115</sup> *Id.*
- <sup>116</sup> *Id.*
- <sup>117</sup> JUDICIAL CHECKLIST, *supra* note 101, at 3.
- <sup>118</sup> Matthews, *supra* note 81, at 3.
- <sup>119</sup> *Id.* at 2.
- <sup>120</sup> *Id.* at 3.
- <sup>121</sup> *Id.*
- <sup>122</sup> See, e.g., CAL. FAMILY CODE § 3110.5 (child abuse and domestic violence training required for evaluators); CAL. WELFARE AND INSTITUTIONAL CODE § 218.5 (domestic violence training required for minors’ counsel).
- <sup>123</sup> National Council of Juvenile and Family Court Judges, *supra* note 111, at 201.

## RECURRING ISSUES

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- <sup>124</sup> Matthews, *supra* note 81, at 3. See, e.g., *Lawrence v. Lawrence*, 20 P.3d 972 (Wash. App. 2001)(absent statutory authority, court may not use the “friendly parent” concept when making its custody determination, as custody and visitation privileges are not to be used to penalize or reward parents for their conduct).
- <sup>125</sup> Davidson, *supra* note 112, at 15.
- <sup>126</sup> Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (Fall 2001).
- <sup>127</sup> Tortorella, *supra* note 1, at 205.
- <sup>128</sup> Debra A. Clement, Note, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 FAM. & CONCILIATION COURTS REV. 294, 296 (1998).
- <sup>129</sup> ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 340 (American Bar Association 1999).
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.* at 343.
- <sup>132</sup> *Id.*
- <sup>133</sup> *Id.*
- <sup>134</sup> Matthews, *supra* note 81, at 4.
- <sup>135</sup> *Id.*
- <sup>136</sup> *Id.*
- <sup>137</sup> *Id.*
- <sup>138</sup> Matthews, *supra* note 81, at 4. The exemption of cases involving domestic violence from mandatory mediation requirements may not actually benefit low-income battered spouses. For those with limited financial resources, pro se litigation may be the only alternative. *Id.*
- <sup>139</sup> JUDICIAL CHECKLIST, *supra* note 101, at 6.
- <sup>140</sup> See generally NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC VIOLENCE §§ 407, 408(A), 408(B) (1994).

# **Appendix 1**

## **Sources and Useful Materials**



## **LISTING OF SOURCES AND OTHER USEFUL MATERIAL**

1. Atmosphere of civility and respect in courtroom
2. Managing the child custody case
3. Representing the parties, including the child
4. Litigation of divorce proceedings
5. Innovative approaches
6. Effects of divorce on children
7. Family relationships in divorce and custody decisions
8. Religious custodial concerns
9. Gay/Lesbian parents
10. Parent health
11. Parent alienation syndrome
12. High conflict divorce
13. Domestic violence
14. Health/development of children
15. Physical and sexual abuse of children
16. Relocation concerns
17. Visitation
18. Child abduction
19. Speaking with children
20. Resources for parents
21. Resources for children
22. Other relevant material

### **1. Atmosphere of Civility and Respect in Courtroom**

American Academy of Matrimonial Attorneys. *Bounds of Advocacy: AAML Standards of Conduct in Family Law Litigation*. Retrieved from [http://www.aaml.org/files/public/Bounds\\_of\\_Advocacy.htm](http://www.aaml.org/files/public/Bounds_of_Advocacy.htm)

Nancy Zalusky Berg. *Dealing with Difficult Clients, Difficult Lawyers and Difficult Judges*. Retrieved from <http://www.wbdlaw.com/CM/Articles/DealingwithDifficultClients.pdf>

Abraham G. Gerges. (2003). *Judicial Excellence: A Trial Judge's Perspective*. 42 Judges J. 9

Ann Laquer Estin. (2004-2005). *Toward a Multicultural Family Law*. 38 Fam. L.Q. 501

Stephanie A. Gonzalez Ferrandez. (2004-2005). *Representing Diverse Clients Fact Gathering and Team Building*. 27 Fam. Advoc. 14

Valerie McNaughton. (1999). *Active Listening: Applying Mediation Skills in the Courtroom*. 38 (2) Judges J. 23

Model Code of Judicial Conduct Canon 2 Rule 2.3 (2007).

Lei-Chala I. Wilson. *The ABC's of Civility in the Legal Profession Taking the High and Ethical Road to Effective Advocacy*. Retrieved from <http://www.gud.uscourts.gov/2007DistrictConference/The%20ABC's%20of%20Civility%20in%20the%20Legal%20Profession.ppt>

## **2. Managing the Child Custody Case**

Gary B. Tash. *Managing a Child Custody Case*. Retrieved from [http://www.tashkurtzlaw.com/pdfs/Custody\(GBT\).pdf](http://www.tashkurtzlaw.com/pdfs/Custody(GBT).pdf)

National Council of Juvenile and Family Court Judges. (Spring 1995). *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. Retrieved from <http://www.ncjrs.gov/pdffiles/resguid.pdf>

National Council of Juvenile and Family Court Judges. (Revised 2006). *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judges Guide*. Retrieved from [http://www.ncjfcj.org/images/stories/dept/fvd/pdf/navigating\\_cust.pdf](http://www.ncjfcj.org/images/stories/dept/fvd/pdf/navigating_cust.pdf)

Mark Hardin, Barbara Smith & Samia Dawud-Norsi. (May 2004). *Improving State Courts' Performance In Child Protection Cases: User's Manual For Conducting Your Court Reassessment*. Retrieved from <http://www.abanet.org/child/rcjji/2004usermanual.pdf>

Muskie School of Public Service, Cutler Institute for Child and Family Policy & American Bar Association, Center on Children and the Law. (August 2005). *Michigan Court Improvement Program Reassessment submitted to Michigan Supreme Court*. Retrieved from [http://muskie.usm.maine.edu/Publications/cf/MI\\_CourtImprovementProgramReassessment.pdf](http://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf)

American Bar Association Center on Children & the Law & National Center for State Courts. (1977). *Michigan Court Improvement Program Assessment of Probate Courts' Handling of Child Abuse and Neglect Cases: Final Report*. Retrieved from <http://courts.michigan.gov/scao/resources/publications/reports/cipaba.pdf>

Joy D. Osofsky, Candice L. Maze, Cindy S. Lederman, & Martha P. Grace. (2004). *Questions Every Judge and Lawyer Should Ask about Infants and Toddlers in the Child Welfare System*. 55 Juv. & Fam. Ct. J. 45

Linda D. Elrod. (2003-2004). *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*. 37 Fam. L.Q. 105

Diane Boyd Rauder. (2004). *Court Improvement Progress Report: National Summary*. (Mimi Laver, ed., American Bar Association, 2004).

Diane Boyd Rauder & the ABA Center on Children & the Law. (2007). *Court Improvement Progress Report 2006*. Retrieved from <http://www.abanet.org/abanet/child/natsum/allnatcat.cfm?y=2006>

*Resolution of the Michigan Probate Judges Association Regarding Delays in Termination Appeals from the Juvenile Court*. Resolution 2 (January 22, 1992) (unanimously adopted at the MPJA Winter Conference and citing report findings of the Children's Charter of the Courts of Michigan).

American Bar Association, National Center for State Courts, & National Council of Juvenile & Family Court Judges. (2004). *Building A Better Court: Measuring and Improving Court Performance and Judicial Workload In Child Abuse and Neglect Cases*. Retrieved from [http://www.ncsconline.org/WC/Publications/Res\\_CtPerS\\_TCPS\\_PackGde4-04Pub.pdf](http://www.ncsconline.org/WC/Publications/Res_CtPerS_TCPS_PackGde4-04Pub.pdf)

National Council of Juvenile & Family Court Judges. (1995). *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*.

Jacob Ethan Smiles. (2003-2004). *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*. 37 Fam. L.Q. 485

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# **Appendix 2**

## **Useful Periodicals & Websites**





## Periodicals of the ABA Center on Children and the Law

The *ABA Child Law Practice* is published monthly and keeps lawyers, judges and other professionals abreast of case law, legislative, and research developments, particularly in the areas of child maltreatment, child custody, adoption, termination of parental rights, child and adolescent health, civil rights, and juvenile justice. For a complimentary copy and to inquire about a subscription, contact Charles Teague at (202) 662-1513 or [teaguec@staff.abanet.org](mailto:teaguec@staff.abanet.org).

*Child CourtWorks* is a bimonthly newsletter published by the ABA Center on Children and the Law. Child CourtWorks keeps judges, court administrators, attorneys, social workers, child advocates and others informed of new developments and innovations across state court improvement projects focusing on child abuse and neglect and foster care and offers suggestions for productive juvenile dependency court reform. The newsletter, which focuses solely on issues of court improvements, is available free of charge. To receive a print copy, send your name, and address to: Charles Teague, American Bar Association, Center on Children and the Law, 740 15th Street, NW, Washington, DC 20005-1022, (202) 662-1513, [teaguec@staff.abanet.org](mailto:teaguec@staff.abanet.org)

*Children's Legal Rights Journal* is a quarterly legal journal, edited by Loyola students in conjunction with the American Bar Association Center on Children and the Law and with the cooperation of the National Association of Counsel for Children. The journal focuses on the broad range of legal issues confronting children. Its goal is to provide practitioners in law and related fields with the practical resources they need to be effective advocates for their child clients.

*The Center on Children and the Law has produced many other books that are relevant to child welfare and custodial issues. For a listing of other ABA Center on Children and the Law publications, refer to the Center's website <http://www.abanet.org/child>.*

## Other Periodicals of Interest

*The Family Advocate* is the quarterly news-and-feature membership magazine of the Section of Family Law at the American Bar Association. It addresses current family law topics and provides useful how-to articles for mental health professionals, judges, family lawyers, and their clients. Subscriptions for Section members are included in their dues and outside subscriptions are permitted. Inquiries about subscriptions should be directed to the ABA Service Center at 1-800-285-2221.

*Family Law Quarterly* is published by the ABA Family Law Section. A scholarly journal, issues are devoted to relevant topics concerning families, including abduction, tax issues, and custodial concerns. Membership in the Section includes a subscription and outside subscriptions are permitted. Back issues may be ordered. For information regarding *Family Law Quarterly*, direct inquiries to the ABA Service Center at 1-800-285-2221

*The Guardian* is the quarterly newsletter of the NACC. *The Guardian* includes case reviews, a federal policy update, practice tips, news, jobs, a training and conference calendar, and newly

released publications. All NACC members receive *The Guardian* as a benefit of membership. Outside subscriptions to *The Guardian* are also available. Inquiries should be directed to: 1-888-828-NACC, 1825 Marion Street, Suite 242 Denver, CO 80218, [advocate@NACCchildlaw.org](mailto:advocate@NACCchildlaw.org).

## Directory of Helpful Websites

These websites offer information on current publications, the availability of technical assistance, and law and public policy relevant to child custody issues. In addition, they may provide information pertinent to the health and developmental concerns of children that may arise during legal proceedings.

### **Academy of Family Mediators**

[www.mediate.com](http://www.mediate.com)

- non-profit educational membership association
- standards for mediation, listing of mediators by state that specialize in family mediation

### **American Academy of Matrimonial Lawyers**

[www.aaml.org](http://www.aaml.org)

- resources for family law attorneys, articles for parents, child's bill of rights

### **American Bar Association Center on Children and the Law**

[www.abanet.org/child](http://www.abanet.org/child)

- links to ABA entities such as Commission on Domestic Violence, Commission on Mental and Physical Disability Law, Family Law Section, Juvenile Justice Center, Litigation Section Task Force on Children, and Steering Committee on the Unmet Legal Needs of Children

### **Association of Family and Conciliation Courts**

[www.afccnet.org](http://www.afccnet.org)

### **Children's Defense Fund**

[www.childrensdefense.org](http://www.childrensdefense.org)

### **Child Welfare League of America**

[www.cwla.org](http://www.cwla.org)

- parenting tips, general welfare of children

### **National Family Resiliency Center, Inc.**

[www.divorceabc.com](http://www.divorceabc.com)

- child focused seminars for professionals
- books related to the effects of divorce on children

### **Court Appointed Special Advocates**

[www.nationalcasa.org](http://www.nationalcasa.org)

- resources for volunteer court appointed special advocates

### **National Association of Counsel for Children**

[www.NACCchildlaw.org](http://www.NACCchildlaw.org)

### **National Center for State Courts**

[www.ncsconline.org](http://www.ncsconline.org)

### **National Council of Juvenile and Family Court Judges**

[www.ncjfcj.org](http://www.ncjfcj.org)

### **State Justice Institute**

[www.statejustice.org](http://www.statejustice.org)

## **Health and Development**

### **Administration for Children and Families of the Department of Health and Human Services**

*www.acf.dhhs.gov*

### **American Academy of Child and Adolescent Psychiatry**

*www.aacap.org*

### **American Academy of Pediatrics**

*www.aap.org*

### **American Medical Association**

*www.ama-assn.org*

### **American Psychiatric Association**

*www.psych.org*

### **American Psychological Association**

*www.apa.org*

### **Centers for Disease Control and Prevention**

*www.cdc.gov*

### **Federation of Families for Children's Mental Health**

*www.ffcmh.org*

### **National Adolescent Health Information Center**

*http://nahic.ucsf.edu*

### **National Association of Protection and Advocacy Systems**

*www.napas.org*

### **National Institutes of Health**

*www.nih.gov*

### **National Institute of Mental Health**

*www.nimh.nih.gov*

### **Mental Health America**

*www.nmha.org*

### **New England Journal of Medicine**

*www.nejm.org*

### **Office of the United States Surgeon General**

*www.surgeongeneral.gov*

## **Parenting**

### **Parenting Websites:**

*www.parenting.ivillage.com*

- Basic resource center, advice forum, online tools for pregnancy and parenting.

*www.4children.org*

- Offers information on current issues, trends, and public policies that affect children and families.
- All information is available in English and Spanish, with pdfs available in Chinese for some articles as well.

*www.childwelfare.gov*

- Provides access to information and resources to help protect children and strengthen families, including child abuse, neglect, and adoption.

*www.familysupportamerica.org*

- Parenting advice, and information regarding child abuse, alcoholism, disciplining children, divorce, and other topics related to families.

*www.talkingwithkids.org/*

- Advice for talking with kids about sex, HIV/AIDS, violence, drugs and alcohol.

[www.Familyequality.org](http://www.Familyequality.org)

- Organization committed to securing family equality for lesbian, gay, bisexual, transgender and queer parents, guardians and allies.
- Includes links to publications, parent groups, FAQ, research, and other organizations.

[www.ed.gov/parents](http://www.ed.gov/parents)

- Tools for parents to help children succeed in school.

[www.Divorcenet.com](http://www.Divorcenet.com)

- Basic information regarding child support, alimony, custody and visitation.

[www.Divorcesource.com](http://www.Divorcesource.com)

- State specific divorce laws, parenting plans, child support calculators.

[www.divorceinfo.com/children.htm](http://www.divorceinfo.com/children.htm)

- Information for “Getting Your Child Through Your Divorce”.

[www.acbr.com/paragree.htm](http://www.acbr.com/paragree.htm)

- Sample separation and co-parenting agreement.

**Appendix 3**

**Preliminary Parenting Plan**

**The Thread of Child Development**



## Preliminary Parenting Plan

The National Family Resiliency Center, Inc. (*formerly The Children of Separation and Divorce Center, Inc.*) staff developed a Preliminary Parenting Plan based on its child-focused approach to parental decision making. Parents learn about child development, the impact of divorce, and appropriate parenting to meet children's needs at parent education classes. They are encouraged to think about the unique needs of each child in the family and develop separate parenting agreements for focus on each of the developmental considerations, discussed in Chapter 3, and in all parenting seminars, as it applies to a specific child. For example, the Preliminary Parenting Plan categorizes developmental needs related to safety and security as Health Needs, Day Care, Provisions for Physical and Psychological Safety, Discipline and Co-parent Communication. Parents can subscribe to an online program, [www.familyconnex.org](http://www.familyconnex.org), which offers a step-by-step process to complete a comprehensive needs assessment and then a parenting plan. A manual is available as a resource for parents.

Parents learn what specific parenting behaviors and responsibilities are needed to meet a child's particular needs. After completion of the Preliminary Parenting Plan or the FamilyConnex© program, parents have greater awareness and understanding of their respective roles in meeting the developmental needs of a child as well as a sense of what gaps remain. Perhaps most importantly, parents learn through the process of attending parenting seminars and completing parenting programs like FamilyConnex that the many needs of children require both parents' involvement, communication and, renegotiation.

Risa Garon, LCSW-C, BCD, CFLE  
Executive Director  
National Family Resiliency Center, Inc.



# PRELIMINARY PARENTING PLAN

- A. How will parents explain separation/divorce to the children?
- B. How will each parent support the unique personality and needs of each child?
- C. Children's living arrangements:
  - 1. When will children be with each parent?
  - 2. Time with each parent
    - > Special time with parent
    - > Family time
    - > Flexibility in changing time based on child's needs
    - > Plan for when parent is out of town or unavailable
  - 3. Pick-up, Drop-off
    - > Transportation
    - > Location
    - > Rules for communication
  - 4. Child's contact with other parent when apart
    - > Calls
    - > Time with other parent
    - > Letters
- D. What arrangements will be made for:
  - 1. Health Needs
    - > Making appointments
    - > Getting medication

- > Health insurance
- > Medical treatment
- > Dental
- > Orthodontics or age appropriate special needs
- > Expenses
- > Transportation
- > Counseling
- > Psychiatric evaluation

## 2. Daycare

- > Pick up/drop off
- > Expense
- > Communication
- > Selection criteria

## 3. Religious Involvement

- > Agreement about religious affiliation and education
- > Expense
- > Transportation

## 4. Social relationship with peers

- > Time with
- > Modification of time with child to support extended family and peer relationships
- > Network with friends' parents
- > How will parents accept and encourage peers as a normal part of life

- 5. Extracurricular activities
  - > Supports consistent involvement in attending practices or activities
  - > Financial support
  - > Parent attendance at special events
  - > Child participates in practice, games, events regardless of where home is
  - > Time with peers, activities with peers
  
- E. What are age appropriate provisions for physical safety?
  - 1. What are age appropriate provisions for psychological safety?
  
- F. What are expectations regarding discipline?
  - 1. What important rules will child be asked to follow?
  - 2. What are the consequences?
  - 3. How will child be involved in discussing rules and consequences?
  - 4. How will consequences be followed through?
  - 5. How will parents support each other as well as explain differences in expectations and consequences?
  
- G. Education
  - 1. What school will child attend?
    - > How will parents make decisions about particular schools, programs?
  - 2. How will parents communicate with teacher, counselor and each other about programs, problems, and/or special needs?
    - > How and when will they discuss information with each other?
  - 3. Who will pick up child in the event of emergency?
  - 4. What legal information will school have to facilitate safety and security of child?

5. How will parents provide space, quiet atmosphere for study, homework time to do work and study?
  6. How will parents help children with content of homework, special projects?
  7. How will parents obtain help if needed and financially support it?
    - > How will parents follow through with school and specialist recommendation?
    - > How will parents support each other in addressing child's special needs?
  8. Who will transport child to school?
  9. How will parents provide for child's future education/career?
- H. How will parents handle other adult relationships with child?
1. When/how will child be introduced to parent's friend?
  2. What alone time will be available for parent & child?
  3. What will living-sleeping arrangements be?
- I. How will parents handle child's relationship with extended family members and others?
1. Calls
  2. Letters
  3. Attendance at family events
  4. Consistent contact
  5. How will each parent support other parent's or child's relationships with each extended family?
- J. How will parents communicate with each other:
1. Frequency
  2. In person
    - Written
    - Telephone

3. Topics to be discussed
4. School - achievements; activities; problems
5. Special needs
6. Peer relationships
7. Physical and psychological well being

J.(B) How will parents address their own special needs and provide support to each other?

1. Relocation
2. Medical treatment
3. Significant others

K. How will parents handle changes in circumstance:

1. Predetermined decisions
2. Relocation
3. Illness/Death of parent
4. Developmental milestones

Child

Adult

L. How will parents discuss the agreement with children?

M. How will parents build in renegotiation based on children's needs?

1. Time
2. With whom
3. Payment

## THE THREAD OF CHILD DEVELOPMENT

### Infancy

I have needs.

I am totally dependent on you to interpret and meet my needs.

When you consistently and predictably meet my needs by feeding me, changing me, holding me, comforting me and playing with me, I can trust you and know that I am safe and important.

### Toddlerhood

I am separate from you.

I explore.

I leave you and come back; you let me go a little bit.

You watch me.

I can be a separate person and control my environment.

You will still be there and love me even if I say no and disagree.

You laugh with me, clap for my new achievements and let me learn to do things on my own.

You read my favorite stories over and over; just the way I like.

### Young elementary

I take more steps on my own.

I am excited about all the new things in my life; friends, school and activities.

You are still by my side.

You check situations out to make sure that I am safe.

You don't leave me alone for long periods of time. You help me take the steps into the wider community.

You play with me and read to me.

You encourage me to make friends.

You reassure me when I'm scared.

You help me with schoolwork.

### Elementary

I am learning so much and am better coordinated in my fine and large motor development.

I am making close friends and love playing with them.

I am in more activities and you come and watch and cheer me on.

You help me with my schoolwork and meet with the teachers and counselor.

I love each of my parents the very same.

### Middle School

I am self conscious and very critical of myself and others.

I have to cope with a lot of changes in my life.

You cannot be right; I have to move away from you.

Peer acceptance is everything. They know everything; parents know very little.

I challenge you all the time. I like it; I use my mind and exercise my independence.  
I still need you; but please don't hug me in front of my friends.  
I am always tempted to be impulsive and am exposed to many things that can be dangerous.  
I need supervision and adult feedback or interaction.

### High School

I like you. You have strengths and weaknesses. So do I. That is OK.  
I'm leaving home soon; I need your support. I'm independent. Sometimes it's scary.  
I need you to be there for me. I need help in making decisions about the rest of my life.  
I need reassurance that I can make it in the big world out there.  
I am a lovable person who can be part of a loving relationship.  
I need supervision. I have lots of pressures and lots of temptations in the world outside my home.

## **THE THREAD UNRAVELS**

### Infancy

I am all alone. No one understands me.  
I cry and cry and no one comes.  
My needs aren't met.  
I fight; I cry; I give up.  
I don't sleep right.  
I am listless.  
I don't learn.  
I feel unloved.  
I don't try new things.  
I give up.  
I can't trust.

### Toddlerhood

I can't be separate.  
I try and sometimes I am punished.  
I say "no" but am not allowed to.  
I may want to explore but you may not be there for me when I return.  
You don't celebrate my achievements.  
Sometimes I am defiant. I don't care.  
Other times, I run to strangers for love and comfort.

### Young Elementary

I'm afraid to leave you; you may not be there when I return.  
I feel scared; I know about death and earthquakes and other scary things.

I do neat things like learn to ride a two-wheeler. Is there anyone there to clap for me? I got 100% on a spelling test.  
The world is a big scary place. I'm afraid to try.

### Older Elementary

I feel so responsible for your happiness. Did I cause all of this?  
I don't think I should leave the house to play with my friends. You need me.  
Hey, I'm tough. I don't need friends. They're just babies. I'll show them on the playground.  
I am so loyal to you but you're not loyal back to me. I am building a "wall."  
I have no help with my schoolwork. I don't know how to ask for help. I am behind.

### Middle School

I don't need you. I never did. Stay away from me.  
I can manipulate people; you, too; and get what I want. I don't care.  
I can't empathize.  
I am ready to explode.  
School is boring. I don't learn anything good.  
Drugs and street culture become my friends.

### High School

I have walls of anger hiding my pain.  
Drugs, like alcohol, numb me.  
Love-it means nothing. I get what I want – whenever.  
Adults don't care. They don't listen. They let you down.  
What will I do for money? I don't have many skills.  
I dropped out of school. No one cares.





## **Appendix 4**

# **American Bar Association Family Law Section Standards of Practice for Lawyers Representing Children in Child Custody Cases**



# **American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases**

*Approved by the American Bar Association House of Delegates  
August 2003*

## **I. INTRODUCTION**

Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. By adopting these Standards, the American Bar Association sets a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases.

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do. Too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or children's lawyers themselves understand children's lawyers' roles, duties and powers. Children's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. These Standards distinguish two distinct types of lawyers for children: (1) The Child's Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) The Best Interests Attorney, who independently investigates, assesses and advocates the child's best interests as a lawyer. While some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child's best interests and/or related information, this is not a lawyer's role under these Standards.

These Standards seek to keep the best interests of children at the center of courts' attention, and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity and predictability. They require that: (1) all participants in a case know the duties, powers and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions. The American Bar Association commends these Standards to all jurisdictions, and to individual lawyers, courts, and child representation programs.

## II. SCOPE AND DEFINITIONS

### A. Scope

**These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).**

### B. Definitions

- 1. “Child’s Attorney”:** A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
- 2. “Best Interests Attorney”:** A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

### *Commentary*

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child’s Attorney or a Best Interests Attorney. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child’s Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

These Standards do not use the term “Guardian Ad Litem.” The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving

as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.

### **III. DUTIES OF ALL LAWYERS FOR CHILDREN**

**In addition to their general ethical duties as lawyers, and the specific duties set out in Parts IV and V, Child’s Attorneys and Best Interests Attorneys also have the duties outlined in this section.**

#### **A. Accepting Appointment**

**The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.**

#### **B. Lawyer’s Roles**

**A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.**

#### *Commentary*

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child’s Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child’s Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

#### **C. Independence**

**The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.**

### *Commentary*

The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

#### **D. Initial Tasks**

**Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment, and that as counsel of record he or she should receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.**

#### **E. Meeting With the Child**

**The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.**

### *Commentary*

Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child's interest.

The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child's developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, non-suggestive questions and how to interpret the child's responses. The lawyer may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

While the lawyer should always take the child's point of view into account, caution should be used because the child's stated views and desires may vary over time or may be the result of fear, intimidation and manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes.

## **F. Pretrial Responsibilities**

**The lawyer should:**

- 1. Conduct thorough, continuing, and independent discovery and investigations.**
- 2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.**
- 3. Stay apprised of other court proceedings affecting the child, the parties and other household members.**
- 4. Attend meetings involving issues within the scope of the appointment.**
- 5. Take any necessary and appropriate action to expedite the proceedings.**
- 6. Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.**
- 7. Participate in depositions, pretrial conferences, and hearings.**
- 8. File or make petitions, motions, responses or objections when necessary.**
- 9. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.**

### *Commentary*

The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. This is necessary even for a Child's Attorney, whose ultimate task is to seek the client's objectives. Best Interests Attorneys have additional investigation duties described in Standard V-E.

By attending relevant meetings, the lawyer can present the child's perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of



domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available to litigants under state laws or court rules or by permission of the court, relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings; or third parties, (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

## **G. Hearings**

**The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:**

- 1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney at the beginning of any hearing.**
- 2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.**
- 3. Present and cross-examine witnesses and offer exhibits as necessary.**
- 4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.**
- 5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.**

- 6. Where appropriate, introduce evidence and make arguments on the child's competency to testify, or the reliability of the child's testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility.**
- 7. Make a closing argument, proposing specific findings of fact and conclusions of law.**
- 8. Ensure that a written order is made, and that it conforms to the court's oral rulings and statutorily required findings and notices.**

### *Commentary*

Although the lawyer's position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child's interests, describe the issues from the child's perspective, keep the case focused on the child's needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer's exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing. If there is a jury, a brief explanation of the role will be needed.

The lawyer's preparation of the child should include attention to the child's developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes, explaining that such a result would not be the child's fault.

If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness, or seek a protective order from the court. The lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by law so that the child's views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally, in chambers, without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

Questions to the child should be phrased consistently with the law and research regarding children's testimony, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present

expert testimony on the issue, or have an expert present when a young child is directly involved in the litigation, to point out any developmentally inappropriate phrasing of questions.

The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child's input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Many jurisdictions have abolished presumptive ages of competency and replaced them with more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

## **H. Appeals**

- 1. If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to Standard IV-D or V-G that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.**
- 2. The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.**
- 3. When the appeals court's decision is received, the lawyer should explain it to the child.**

### *Commentary*

The lawyer should take a position in any appeal filed by a party or agency. In some jurisdictions, the lawyer's appointment does not include representation on appeal, but if the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court's decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

## **I. Enforcement**

**The lawyer should monitor the implementation of the court's orders and address any non-compliance.**

## **J. End of Representation**

**When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.**

## IV. CHILD'S ATTORNEYS

### A. Ethics and Confidentiality

1. **Child's Attorneys are bound by their states' ethics rules in all matters.**
2. **A Child's Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.**

#### *Commentary*

The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client, subject to Rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct (2002).

The Model Rules of Professional Conduct (2002) (which in their amended form may not yet have been adopted in a particular state) impose a broad duty of confidentiality concerning all "information relating to the representation of a client", but they also modify the traditional exceptions to confidentiality. Under Model Rule 1.6 (2002), a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm", or "to comply with other law or a court order", or when "the disclosure is impliedly authorized in order to carry out the representation". Also, according to Model Rule 1.14(c) (2002), "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests" when acting under Rule 1.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial or other harm."

Model Rule 1.7 (1)(1) (2002) provides that "a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client ... ." Some diversity between siblings' views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are "directly adverse." Comment [8] to Model Rule 1.7 (2002) states: "... a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited ... a lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. ... The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

## **B. Informing and Counseling the Client**

**In a developmentally appropriate manner, the Child's Attorney should:**

- 1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed.**
- 2. Explain to the child what is expected to happen before, during and after each hearing.**
- 3. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.**
- 4. Discuss each substantive order, and its consequences, with the child.**

### *Commentary*

Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

The Child's Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client's choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child knows, and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On the one hand, the lawyer has a duty to ensure that the client is given the information

necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the client. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by the applicable ethical standards.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

As developmentally appropriate, the Child's Attorney should consult the child prior to any settlement becoming binding.

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

### **C. Client Decisions**

**The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.**

#### ***Commentary***

The child is entitled to determine the overall objectives to be pursued. The Child's Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult's lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child's developmental limitations make it not feasible to obtain the child's direction, as with an infant or preverbal child.

- 1. The Child's Attorney should make a separate determination whether the child has "diminished capacity" pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.**

### *Commentary*

These Standards do not presume that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

- 2. If the child does not express objectives of representation, the Child's Attorney should make a good faith effort to determine the child's wishes, and advocate according to those wishes if they are expressed. If a child does not or will not express objectives regarding a particular issue or issues, the Child's Attorney should determine and advocate the child's legal interests or request the appointment of a Best Interests Attorney.**

### *Commentary*

There are circumstances in which a child is unable to express any positions, as in the case of a preverbal child. Under such circumstances, the Child’s Attorney should represent the child’s legal interests or request appointment of a Best Interests Attorney. “Legal interests” are distinct from “best interests” and from the child’s objectives. Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts. A child’s legal interests could include, for example, depending on the nature of the case, a special needs child’s right to appropriate educational, medical, or mental health services; helping assure that children needing residential placement are placed in the least restrictive setting consistent with their needs; a child’s child support, governmental and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child’s due process or other procedural rights.

The child’s failure to express a position is different from being unable to do so, and from directing the lawyer not to take a position on certain issues. The child may **have no** opinion with respect to a particular issue, or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client’s legal interests based on information the lawyer has, and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, or to remain silent with respect to that issue, or wants the point of view expressed only if the party is out of the room. The lawyer is then bound by the child’s directive.

- 3. If the Child's Attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate Best Interests**

**Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. The Child's Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child's position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.**

### *Commentary*

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

It should be remembered in this context that the lawyer is bound to pursue the client's objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function, if the lawyer has taken the time to establish rapport with the child and gain that child's trust. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child's first choice.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a Best Interests Attorney. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Best Interests Attorney may never learn of the disclosed danger.

Model Rule 1.14 (2002) provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action ... the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's



safety and ethical rules. States that do not abrogate the lawyer-client privilege or confidentiality, or mandate reporting in cases of child abuse, may permit reports notwithstanding privilege.

- 4. The Child's Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child's needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in case, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child's Attorney is bound by the child's direction concerning testifying.**

#### *Commentary*

Decisions about the child's testifying should be made individually, based on the circumstances. If the child has a therapist, the attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

#### **D. Appeals**

**Where appeals on behalf of the child are permitted by state law, the Child's Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child's Attorney should appeal. If the Child's Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she should notify the court and seek to be discharged or replaced.**

#### *Commentary*

The lawyer should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

#### **E. Obligations after Initial Disposition**

**The Child's Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.**

### *Commentary*

Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The bulk of the Child's Attorney's work often comes after the initial hearing. The Child's Attorney should stay in touch with the child, with the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

#### **F. End of Representation**

**The Child's Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child's Attorney and the child will continue to have, and how the child can obtain assistance in the future, if necessary.**

### **V. BEST INTERESTS ATTORNEYS**

#### **A. Ethics**

**Best Interests Attorneys are bound by their states' ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.**

### *Commentary*

Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client's objective. A Best Interests Attorney in such a case should report the relevant views of all the children in accordance with Standard V-F-3, and advocate the children's best interests in accordance with Standard V-F-1.

#### **B. Confidentiality**

**A child's communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.**

### *Commentary*

ABA Model Rule 1.6(a) bars any release of information "except for disclosures that are impliedly authorized in order to carry out the representation." Under DR 4-101(C)(2), a lawyer may reveal confidences when "required by law or court order". As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child's best interests, without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug

use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV-A.

### **C. Limited Appointments**

**If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney's tasks may be reduced as the court may direct.**

### **D. Explaining Role to the Child**

**In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the Best Interests Attorney will (1) investigate and advocate the child's best interests, (2) will investigate the child's views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.**

### **E. Investigations**

**The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:**

- 1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;**
- 2. Reviewing child's social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;**
- 3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);**
- 4. Contacting and meeting with the parties, with permission of their lawyers;**
- 5. Interviewing individuals significantly involved with the child, who may in the lawyer's discretion include, if appropriate, case workers, caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;**
- 6. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it;**
- 7. Staying apprised of other court proceedings affecting the child, the parties and other household members.**

## *Commentary*

Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party's lawyer will not allow the Best-Interests Attorney to communicate with the party. Model Rule 4.2 prohibits such contact without consent of the party's lawyer. In some such cases, the Best-Interests Attorney may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, Model Rule 4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests Attorney's role.

The parties' lawyers may have information not included in any of the available records. They can provide information on their clients' perspectives.

Volunteer CASAs can often provide a great deal of information. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and reporting on the child's best interests. Where there appears to be role conflict or confusion over the involvement of both a lawyer and a CASA in the same case, there should be joint efforts to clarify and define the responsibilities of both.

### **F. Advocating the Child's Best Interests**

- 1. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.**
- 2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.**
- 3. At hearings on custody or parenting time, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.**

## *Commentary*

Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child's interests will generally be stated in a state's statutes and case law, and

Best Interests Attorneys must be familiar with them and how courts apply them. A child's desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including his or her sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court's attention. This should not be done by ex parte communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.

## **G. Appeals**

**Where appeals on behalf of the child are permitted by state law, the Best Interests Attorney should appeal when he or she believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.**

## **VI. COURTS**

### **A. Appointment of Lawyers**

**A court should appoint a lawyer as a Child's Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case.**

## **1. Mandatory Appointment**

**A court should appoint a lawyer whenever such an appointment is mandated by state law. A court should also appoint a lawyer in accordance with the A.B.A. Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996) when considering allegations of child abuse or neglect that warrant state intervention.**

### *Commentary*

Whether in a divorce, custody or child protection case, issues such as abuse, neglect or other dangers to the child create an especially compelling need for lawyers to protect the interests of children. Lawyers in these cases must take appropriate steps to ensure that harm to the child is minimized while the custody case is being litigated. Appointing a lawyer is no substitute for a child protective services investigation or other law enforcement investigation, where appropriate. The situation may call for referrals to or joinder of child protection officials, transfer of the case to the juvenile dependency court, or steps to coordinate the case with a related ongoing child protection proceeding, which may be in a different court. Any question of child maltreatment should be a critical factor in the court's resolution of custody and parenting time proceedings, and should be factually resolved before permanent custody and parenting time are addressed. A serious forensic investigation to find out what happened should come before, and not be diluted by, a more general investigation into the best interests of the child.

## **2. Discretionary Appointment**

**In deciding whether to appoint a lawyer, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:**

- a. **Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;**
- b. **Relocation that could substantially reduce the child's time with a parent or sibling;**
- c. **The child's concerns or views;**
- d. **Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;**
- e. **Disputed paternity;**
- f. **Past or present child abduction or risk of future abduction;**
- g. **Past or present family violence;**
- h. **Past or present mental health problems of the child or a party;**
- i. **Special physical, educational, or mental health needs of a child that require investigation or advocacy;**
- j. **A high level of acrimony;**

- k. **Inappropriate adult influence or manipulation;**
- l. **Interference with custody or parenting time;**
- m. **A need for more evidence relevant to the best interests of the child;**
- n. **A need to minimize the harm to the child from the processes of family separation and litigation; or**
- o. **Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.**

### *Commentary*

In some cases the court's capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child's best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child's case, or a case for the child's best interests, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner — that which is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child's best interests. A decision not to appoint should not be regarded as actionably denying a child's procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

### **3. Appointment Orders**

**Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties**

**as well as to counsel. Orders should specify the lawyer’s role as either Child’s Attorney or Best Interests Attorney, and the reasons for and duration of the appointment.**

*Commentary*

Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-2(o), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child’s interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

**4. Information Access Orders**

**An accompanying, separate order should authorize the lawyer’s reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.**

*Commentary*

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term “privileged” in this Standard does not include the attorney-client privilege, which is not affected by it.

**5. Independence**

**The court must assure that the lawyer is independent of the court, court services, the parties, and the state.**

**6. Duration of Appointments**

**Appointments should last, and require active representation, as long as the issues for which the lawyer was appointed are pending.**



## *Commentary*

The Child's Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

### **7. Whom to Appoint**

**Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.**

## *Commentary*

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney, or only as Best Interests Attorney.

### **8. Privately-Retained Attorneys**

**An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) should have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) should be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) should vigilantly guard the client-lawyer relationship from interference as provided in Model Rule 1.8(f).**

## **B. Training**

**Training for lawyers representing children in custody cases should cover:**

- 1. Relevant state and federal laws, agency regulations, court decisions and court rules;**
- 2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;**
- 3. Applicable representation guidelines and standards;**
- 4. The court process and key personnel in child-related litigation, including custody evaluations and mediation;**
- 5. Children's development, needs and abilities at different ages;**

6. **Communicating with children;**
7. **Preparing and presenting a child’s viewpoints, including child testimony and alternatives to direct testimony;**
8. **Recognizing, evaluating and understanding evidence of child abuse and neglect;**
9. **Family dynamics and dysfunction, domestic violence and substance abuse;**
10. **The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;**
11. **Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;**
12. **Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.**

### *Commentary*

Courts, bar associations, and other organizations should sponsor, fund and participate in training. They should also offer advanced and new-developments training, and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed, and the different legal standards to be applied.

Training should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.

### **C. Compensation**

**Lawyers for children are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness of privately-retained lawyers’ hourly fees in family law cases.**

#### **1. Compensation Aspects of Appointment Orders**

**The court should make clear to all parties, orally and in writing, how fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work will be paid for;**

**and how and by whom the fees and expenses are to be paid, in what shares. If the parties are to pay for the lawyer's services, then at the time of appointment the court should order the parties to deposit specific amounts of money for fees and costs.**

## **2. Sources of Payment**

**Courts should look to the following sources, in the following order, to pay for the lawyer's services: (a) The incomes and assets of the parties; (b) Targeted filing fees assessed against litigants in similar cases, and reserved in a fund for child representation; (c) Government funding; (d) Voluntary pro bono service. States and localities should provide sufficient funding to reimburse private attorneys, to contract with lawyers or firms specializing in children's law, and to support pro bono and legal aid programs. Courts should eliminate involuntary "pro bono" appointments, and should not expect all or most representation to be pro bono.**

## **3. Timeliness of Claims and Payment**

**Lawyers should regularly bill for their time and receive adequate and timely compensation. Periodically and after certain events, such as hearings or orders, they should be allowed to request payment. States should set a maximum number of days for any required court review of these bills, and for any governmental payment process to be completed.**

## **4. Costs**

**Attorneys should have reasonable and necessary access to, or reimbursement for, experts, investigative services, paralegals, research, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings.**

## **5. Enforcement**

**Courts should vigorously enforce orders for payment by all available means.**

### ***Commentary***

These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers' fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.

Lawyers and parties need to understand how the lawyer will be paid. The requirement to state the lawyer's hourly rate in the appointment order will help make litigants aware of the costs being incurred. It is not meant to set a uniform rate, nor to pre-empt a court's

determination of the overall reasonableness of fees. The court should keep information on eligible lawyers' hourly rates and pro bono availability on file, or ascertain it when making the appointment order. Judges should not arbitrarily reduce properly requested compensation, except in accordance with legal standards of reasonableness.

Many children go unrepresented because of a lack of resources. A three-fold solution is appropriate: hold more parents responsible for the costs of representation, increase public funding, and increase the number of qualified pro bono and legal service attorneys. All of these steps will increase the professionalism of children's lawyers generally.

As much as possible, those whose decisions impose costs on others and on society should bear such costs at the time that they make the decisions, so that the decisions will be more fully informed and socially conscious. Thus direct payment of lawyer's fees by litigants is best, where possible. Nonetheless, states and localities ultimately have the obligation to protect children in their court systems whose needs cannot otherwise be met.

Courts are encouraged to seek high-quality child representation through contracting with special children's law offices, law firms, and other programs. However, the motive should not be a lower level of compensation. Courts should assure that payment is commensurate with the fees paid to equivalently experienced individual lawyers who have similar qualifications and responsibilities.

Courts and bar associations should establish or cooperate with voluntary pro bono and/or legal services programs to adequately train and support pro bono and legal services lawyers in representing children in custody cases.

In jurisdictions where more than one court system deals with child custody, the availability, continuity and payment of lawyers should not vary depending on which court is used, nor on the type of appointment.

#### **D. Caseloads**

**Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.**

#### **E. Physical accommodations**

**Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court**

representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.

#### **F. Immunity**

**Courts should take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child should have any right of action against a Child's Attorney or Best Interests Attorney.**

#### *Commentary*

Lawyers and Guardians Ad Litem for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children's lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers' ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their state bars' rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.

**APPENDIX A**

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_

\_\_\_\_\_  
Petitioner,  
v.  
\_\_\_\_\_  
Respondent.

Case No. \_\_\_\_\_

In Re: \_\_\_\_\_, D.O.B. \_\_\_\_\_

**CHILD REPRESENTATION APPOINTMENT ORDER**

**I. REASONS FOR APPOINTMENT**

This case came on this \_\_\_\_\_, 20\_\_\_\_, and it appearing to the Court that appointing a Child's Attorney or Best Interests Attorney is necessary to help the Court decide the case properly, because of the following factors or allegations:

**A. Mandatory appointment grounds:**

- The Court is considering child abuse or neglect allegations that warrant state intervention.
- Appointment is mandated by state law.

**B. Discretionary grounds warranting appointment:**

- Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
- Relocation that could substantially reduce of the child's time with a parent or sibling
- The child's concerns or views
- Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
- Disputed paternity
- Past or present child abduction, or risk of future abduction
- Past or present family violence
- Past or present mental health problems of the child or a party
- Special physical, educational, or mental health needs requiring investigation or advocacy
- A high level of acrimony
- Inappropriate adult influence or manipulation
- Interference with custody or parenting time
- A need for more evidence relevant to the best interests of the child
- A need to minimize the harm to the child from family separation and litigation
- Specific issue(s) to be addressed: \_\_\_\_\_

## II. NATURE OF APPOINTMENT

\_\_\_\_\_, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as  Child's Attorney  Best Interests Attorney, for the  the child or children named above  the child(ren) \_\_\_\_\_, to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which  is attached  has been furnished to the appointee. A Child's Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child's best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

## III. FEES AND COSTS

The hourly rate of the lawyer appointed is \$ \_\_\_\_\_, for both in-court and out-of-court work.

The parties shall be responsible for paying the fees and costs. The parties shall deposit \$ \_\_\_\_\_ with  the Court,  the appointed lawyer. \_\_\_\_\_ shall deposit \$ \_\_\_\_\_, and \_\_\_\_\_ shall deposit \$ \_\_\_\_\_. The parties' individual shares of the responsibility for the fees and costs as between the parties  are to be determined later  are as follows: \_\_\_\_\_ to pay \_\_\_\_\_ %; \_\_\_\_\_ to pay \_\_\_\_\_ %.

The State shall be responsible for paying the fees and costs.

The lawyer has agreed to serve without payment. However, the lawyer's expenses will be reimbursed by  the parties  the state.

## IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer appointed shall have access to confidential information about the child as provided in the Standards of Practice for Lawyers Representing Children in Custody Cases and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

**THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.**

DATE: \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
JUDGE

**APPENDIX B**

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_

\_\_\_\_\_  
Petitioner,

v.

Case No. \_\_\_\_\_

\_\_\_\_\_  
Respondent.

In Re: \_\_\_\_\_, D.O.B. \_\_\_\_\_

**ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION**

\_\_\_\_\_ has been appointed as  Best Interests Attorney  Child's Attorney for  the child or children named above  the child \_\_\_\_\_, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child's Attorney or Best Interests Attorney only in accordance with such laws.

**THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.**

DATE: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
JUDGE





**Appendix 5**

**Domestic Violence Materials**



# 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).

The views expressed herein have not been approved by the House of Delegates of the Board of Governors of the American Bar Association except where otherwise indicated, and accordingly, should not be construed as representing the policy of the American Bar Association.

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**Excerpts From:**  
**MODEL CODE**  
**ON**  
**DOMESTIC AND FAMILY**  
**VIOLENCE**

*Drafted by the*  
***Advisory Committee***  
*of the*  
*Conrad N. Hilton Foundation*  
*Model Code Project*  
*of the*  
*Family Violence Project*

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## INTRODUCTION

Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.

Domestic and family violence must be reduced and prevented. When it occurs we must intervene effectively. Our best hope to do so requires strong public policy against domestic and family violence and begins with appropriate legislation to that end. Leadership, communication and coordination are critical among legislators; government administrators; law enforcement; courts and their gatekeepers; attorneys; the medical and health care community; advocates and providers of services to victims; corrections and providers of treatment for offenders, educators, and volunteers.

Recognizing the critical importance of legislation, in 1991 The National Council of Juvenile and Family Court Judges, with the generous support and commitment of the Conrad N. Hilton Foundation, undertook the challenge of drafting a Model State Code on Domestic and Family Violence through its Family Violence Project. The Model Code was developed with the collegial and expert assistance of an advisory committee composed of leaders in the domestic violence field including judges, prosecutors, defense attorneys, matrimonial lawyers, battered women's advocates, medical and health care professionals, law enforcement personnel, legislators, educators and others. Hard choices and necessary compromises were made during three years of intense work. In two instances alternative solutions were set forth. The commentary accompanying the Code is descriptive while the appendices contain selected source materials. Throughout the discussions and Code itself, due process and fairness were paramount. Because this is a Model Code each chapter and section can be independently assessed and accepted or modified.

**MODEL CODE ON  
DOMESTIC AND FAMILY VIOLENCE  
CHAPTER 1  
GENERAL PROVISIONS**

**Section 101. Construction.**

The Model Code on Domestic and Family Violence must be construed to promote:

1. The protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and
2. The prevention of future violence in all families.

COMMENTARY

The Model Code was crafted to facilitate parallel statutory development with respect to domestic and family violence among the States and the District of Columbia. The enactment of similar codes by all jurisdictions will enhance both the uniformity and quality of justice for victims and perpetrators of domestic and family violence throughout the nation.

**Sec. 102. Definitions.**

Unless the context otherwise requires, as used in the Model Code:

1. "Domestic or family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:
  - (a) Attempting to cause or causing physical harm to another family or household member;
  - (b) Placing a family or household member in fear of physical harm; or
  - (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.
2. "Family or household members" include:
  - (a) Adults or minors who are current or former spouses;
  - (b) Adults or minors who live together or who have lived together;
  - (c) Adults or minors who are dating or who have dated;
  - (d) Adults or minors who are engaged in or who have engaged in a sexual relationship;
  - (e) Adults or minors who are related by blood or adoption;
  - (f) Adults or minors who are related or formerly related by marriage;
  - (g) Persons who have a child in common; and
  - (h) Minor children of a person in a relationship that is described in paragraphs (a) through (g).
3. "Program of intervention for perpetrators" means a specialized program that:
  - (a) Accepts perpetrators of domestic or family violence into treatment or educational classes to satisfy court orders;
  - (b) Offers treatment to perpetrators of domestic or family violence; or
  - (c) Offers classes or instruction to perpetrators of domestic or family violence.
4. "Program for victims of domestic or family violence" means a specialized program for victims of domestic or family violence and their children that provides advocacy, shelter, crisis intervention, social services, treatment, counseling, education, or training.



5. "Safety plan" means a written or oral outline of actions to be taken by a victim of domestic or family violence to secure protection and support after making an assessment of the dangerousness of the situation.

#### COMMENTARY

Domestic or family violence as defined in subsection 1 identifies the conduct that is commonly recognized as domestic or family violence. The definition incorporates assaultive and non-violent conduct that injures or attempts injury. The term "physical harm" permits a court to exercise broad discretion in evaluating whether the conduct has resulted in an injury that might not typically be identified as a medical injury. The definition recognizes that abusive persons jeopardize partners and family members by threatening physical harm or acting in a manner to instill fear. Use of the word "fear" in paragraph (b) refers to a reasonable person standard, that is which acts would place a reasonable person in fear of physical harm.

Subsection 2 identifies the persons to be protected by the various remedies set forth in the Model Code. The definition of family or household member is broad. Cohabitation is not a prerequisite for eligibility; and the relationship between the victim and the perpetrator need not be current. The Code recognizes that violence may continue after the formal or informal relationship has ended.

Subsection 3 defines a program of intervention for perpetrators. The definition contemplates that the treatment or educational services provided for perpetrators of domestic or family violence pursuant to this Code be those designed specifically and exclusively for this distinct class of offenders.

The programs for victims of domestic or family violence defined in subsection 4 are designed to offer specialized advocacy and assistance. The Code addresses these programs throughout, particularly related to referrals by the justice and health systems, safety planning for victims, supportive services, and advocacy.

Subsection 5 briefly defines a safety plan. The Code anticipates that professionals throughout the justice, health, education and social services systems will educate victims about how to assess risk, to devise effective protection strategies, and to gain community assistance for implementation.

Drafter's Note: States should incorporate the specific terminology for domestic and family violence from their own states.

**CHAPTER 4**  
**FAMILY AND CHILDREN**

**Sec. 401. Presumptions concerning custody.**

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

COMMENTARY

Support for the presumptions incorporated in this section, that domestic violence is detrimental to the child and that it is contrary to the child's best interest to be placed in sole or joint custody with the perpetrator thereof, is extensive. This section compels courts, attorneys, custody evaluators, and other professionals working with cases involving the custody of children to consider the impact of domestic and family violence on these children. This mandate is not limited to courts issuing orders for protection but includes courts hearing divorce, delinquency, and child protection cases.

**Sec. 402. Factors in determining custody and visitation.**

1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence:
  - (a) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.
  - (b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.
2. If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation.

COMMENTARY

This section was constructed to remedy the failure of many custody statutes to give courts direction related to appropriate consideration of domestic and family violence in contested custody cases. Paragraph (a) of subsection 1 elevates the safety and well-being of the child and abused parent above all other "best interest" factors in deliberations about custodial options in those disputed custody cases where there has been a finding of abuse by one parent of the other. It contemplates that no custodial or visitation award may properly issue that jeopardizes the safety and well-being of adult and child victims.

Paragraph (b) compels courts to consider the history, both the acts and patterns, of physical abuse inflicted by the abuser on other persons, including but not limited to the child and the abused parent, as well as the fear of physical harm reasonably engendered by this conduct. It recognizes that discreet acts of abuse do not accurately convey the risk of continuing violence, the likely severity of future abuse, or the magnitude of fear precipitated by the composite picture of violent conduct.

Subsection 2 recognizes that sometimes abused adults flee the family home in order to preserve or protect their lives and sometimes do not take dependent children with them because of the emergency circumstances of flight; because they lack resources to provide for the children outside the family home; or because they conclude that the abuser will hurt the children, the abused parent, or third parties if the children are removed prior to court intervention. This provision prevents the abuser from benefiting from the violent or coercive conduct precipitating the relocation of the battered parent and affords the abused parent an affirmative defense to the allegation of child abandonment.

**Sec. 403. Presumption concerning residence of child.**

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent's choice, within or outside the state.

COMMENTARY

This section articulates a rebuttable presumption that the residence of the child in the context of domestic or family violence should be with the non-perpetrating parent in the location chosen by that parent. This presumption builds on the one enumerated in section 401. It is designed to defeat any assertion by a perpetrator of domestic or family violence that custody and residence with the abused parent should be presumptive only if the abused adult remains within the jurisdiction of the marital domicile. It recognizes that the enhanced safety, personal, and social supports, and the economic opportunity available to the abused parent in another jurisdiction are not only in that parent's best interest, but are, likewise and concomitantly, in the best interest of the child.

**Sec. 404. Change of circumstances.**

In every proceeding in which there is at issue the modification of an order for custody or visitation of a child, the finding that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstances.

COMMENTARY

This section provides that in proceedings concerning modification of an order for custody or visitation of a child, a finding by the reviewing court that domestic or family violence has occurred constitutes a finding of a change of circumstances.

**Sec. 405. Conditions of visitation in cases involving domestic and family violence.**

1. A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.
2. In a visitation order, a court may:
  - (a) Order an exchange of a child to occur in a protected setting.
  - (b) Order visitation supervised by another person or agency.
  - (c) Order the perpetrator of domestic or family violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of the visitation.
  - (d) Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding the visitation.
  - (e) Order the perpetrator of domestic or family violence to pay a fee to defray the costs of supervised visitation.
  - (f) Prohibit overnight visitation.
  - (g) Require a bond from the perpetrator of domestic or family violence for the return and safety of the child.
  - (h) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic or family violence, or other family or household member.

3. Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential.
4. The court may refer but shall not order an adult who is a victim of domestic or family violence to attend counseling relating to the victim's status or behavior as a victim, individually or with the perpetrator of domestic or family violence as a condition of receiving custody of a child or as a condition of visitation.
5. If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

#### COMMENTARY

Subsection 1 permits the award of visitation to a perpetrator of domestic violence only if protective measures, including but not limited to those enumerated in subsection 2 of this section, are deemed sufficient to protect the child and the abused parent from further acts or threats of violence or other fear-engendering conduct. The Model Code posits that where protective interventions are not accessible in a community, a court should not endanger a child or adult victim of domestic violence in order to accommodate visitation by a perpetrator of domestic or family violence. The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal interventions.

Subsection 2 lists the protective conditions most routinely imposed on visitation by the perpetrator of domestic and family violence. It is not intended to be exhaustive, nor does this subsection contemplate that each provision should be imposed on every custody order.

Subsection 3 recognizes that it may be necessary to withhold the address of the adult victim and children from the perpetrator and others in order to prevent stalking and assault of adult and child victims in their undisclosed residence. Research reveals that one of the most effective methods of averting violence is denying the abuser access to the victim, which can be facilitated by preserving the confidentiality of the victim's address.

Subsection 4 prohibits a court from ordering a victim of domestic or family violence to attend counseling related to the status or behavior as a victim as a condition of receiving custody of a child or as a condition of visitation. It does not preclude the court from ordering other types of counseling, such as substance abuse counseling or educational classes.

Subsection 5 requires a court to establish conditions to be followed if the court allows a family or household member to supervise visitation. When those supervising visitation are furnished clear guidelines related to their responsibility and authority during supervision, they are better able to protect the child should the perpetrator engage in violent or intimidating conduct toward the child or adult victim in the course of visitation.

#### **Sec. 406. Specialized visitation center for victims of domestic or family violence.**

1. The insert appropriate state agency shall provide for visitation centers throughout the state for victims of domestic or family violence and their children to allow court ordered visitation in a manner that protects the safety of all family members. The state agency shall coordinate and cooperate with local governmental agencies in providing the visitation centers.
2. A visitation center must provide:
  - (a) A secure setting and specialized procedures for supervised visitation and the transfer of children for visitation; and
  - (b) Supervision by a person trained in security and the avoidance of domestic and family violence.

#### COMMENTARY

Supervised visitation centers are an essential component of an integrated community intervention system to eliminate abuse and protect its victims. Visitation centers may reduce the opportunity for retributive violence by batterers, prevent parental abduction, safeguard endangered family members, and offer the batterer continuing contact and relationship with their children. This section requires a state to provide for the existence of visitation centers but does not mandate that the state own or operate such centers, nor that the centers be operated at public expense.

#### **Sec. 407. Duty of mediator to screen for domestic violence during mediation referred or ordered by court.**

1. A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties.
2. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:
  - (a) Mediation is requested by the victim of the alleged domestic or family violence;
  - (b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
  - (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

#### COMMENTARY

This section requires mediators who receive referrals or orders from courts to screen for domestic or family violence between the parties. Screening must include an assessment of the danger posed by the perpetrator, recognizing that victims of domestic violence are at sharply elevated risk as they attempt to end the relationship and utilize the legal system to gain essential protective safeguards. Subsection 2 articulates a practice standard for the mediator who discovers that domestic or family violence has occurred. See Appendix III.

Drafters note: Drafters must look to general provisions concerning mediation in their state laws and insert exception as provided in sections 311 and 408.

*The Model Code provides alternative sections concerning mediation in cases involving domestic or family violence. Both of the sections provide directives for courts hearing cases concerning the custody or visitation of children, if there is a protection order in effect and if there is an allegation of domestic or family violence. Neither of these sections prohibits the parties to such a hearing from engaging in mediation of their own volition. For the majority of jurisdictions, section 408(A) is the preferred section. For the minority of jurisdictions that have developed mandatory mediation by trained, certified mediators, and that follow special procedures to protect a victim of domestic or family violence from intimidation, section 408(B) is provided as an alternative.*

#### **Sec. 408(A). Mediation in cases involving domestic or family violence.**

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.

2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:

- (a) Mediation is requested by the victim of the alleged domestic or family violence;
- (b) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

#### COMMENTARY

Subsection 1 makes it explicit that referrals to mediation by a court in the context of domestic or family violence, not only mandates for participation, are impermissible. Judicial referrals are compelling and often viewed by litigants as the dispute resolution method preferred by the court. Also see commentary following section 311.

Subsection 2 authorizes courts to require mediation or refer to mediation when there is an allegation of domestic or family violence only where there is no protection order in effect and the three enumerated conditions for mediation are met. First, the court should not approve mediation unless the victim of the alleged violence requests mediation. The second requisite condition for court-approved mediation in the context of domestic violence contains two components: that mediation be provided in a specialized manner that protects the safety of the victim and that mediators be certified and trained in domestic and family violence. Guidelines have been generated by mediators, scholars, and advocates.

Paragraph (c) of subsection 2 reflects the policy recommendations, promulgated by the collaborative studies of mediators, advocates, and legal scholars, that at the victim's option, he or she may have another party present during mediation. This person may be the victim's attorney, an advocate, or some other person of the victim's choosing.

#### **Sec. 408(B). Mediation in cases involving domestic or family violence.**

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if there is an allegation of domestic or family violence, the court shall not order mediation or refer either party to mediation unless the court finds that:

- (a) The mediation is provided by a certified mediator who is trained in the dynamics of domestic and family violence; and
- (b) The mediator or mediation service provides procedures to protect the victim from intimidation by the alleged perpetrator in accordance with subsection 2.

2. Procedures to protect the victim must include but are not limited to:

- (a) Permission for the victim to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate; and
- (b) Any other procedure deemed necessary by the court to protect the victim from intimidation from the alleged perpetrator.

## COMMENTARY

Subsection 1 authorizes a court to order or refer parties in a proceeding concerning custody or visitation of a child only under two conditions, that mediation is provided by a certified mediator who is trained in domestic and family violence and procedures are provided that protect the victim from intimidation.

Subsection 2 enumerates the procedures that must be followed by a mediator to protect the victim from intimidation. Paragraph (a) reflects the policy recommendations, promulgated by the collaborative studies of mediators, advocates, and legal scholars, that at the victim's option, he or she may have another party present at mediation. This person may be the victim's attorney, an advocate, or some other person of the victim's choosing. Paragraph (b) authorizes the court to impose any additional procedure deemed necessary to protect the victim from intimidation.

### **Sec. 409. Duties of children's protective services.**

1. The state administrator of children's protective services shall develop written procedures for screening each referral for abuse or neglect of a child to assess whether abuse of another family or household member is also occurring. The assessment must include but is not limited to:

(a) Inquiry concerning the criminal record of the parents, and the alleged abusive or neglectful person and the alleged perpetrator of domestic or family violence, if not a parent of the child; and

(b) Inquiry concerning the existence of orders for protection issued to either parent.

2. If it is determined in an investigation of abuse or neglect of a child:

(a) That the child or another family or household member is in danger of domestic or family violence and that removal of one of the parties is necessary to prevent the abuse or neglect of the child, the administrator shall seek the removal of the alleged perpetrator of domestic or family violence whenever possible.

(b) That a parent of the child is a victim of domestic or family violence, services must be offered to the victimized parent and the provision of such services must not be contingent upon a finding that either parent is at fault or has failed to protect the child.

## COMMENTARY

This section underscores the premise that protection of the abused child and the non-perpetrating parent should be the guiding policy of child protective services agencies. Subsection 1 requires the state's administrator of child protective services to develop both an assessment tool and investigation procedures for identification of violence directed at family or household members in addition to the child alleged to be at risk. Identification of adult domestic or family violence through careful intake screening and preliminary risk assessment, followed by thorough investigation, is essential if parents are to be afforded the life preserving assistance necessary for effective parenting and child protection.

Paragraph (a) of subsection 2 codifies the premise that when a parent or parent-surrogate has abused a child or poses a continuing risk of abuse or violence towards anyone in the family or household, and the agency concludes that safety can be accomplished only if those at risk live separate and apart from the perpetrator, the agency should either assist the non-perpetrating parent in seeking the legal exclusion of the perpetrator from the home or itself pursue removal of the perpetrator from the home. The perpetrator should be removed rather than placing the abused child or children in foster care or other placement. This provision does not require that a perpetrator be removed from the home if both the child and the victim of domestic violence can be adequately protected by other interventions. Paragraph (b) of subsection 2 requires that the agency make services available to parents of abused children under the supervision of the agency, who have been victimized by domestic or family violence. This subsection requires that services for parents victimized by domestic or family violence are to be undertaken whether or not the abused parent is found to bear any culpability for the abuse of a child under the supervision of the agency; findings of neglect, abuse, or any failure to protect by the parent victimized by domestic or family violence are not a prerequisite for service.

**THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN:  
RECOMMENDATIONS TO IMPROVE INTERVENTIONS**

by Sarah M. Buel, J.D.<sup>1</sup>  
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## I. INTRODUCTION

That children are adversely impacted by domestic violence<sup>2</sup> is now well documented<sup>3</sup> and intellectually understood. Yet, intervenor<sup>4</sup> and court practices in some jurisdictions continue to reflect the out-dated notion that if children have not been *physically* battered, evidence of domestic violence will be of little import in fashioning orders and agreements. Yet, empirical studies now document that even children's exposure to family violence greatly increases the likelihood of internalized and externalized trauma.<sup>5</sup> In response, some states have enacted statutes imposing sanctions for adults who are perceived as not adequately protecting child witnesses to domestic violence.<sup>6</sup> Absent effective interventions, the abused parent and children

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<sup>2</sup> "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. Roberta Valente, *Domestic Violence and the Law*, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE (1996).

<sup>3</sup> See, Louis Dixon, Catherine Hamilton-Giachritsis, Kevin Browne, and Eugene Ostapuik, *The Co-Occurrence of Child and Intimate Partner Maltreatment in the Family: Characteristics of the Violent Perpetrators*, 22 J. OF FAMILY VIOLENCE 675,676 (November 2007) (documenting with numerous empirical studies the dangerous overlap of child physical and sexual abuse with adult, intimate partner violence); Peter G. Jaffe, Nancy K.D. Lemon, and Samantha E. Poisson, CHILD CUSTODY & DOMESTIC VIOLENCE, A CALL FOR SAFETY AND ACCOUNTABILITY (2003); Mildred Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION QUARTERLY (1990); Peter Jaffe, D. Wolfe and S. Wilson, CHILDREN OF BATTERED WOMEN: ISSUES IN CHILD DEVELOPMENT AND INTERVENTION PLANNING (1990); Bowker, Arbitell, and McFerron, *On the Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVES ON WIFE ABUSE (1988); Peter Jaffe, et. al, CHILDREN OF BATTERED WOMEN, (1990); B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Al. L. Rev. 1109, 1113 (Spring 1995).

<sup>4</sup> Intervenor will herein mean those professionals providing any services to adult or child victims, including, but not limited to advocates, batterer's intervention program staff, child protective services' staff, child care providers, defense attorneys, educators, faith community leaders, family law attorneys, judges, juvenile justice staff, law enforcement officers, medical and mental health providers, parole and probation officers, and prosecutors.

<sup>5</sup> See, Chantal Bourassa, *Co-Occurrence of Interparental Violence and Child Physical Abuse and Its Effect on the Adolescents' Behavior*, 22 J. OF FAMILY VIOLENCE 691 (November 2007) (reporting that "exposure exclusively to interparental violence also has definite negative impact; for example, teens who are only exposed to interparental violence exhibit internalized and externalized symptoms more frequently than do those who have been neither subject to physical abuse from a parent nor exposed to interparental violence.")

<sup>6</sup> Although these are somewhat controversial because of fears that the battered mother will be erroneously blamed, several states provide an increased penalty where children witness domestic violence. See, e.g. Fla. Stat. § 921.0024 (b) (2007) Domestic violence in the presence of a child, "If the offender is convicted of the primary offense and the primary offense is a crime of domestic violence...which was committed in the presence of a child under 16 years of age who is a family or household member...with the victim or perpetrator, the subtotal sentence points are multiplied by 1.5. (providing for an enhanced penalty on the Florida Criminal Punishment Worksheet); Wash. Rev. Code § 9.94A.535(h) (2008) Departures from Guidelines, "The current offense involved domestic violence...and one or more of the following was present: (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years (listing factors that justify a departure from sentencing guidelines); see also, Cal. Pen. Code § 1170.76 (2007) Specified relationship with minor or victim as an aggravating circumstance for certain crimes: "The fact that a defendant who commits or attempts to commit a violation of [sexual assault, assault with a deadly weapon, or infliction of injury on present or former spouse or cohabitant or parent of child] is or has been a member of the household of a minor or of the victim of the offense, or the defendant is a marital or blood relative of the minor or the victim, or the defendant or the victim is the natural parent, adoptive parent, stepparent, or foster parent of the minor, and the offense contemporaneously

are at greater risk of more harm, and all but ensures that the abuser will have further involvement with the criminal justice system.<sup>7</sup> It is bad enough that children exposed to violence in their homes suffer myriad harmful effects,<sup>8</sup> but it is worse that once professional interveners become aware of such danger, little is done to protect these vulnerable victims. One goal must be determining the factors that contribute to a child's resilience,<sup>9</sup> and then expeditiously implementing those protective measures.

Of particular importance is an understanding of the correlation between domestic violence, child abuse, and juvenile delinquency through the lenses of poverty and race,<sup>10</sup> and, in the context of mental health and substance abuse issues.<sup>11</sup> All of this must be viewed through the structural framework of frequent cultural incompetence within our most powerful institutions.<sup>12</sup> This article offers recommendations for improving our interventions in domestic violence legal matters regarding children and their families.

Domestic violence impacts all legal system professionals,<sup>13</sup> with juvenile, criminal, and family court interveners uniquely positioned to dramatically improve victim safety and offender

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occurred in the presence of, or was witnessed by, the minor shall be considered a circumstance in aggravation of the crime ...”

<sup>7</sup> See James Ptacek, *BATTERED WOMEN IN THE COURTROOM, THE POWER OF JUDICIAL RESPONSES* (1999); and David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, *BOSTON BAR JOURNAL* 25 (July/August 1989).

<sup>8</sup> See, Bourassa, *supra* note 5.

<sup>9</sup> See, Abigail H. Gewertz and Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk and Resilience Framework for Research and Intervention*, 22 *J. OF FAMILY VIOLENCE* 151 (April 2007) (arguing for the need for early intervention to improve resilience for children exposed to family violence).

<sup>10</sup> See, Zanita E. Fenton, *Colorblind Must Not Mean Blind to the Realities Facing Black Children*, 26 *B.C. THIRD WORLD L.J.* 81 (Winter, 2006) (discussing the impact of institutional racism on welfare of black children and their families) (hereinafter *Colorblind Must Not Mean Blind to the Realities Facing Black Children*).

<sup>11</sup> See Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse and Child Welfare: The Legal System's Response*, 3 *J. HEALTH CARE L. & POL'Y* 89 (1999); Kathleen A Oriel, *Screening Men for Partner Violence in a Primary Care Setting, A new Strategy for Detecting Domestic Violence*, 46 *J. FAMILY PRAC.* 493 (1998); Beth Gorney, *Domestic Violence and Chemical Dependency: Dual Problems, Dual Interventions*, 21 *J. PSYCHOACTIVE DRUGS* 229 (1989); and Albert R. Roberts, *Substance Abuse Among Men Who Batter Their Mates*, 5 *J. SUBSTANCE ABUSE TREATMENT* 83 (1988).

<sup>12</sup> See Reneta J. Lawson, *Critical Race Theory as Praxis: A View From Outside the Outside*, 38 *HOWARD L. J.* 353, 359 (1995); Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 *VILL. L. REV.* 767 (1988) (contending that, historically, white superiority has forced the sacrifice of black interests); and Richard Delgado, *Critical Legal Studies and the Realities of Race – Does the Fundamental Contradiction Have a Corollary?* 23 *HARV. C.R.-C.L. L. REV.* 407 (1988) (showing how the “race-charged” condition of the world impacts the way people of color strike various balances); see also, *infra*, Section XII.C. addressing disproportionate rates of reporting, substantiation, and out-of-home placement for African American children.

<sup>13</sup> See *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE (1996), with chapters covering the relevance for most fields of law, including Children's; Civil Rights; Contracts; Corporate; Criminal; Elder; Employment Evidence; General Practice; Health Care; Government and Public Sector; Housing and Homelessness; Insurance; Judiciary; Law Firm Management; Legal Services; Mediation; Military; Poverty; Probate, Estate and Trust; Professional Responsibility and Ethics; Real Property; Safety Planning; Screening; Sexual Harassment; Solo Practitioners; Sports and Entertainment; State and Local Government; Tax; Trial Practice and Torts. Available for \$35. from the ABA Resource Center 800/285-2221.

accountability *if* they have learned how to respond effectively.<sup>14</sup> Practices must be improved to change the current truth that it is a toss of the dice whether child and adult abuse victims can access interveners who will take their safety seriously. It is this chilling reality that informs the challenge to all interveners to move beyond dialogue to action; beyond victim-blaming to offender accountability, and rehabilitation when feasible. Promising practices exist and will be highlighted, evidencing the many interveners embracing the notion that *all* parties deserve safety and “domestic tranquility.”<sup>15</sup>

Often the best way to protect children is to protect their battered mothers<sup>16</sup> who are desperately attempting to achieve safety.<sup>17</sup> Sadly, the most frequently asked question remains, “But, *why* do those battered women stay?” The on-going, uninformed antipathy toward abuse victims appears based on the notion of volition; that they choose to stay with abusers in the face of appealing options. Victims have many valid reasons for staying with or returning to the batterer, not the least of which include a lack of financial resources, no job skills, fear, low self-esteem and believing that it is in the children’s best interest to have their father or a father-figure in the home. Many victims lack knowledge of their legal and other options, thus their response could be greatly impacted by access to well-informed, zealous counsel and progressive courts.<sup>18</sup>

## **II. JUST AS UNIVERSAL SCREENING FOR DOMESTIC VIOLENCE HAS BECOME PART OF THE STANDARD OF CARE FOR MEDICAL AND MENTAL HEALTH PRACTITIONERS, OTHER PROFESSIONALS MUST SCREEN EVERY CHILD FOR ABUSE.**

Interveners must *initiate* questions about abuse in the household (or relationship) during the first meeting, in order to assess the immediate safety issues, regardless of whether the meeting

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<sup>14</sup> See Roberta Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAMILY LAW QUARTERLY 187 (Summer 1995).

<sup>15</sup> U.S. Const. pmb. (“We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

<sup>16</sup> Although there are also battered men and they should be afforded the same protections as female victims, they are a small minority of the cases. I will thus refer to victims as female, using the terms “battered women” and “abuse victims” interchangeably. See Callie Marie Rennison, U.S. DEP’T OF JUSTICE, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-99, at 3 (Bureau of Just. Stat. Special Rep. NCJ 187635, Oct. 2001) (“Women were victimized in 85% of the 791,210 intimate partner violent crimes in 1999.”), available at <http://www.ojp.usdoj.gov/bjs/abstract/ipva99.htm>; see also Patricia Tjaden & Nancy Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence 17 (2000) (noting data that women are significantly more likely than men to report being the victims of intimate partner violence); Russel Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 Soc. Probs. 71, 74-75 (1992) (documenting that empirical data prove that females constitute the vast majority of domestic violence victims).

<sup>17</sup> There is no dispute that some mothers, battered or otherwise, will not or cannot protect their children from harm. However, the vast majority of battered mothers make many courageous attempts to shield their children from harm. See e.g. Pagelow, and Jaffee, *supra* note 3.

<sup>18</sup> See Sarah M. Buel, 50 *Obstacles to Leaving a.k.a. Why Victims Stay*, 28 COLORADO LAWYER 1 (October 1999); Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEXAS BAR JOURNAL 936 (October 1999).

is with the victim or perpetrator, adult or child.<sup>19</sup> Experts recommend a four-step process for child protection and victim advocates to increase safety for all in the family: screening, investigating, assessing, and intervening.<sup>20</sup> At the very least, initial screening of children should involve basic questions such as: “Does anyone hit or scare you at home?” and “What happens when people in your home get mad?” For adults, lawyers and other interveners would be wise to follow the American Medical Association (hereinafter AMA) physician guidelines, starting with, “Because abuse and violence are so common in women’s lives, I’ve begun to ask about it routinely.”<sup>21</sup> The intervener can then follow through with, “Have you been hit or threatened in this relationship? Are you afraid now? Do you want information about a protective order? What can I do to help?”

Given the frequency with which abuse victims seek medical treatment,<sup>22</sup> healthcare professionals have included screening for intimate partner abuse within the scope of its standard of care.<sup>23</sup> Empirical and anecdotal data indicate that although many battered patients are too ashamed or afraid to self-disclose intentional harm to their physicians, directly inquiring about

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<sup>19</sup> Judge Cindy Lederman of the Dade County (FL.) Juvenile Court has launched a study of their innovative protocol for screening *all* child and adults for abuse who present at their court, then providing counseling and other needed services. See, Cindy S. Lederman and Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court*, 10 PSYCHOL. PUB. POL’Y & L. 162 (March/ June 2004) (describing numerous of Judge Lederman’s innovative programs, including routine screening, at the Miami-Dade Juvenile Court); see also, Cite as: Christine A. O’Riley and Cindy S. Lederman, *Co-Occurring Child Maltreatment and Domestic Violence*, 75 FLA. B. J. 40 (November, 2001) (noting, “In order to meet the objective of child safety, it is critical that family services counselors screen for domestic violence during their initial contact with each family.”) (hereinafter *Co-Occurring Child Maltreatment and Domestic Violence*). The Travis County (TX.) Juvenile Drug Court includes screening for family violence as part of its intake procedures.

<sup>20</sup> See, Janet Carter & Susan Schechter, *Child Abuse and Domestic Violence: Creating Community Partnerships for Safe Families* (San Francisco: Family Violence Prevention Fund, 13, 1997), as cited in *Id. Co-Occurring Child Maltreatment and Domestic Violence*, n. 20.

<sup>21</sup> American Medical Association, *Diagnostic and Treatment Guidelines on Domestic Violence* (1992). See also Michael A. Rodriguez, MD, MPH, Heidi M. Bauer, MD, MPH, Elizabeth McLoughlin, ScD, and Kevin Grumbach, MD, *Screening and Intervention for Intimate Partner Abuse, Practices and Attitudes of Primary Care Physicians*, 282 JAMA 468 (August 4, 1999).

<sup>22</sup> See, e.g., Domestic Violence: A Practical Approach for Clinicians, San Francisco Medical Society: Current News, <http://www.sfms.org/brochure.html> [hereinafter San Francisco Medical Society] (reporting that abuse victims frequently seek treatment in emergency and primary care settings, ranging from obstetrics and allergy, to psychiatric and orthopedic care).

<sup>23</sup> See American Nurses Association, Position Statement on Physical Violence Against Women (1994) available at <http://www.nursingworld.org/readroom/position/social/viowomen.pdf>, American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996); The Battered Woman, 1989 ACOG Bulletin 124 (American College of Obstetricians & Gynecologists, Washington, D.C.); see also, American Medical Association Council on Scientific Affairs, Policy H-515.965, Dec. 2000, available at <http://www.ama-assn.org/ama/pub/category/13577.html> (stating that medical "curricula should include coverage of the diagnosis, treatment, and reporting of child maltreatment, intimate partner violence, and elder abuse and provide training on interviewing techniques, risk assessment, safety planning, and procedures for linking with resources to assist victims. The AMA supports the inclusion of questions on family violence issues on licensure and certification tests..." and the "AMA encourages physicians to: (a) Routinely inquire about the family violence histories of their patients as this knowledge is essential for effective diagnosis and care"); and Linda R. Chambliss, Domestic Violence: A Public Health Crisis, 40 Clinical Obstetrics & Gynecology 630, 633 (1997) (stating that both the American Medical Association and the American College of Obstetricians and Gynecologists strongly encourage screening all patients for violence).

abuse induces some victims who might not otherwise do so to report the abuse.<sup>24</sup> With a bit of heightened awareness, doctors have found their screening and even minimal guidance to be quite effective in assisting battered patients.<sup>25</sup> Lawyers, judges, and other child protection professionals would do well to replicate the innovative screening practices of medical providers.

It is thus not only lawyers who are required to routinely inquire about abuse and provide follow-up information to the victims. It is malpractice for attorneys, medical and mental health providers, social workers, child protection and child care staff, and educators to *not* conduct universal screening.<sup>26</sup> Empirical data document that while domestic violence victims face high risk of recurring abuse, such professionals may be privy to information that could avert further harm.<sup>27</sup>

With any client reporting prior or current abuse, a civil protection order should be fully discussed in the context of completing a SAFETY PLAN.<sup>28</sup> Initially, many non-legal interveners may be reluctant to broach the topic of safety plans -- particularly with children -- armed with numerous excuses justifying their silence. "It's not my job," is a common rationale that is as erroneous as it is nonsensical. *Every* professional intervener with knowledge of current or potential harm to a child has a legal obligation to notify child protective services or their local law enforcement agency.<sup>29</sup> In Boston, area law students staff Boston Medical Center's Emergency Department on the week-ends to advise victim-patients of their rights and explain the process of obtaining a protective order, as well as accessing other helpful services.

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<sup>24</sup> Richard F. Jones, III, *Domestic Violence: Let Our Voices Be Heard*, 81 OBSTETRICS & GYNECOLOGY 1, 2 (1993) (reporting that during decades of ob-gyn practice, domestic violence victims rarely disclosed until Dr. Jones began routinely screening--that is, asking every patient if they had been hit or threatened at home--then victimization reports exponentially increased from an average of 4-5 per year, to 2-3 per week).

<sup>25</sup> See San Francisco Medical Society, *supra* note 20. Note that a number of doctors have now expanded victim screening to include that of patients whom they suspect of being batterers. See Elaine Alpert et al., *Interpersonal Violence and the Education of Physicians*, 72 Acad. Med. 41, 42 (1997).

<sup>26</sup> Sarah M. Buel, *Family Violence: Practical Recommendation for Physicians & the Medical Community*, 5 WOMEN'S HEALTH ISSUES 158 (Winter 1996); see also, Attorney Allen Horsley, Boston Bar Association Seminar on "Tort Litigation Against Domestic Violence Perpetrators," March, 1992, Boston, MA.

<sup>27</sup> See, Sarah Buel and Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. Cin. L. Rev. 447 (Winter 2006).

<sup>28</sup> A SAFETY PLAN is, essentially, an action plan for staying alive; walking the victim through practical steps for protecting herself during an explosive incident, when preparing to leave, at work, in public, and with the children; a sample Safety Plan is available from the American Bar Association's Torts and Insurance Practice Section "Domestic Violence, Safety Tips For You and Your Family" at [www.abanet.org/tips/publicservice/dvsafety.html](http://www.abanet.org/tips/publicservice/dvsafety.html). The Youth Safety Plan is available from the American Bar Association's Commission on Domestic Violence web site at: [www.abanet.org/domviol](http://www.abanet.org/domviol). These Safety Plans are NOT copyrighted in the hope that each reader will take them home for their police, sheriff, shelter, bar association or other entity to reproduce and distribute.

<sup>29</sup> Every state had mandatory child abuse reporting laws for many professionals, including but not limited to teachers, medical and mental health providers, and law enforcement officers. See e.g., Colo. Rev. Stat. § 19-3-304; Fla. Stat. § 39.201; Miss. Code Ann. § 43-21-353; Ohio Rev. Code § 2151.421; Tex. Fam. Code § 261.101; and Wis. Stat. § 48.981.

Medical and nursing students then accompany the law students to court in order to learn the realities of accessing the legal system; the better to advise their future patients.<sup>30</sup>

In addition to screening for physical harm, advocates, lawyers and other interveners should routinely ask children about any psychological abuse,<sup>31</sup> a common tactic of batterers to destroy the victim's self-esteem. The batterer may have told the victim that no one will believe her,<sup>32</sup> that her family will be harmed if she discloses the abuse, that no one will want to help her and that the abuse is all her fault.<sup>33</sup> Interveners must tell their battered child and adult clients, "It's not your fault; you are not to blame for the abuse," and "You don't deserve to be abused."<sup>34</sup>

A lawyer's silence constitutes collusion with the batterer and likely malpractice.<sup>35</sup> The Model Rules of Professional Conduct specify that: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."<sup>36</sup> Given the growing body of legal, psychological, and popular literature<sup>37</sup> about the adverse impact of domestic violence on children, there can be little doubt but that screening is a minimal first step. Regardless of the legal problem with which a client presents, the attorney must routinely screen all clients for abuse.

Interveners must learn to ask for the assistance of child abuse and domestic violence victim advocates, as the case complexity means that they are often not amenable to simple solutions. For example, the battered mother may also be abusing her children, but is more likely to stop

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<sup>30</sup> The author is the co-founder of the Harvard Law School Battered Women's Advocacy Project which took part in this effort, and participated as a trainer at Boston City Hospital to expand the program in 1992.

<sup>31</sup> Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993); See also Patricia Evans, THE VERBALLY ABUSIVE RELATIONSHIP, How to Recognize It and How To Respond ("All Domestic Violence Begins With Verbal Abuse") (1992).

<sup>32</sup> While not discounting the reality of male victims (both gay and heterosexual), the vast majority of domestic violence victims are female and the perpetrators are male. Russel Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992); Caroline W. Harlow, U.S. DEP'T OF JUST., FEMALE VICTIMS OF VIOLENT CRIME 1 (1991); Peter Finn and Sarah Colson, U.S. DEP'T. OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4 (1990); Patsy A. Klaus & Michael R. Rand, FAMILY VIOLENCE: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1984), as cited in Roberta Valente, *supra* note 6.

<sup>33</sup> Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loyola Journal of Public Interest Law 106 (Spring 2002) (noting the many instances in which verbal as well as physical abuse are minimized and ignored by the courts); see also, Barbara Hart, *Why She Stays, When She Leaves*, STOPPING THE VIOLENCE (1990).

<sup>34</sup> See, Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1042-43 (1995).

<sup>35</sup> The Model Rules of Professional Conduct mandate that attorneys "provide competent representation to a client" which "requires the legal knowledge, skills, thoroughness and preparation necessary for the representation." Rule 1.1.

<sup>36</sup> Model Rules of Professional Conduct, Rule 1.1 cmt. 5.

<sup>37</sup> See e.g. *supra* note 3; Ann Jones, NEXT TIME SHE'LL BE DEAD (1992); George Lardner, THE STALKING OF KRISTEN (1993).

when her batterer is removed from the home.<sup>38</sup> When the victims are immigrants,<sup>39</sup> elders,<sup>40</sup> lesbian<sup>41</sup> or gay,<sup>42</sup> handicapped, teens,<sup>43</sup> substance abusers, mentally ill or otherwise traditionally underserved, advocates can provide invaluable guidance.<sup>44</sup> Whether offering specific resource and program referral information, or suggesting strategies with difficult clients, advocates are often able to decrease the stress of handling such cases. Interveners must remember that when a victim recants or seeks to withdraw orders, *she is often trying to stay alive*. If we become frustrated because the victim wants to dismiss the divorce or protective order, has reunited with the abuser or is not leaving a dangerous relationship, it is helpful to say the following:

- (1.) I AM AFRAID FOR YOUR SAFETY.
- (2.) I AM AFRAID FOR THE SAFETY OF YOUR CHILDREN.
- (3.) IT WILL ONLY GET WORSE.
- (4.) I AM/ ADVOCATES ARE HERE FOR YOU WHEN YOU WANT TO TALK OR LEAVE.
- (5.) YOU DO NOT DESERVE TO BE ABUSED.<sup>45</sup>

Finally, attorneys must address domestic violence issues with their child and adult clients in order to avert claim preclusion in future tort litigation against the abuser.<sup>46</sup> Thus, while victims are encouraged to detail the domestic abuse in the divorce or other case pleadings to allow the court to make the proper safety and remedial orders, such information is exactly what impedes future litigation. Especially if child and adult victims will need on-going therapy or will incur other expenses as a direct result of the abuse, it is critical to either ensure restitution and a settlement that includes future expenses, or that the final orders allow for further tort action to cover such expenses. Furthermore, most divorce decrees include language stating specifically that the parties have resolved all matters between them, with some even delineating tort claim prohibitions.

If the child or adult victims have been emotionally traumatized, seeking compensatory as well as the punitive damages should be considered. Although doctrinal obstacles may make tort litigation against abusers more difficult, counsel is ethically obligated to fully discuss such

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<sup>38</sup> Barbara Hart, *Children of Domestic Violence: Risks and Remedies* 1 (1992) in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual (1993).

<sup>39</sup> See Leslye E. Orloff, Deeana Jang, and Catherine F. Klein, *With No Place To Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. LAW Q. 313 (Summer 1995).

<sup>40</sup> See Martha Minow, *Elder Abuse*, FAMILY MATTERS, 246-249 (1993).

<sup>41</sup> See Ruthann Robson, *Lavender Bruiser: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1994).

<sup>42</sup> See Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence*, 9 VICTIMS AND VIOLENCE 95 (1994).

<sup>43</sup> See Stacy L. Brustin, *Legal Responses to Teen Dating Violence*, 29 FAM. LAW Q. 331 (Summer 1995).

<sup>44</sup> See, Sarah M. Buel, *Working With High-Risk Domestic Violence Victims*, TEXAS PROSECUTOR 34 (March/April 1999).

<sup>45</sup> Based on the author's thirty-one years experience working with thousands of abuse victims in six states, and routinely asking victims what was helpful for them.

<sup>46</sup> Many states require that all related issues be handled in the divorce action, and certainly within the statutes of limitation, effectively precluding subsequent legal action as redress for the abuse. See, Sarah M. Buel, *Access to Meaningful Remedy: Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OREGON LAW REVIEW 945 (Fall, 2004).

options with adult battered clients and the legal guardians of child victims.<sup>47</sup> Attorneys will also want to consider tort litigation against other professionals whose improper interventions have harmed the child or adult victim, such as physicians, law enforcement officers or therapists.<sup>48</sup>

### **III. SAFETY PLANNING MUST BECOME AN INTEGRAL PART OF DOMESTIC VIOLENCE, CHILD ABUSE AND JUVENILE JUSTICE INTERVENTIONS.**

A. *Contrary to popular belief, leaving the batterer does not ensure safety.* In fact, separation violence is likely for domestic violence victims.<sup>49</sup> Attempting to leave the batterer can cause the abuse to escalate, resulting in an increased likelihood that the victim, and too often her children, will be murdered.<sup>50</sup> Similarly, children and adolescents disclosing abuse will need immediate and long-term safety planning as their perpetrators often seek to retaliate, particularly if they fail to see adults protecting the victims. Adult and child safety plans may be downloaded for free from the ABA website – these are not copyrighted and should be widely distributed throughout the community.<sup>51</sup>

B. *Safety planning must become an integral part of every intervener's work with domestic violence victims and their children, whether or not the victim remains with the perpetrator.* An abused child or adult may be forced to remain with the perpetrator, yet is obviously in great need of assistance in negotiating safety. Interveners must formulate resolutions that prioritize victim safety, while fairly handling divorce, custody, visitation, support and other assorted civil and criminal matters. The Adult and Youth Safety Plan brochures provide action steps to help victims stay alive, but have a more universal application. Courts can help by implementing a policy in which a protection order, family, criminal and juvenile cases will not be dismissed prior to an advocate completing a Safety Plan with the victim and children. Responsible interveners are advising their clients about the safety ramifications of their decisions, be they victim, offender or child.

C. *Separation abuse adversely impacts the safety of adult and child abuse victims.* Batterers frequently engage in on-going abuse during and after separation that requires child and adult safety planning over time. Domestic violence is often cited as a key factor for women ending marriages and creates continuing challenges for the battered parent.<sup>52</sup> The current legal

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<sup>47</sup> Id.

<sup>48</sup> See David T. Austern, *Strategies For Recovery In Domestic Violence Tort Cases*, 33 TRIAL 26 (August 1997); Fredrica L. Lehrmam, *Torts in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE*, 6-9 (1996); and Edwin J. Terry, Jr. and Kristin K. Proctor, *Infliction of Emotional Distress: No Justice in the 'Middle Ground,'* 27 TEXAS TRIAL LAWYERS FORUM 5 (1993).

<sup>49</sup> Barbara Hart, *supra* note 16.

<sup>50</sup> Ronet Bachman & Linda E. Saltzman, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1,4 (1995), as cited in Deborah M. Goelman, "Safety Planning," THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 2-11 (1996).

<sup>51</sup> American Bar Association Commission on Domestic Violence Web Site: [www.abanet.org/domviol](http://www.abanet.org/domviol).

<sup>52</sup> Jennifer L. Hardesty, *Separation Assault in the Context of Postdivorce Parenting*, 8 VIOL. AG. WOMEN 597-98 (May 2002).



framework offers negligible protection for most battered women whose abusers use the courts to continue their abuse. It turns out that having children with an abuser increases the post-separation danger to abuse victims.<sup>53</sup> Ignoring the high conflict inherent in domestic violence relationships, many courts assume that after divorce co-parenting is in the best interests of the children,<sup>54</sup> with seventeen states and the District of Columbia having a statutory presumption favoring joint custody.<sup>55</sup> However, many states also include presumptions against allowing sole or joint custody to batterers,<sup>56</sup> and allow the victims to opt out of what is otherwise mandatory mediation.<sup>57</sup> The problem is that because many of these legislated safeguards are relatively new, the victim's lawyer may not know about or see the merit of such options. Thus, victims may find themselves compelled to have direct contact with their batterers under the guise of child custody and visitation parenting plans.<sup>58</sup>

**D. “Custody blackmail” impairs the victim’s ability to secure a fair disposition.** Abuse victims often attempt to negotiate child custody and visitation while being physically, verbally, and psychologically abused by the batterers.<sup>59</sup> Some abusers promise to kill or severely harm the victims if they seek custody or support,<sup>60</sup> while others threaten financial ruin, child

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<sup>53</sup> M.B. Liss and G.B. Stahly, *Domestic Violence and Child Custody*, in (M. Hansen & M. Harway, eds.) *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 175 (1993) [hereinafter *Domestic Violence and Child Custody*].

<sup>54</sup> C.C. Ayoub, R.M. Deutsch, and A. Maraganore, *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 *FAMILY AND CONCILIATION COURTS REV.* 297 (1999); see also M.E. Lamb, *Noncustodial Fathers and Their Impact on Children of Divorce*, in (R.A. Thompson & P.R. Amato, eds.) *THE POST-DIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY* 105 (1999).

<sup>55</sup> See K.T. Bartlett, *Improving the Law Relating to Postdivorce Arrangements for Children*, in (R. Thompson & P.R. Amato, eds.) *THE POST-DIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY* 71 (2000); see also, the American Bar Association Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, <http://www.abanet.org/legalservices/probono/childcustody.html>, the PDF file available at [http://www.abanet.org/legalservices/probono/childcustody/general\\_dv\\_statutes.pdf](http://www.abanet.org/legalservices/probono/childcustody/general_dv_statutes.pdf).

<sup>56</sup> See, e.g., TEX. FAM. CODE (2001) § 153.004(b) “The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child. . . It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child. . . is not in the best interest of 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.”

<sup>57</sup> *Id.* at 75; see also, e.g., TEX. FAM. CODE (2001) § 153.0071(f) “A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection.”

<sup>58</sup> See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 *FAM. & CONCILIATION COURTS REV.* 273 (1999); see also Peter G. Jaffee, D.A. Wolfe, and S.K. Wilson, *CHILDREN OF BATTERED WOMEN* (1990).

<sup>59</sup> D. Kurz, *Separation, Divorce, and Woman Abuse*, 2 *VIOLENCE AGAINST WOMEN* 63, 67 (1996) (characterizing this phenomenon as negotiating in a “climate of fear”).

<sup>60</sup> See C. Shalansky, J. Ericksen, & A.D. Henderson, *Abused Women and Child Custody: The Ongoing Exposure to Abusive Ex-Partners*, 29 *J. OF ADVANCED NURSING* 416 (1999); see also T. Arendell, *FATHERS AND DIVORCE* (1995).

abduction, and/or dispute of child custody.<sup>61</sup> Batterers' willingness to use their children as bargaining chips has produced the term "custody blackmail" to describe the revenge motives evidenced during and after separation.<sup>62</sup> Often intimidated, abuse victims are forced to surrender or compromise custody and support rights,<sup>63</sup> to the detriment of the children. Empirical research documents that such fears are justified as there is a clear correlation between the severity of abuse in the course of the marriage and that which continues during and after divorce.<sup>64</sup> Under the weight of such credible threats, many battered women feel no option but to agree to waive child support in exchange for custody.<sup>65</sup> An inability to obtain child support can force abuse victims to seek public assistance, and they may become homeless.<sup>66</sup>

Interveners must consider the empirical data indicating that batterers are far more likely to engage in protracted custody battles, and, generally, are highly litigious as a means of continuing to assert control over their partners.<sup>67</sup> Sharing children with an abuser puts the victim at particular risk, as it is quite difficult to sever ties with such a persistent offender.<sup>68</sup> It is thus evident that the current legal framework affords batterers many opportunities to continue their abuse in the form of custody, visitation, support, and other litigation.

#### IV. INTIMIDATION OF CHILD WITNESSES

Many batterers do not hesitate to involve the victim's children as an effective means of witness tampering, with devastating impact on the child targets. Perpetrators bribe their children to lie about witnessing abuse, to choose batterer as the custodial parent, to report on the mother's actions, and to relay threats<sup>69</sup> and bribes to the mother.<sup>70</sup> In exchange for the mother recanting her testimony, batterers also use their children as pawns in custody, visitation, and child protection cases.<sup>71</sup> Kidnapping the children<sup>72</sup> and engaging in criminal custodial

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<sup>61</sup> See *Domestic Violence and Child Custody*, *supra* note 43; see also R.L. Hegar & G.L. Greif, *Abduction of Children By Their Parents: A Survey of the Problem*, 36 SOCIAL WORK 421 (1991).

<sup>62</sup> Hardesty, *supra* note 46 at 608.

<sup>63</sup> Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273 (1995).

<sup>64</sup> See *Separation, Divorce, and Woman Abuse* *supra* note 49; see also D. Kurz, FOR RICHER, FOR POOERER: MOTHERS CONFRONT DIVORCE (1995).

<sup>65</sup> See *Separation, Divorce, and Woman Abuse* *supra* note 49.

<sup>66</sup> M.F. Davis, *The Economics of Abuse: How Violence Perpetuates Women's Poverty*, in BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 17-30 (R.A. Brandwein ed. 1999).

<sup>67</sup> Hardesty, *supra* note 46 at 607 (reporting that abusers exert their need to control in protracted custody battles and other forms of litigation).

<sup>68</sup> L.J. Stalans and A.J. Lurigio, *Responding to Domestic Violence Against Women*, 41 CRIME & DELINQUENCY 388 (1995).

<sup>69</sup> See e.g., *People v. Rester*, 36 P.3d 98, 100 (Colo. App. 2001) (batterer called his daughter and used her to pass on a threat to her mother).

<sup>70</sup> Attorney Julia Raney, with Texas Rio Grande Legal Aid in Edinburg, Texas, speaking at University of Texas School of Law Domestic Violence Clinic conference, Feb. 29, 2008 (reporting that in her experience batterers bribe teens and adult children with promises of a car, money or payments of \$200 per week). (hereinafter "*Raney Talk*"); see generally, Peter G. Jaffe, Nancy K.D. Lemon, and Samantha E. Poisson, CHILD CUSTODY & DOMESTIC VIOLENCE, A CALL FOR SAFETY AND ACCOUNTABILITY (2003).

<sup>71</sup> See also, *State v. Kazulin*, 2004 Wash. App. LEXIS 926 (Wash. App. 2004) (batterer wrote to victim from jail, threatening to provide evidence that she was an unfit parent.)

interference<sup>73</sup> are also popular tools used by batterers to achieve victim compliance. IPV perpetrators may also threaten harm to the children if the victim does not assist him in committing crimes, thus making her a co-defendant by duress.<sup>74</sup>

Victim advocates and lawyers lament that some judges view even blatant witness tampering with children as “squabbles” that do not warrant court intervention.<sup>75</sup> This attitude reflects what Attorney Julia Raney identifies as “fundamental disbelief” on the part of law enforcement and judges regarding many batterers’ willingness to use the children as leverage in raising the stakes of obstruction with domestic violence victims.<sup>76</sup> To remedy this trend, I propose that a batterer’s witness tampering, obstruction, and/or retaliation against a child result in enhanced criminal penalties.<sup>77</sup>

Certainly, intimidation of child witnesses is also common in child sexual assault, abuse, and neglect cases. Although that separate genre is beyond the scope of this article, it is worth noting that the defendant’s tactics are similar and equally effective at inducing both compliance and long-term trauma.<sup>78</sup> In reading hundreds of witness tampering cases involving batterers’ direct harm of children as the ultimate means of influencing the abused parent, it is shocking

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<sup>72</sup> See, e.g., *State v. Bartilson*, 382 N.W.3d 479 (Iowa App. 1985) (batterer told his wife that he would not return their child to her unless she dropped her assault charge against him); *State v. Blaylock*, 2004 Tex. App. LEXIS 9440, \*4 (Tex. App. 2004) (batterer took victim’s infant child and told her that he would not return the child until she dropped her charges against him); See generally Shelly, Holcomb, *Notes and Comments: Senate Bill 140: How Much Did It Change Texas Family Code Section 153.004*, 9 Tex. Wesleyan L. Rev. 121, 125-26 (2002).

<sup>73</sup> See, e.g., *State v. Roberts*, 556 A.2d 302 (N.H. 1989) (batterer told his estranged wife that she would not get her runaway daughter back unless she refused to testify in pending sexual assault charges against him brought by another person).

<sup>74</sup> Under common law, a prima facie defense of duress requires that the defendant prove she had a reasonable belief of serious bodily injury or imminent death if she failed to comply with the batterer's demands to commit the crime. She must further show that the abuser's threat was the cause of her unlawful conduct. See Cynthia Lee and Angela Harris, *CRIMINAL LAW, CASES AND MATERIALS* 808-09 (2005) (describing duress defense). Here, a duress defense should be considered if the IPV victim is charged with perjury, accepting a bribe, or other crimes committed at the direction of the batterer; See generally Heather R. Skinazi, *Not Just a “Conjured Afterthought”—Using Duress as a Defense for Battered Women Who “Fail to Protect,”* 85 CALIF. L. REV. 993 (1997) (discussing duress as a defense in “failure to protect” cases).

<sup>75</sup> *Raney Talk*, supra note \_\_\_ (noting that especially in civil divorce, custody, and visitation matters, judges and law enforcement mischaracterize witness tampering as “squabbles”); see also, Author’s Experience (observing widespread denial and minimization of batterers’ abuse of children in the context of witness tampering).

<sup>76</sup> *Id.* (describing batterers as using children as tools to force victim recantation); see also, *State v. Parent*, 836 S.2d 494, 5000 (La. App. 2002) (batterer described in detail how he would kill the victim’s son if she testified against him.)

<sup>77</sup> e.g., The TEX. PENAL CODE § 36.06 Obstruction or Retaliation should be amended to include an added section: (d) *An offense under this section is a felony of the third degree unless the victim of the offense was child, in which event the offense is a felony of the second degree.*

<sup>78</sup> See William W. Harris, Alicia F. Lieberman, and Steven Marans, *In the Best Interests of Society*, 48 J. of CHILD PSYCHOLOGY AND PSYCHIATRY 392 (2007) (reporting that [C]hildren’s responses to trauma can render them simultaneously over-reactive, helpless and immobilized – whether as victims of abuse [or] witnesses to domestic and community violence. . . with the potential for long-lasting changes in brain anatomy and physiology.”) (hereinafter *In the Best Interests of Society*); Nat Stern and Karen Oehme, *Increasing Safety for Battered Women and Their Children: Creating a Privilege for Supervised Visitation Intake Records*, 41 U. Rich. Law Rev. 499, 515-16 (2007) (discussing the similar manner in which the perpetrator exerts control over a victim, resulting in comparable damaging effects).

how rarely courts seem outraged. Given that many who batter adult partners also harm children in the home and the concomitant system inaction, the overlap warrants legislative action in the form of enhanced penalties to signal its importance.

In *State v. Cress*, the victim's protective order petition included a sworn statement that the defendant had stalked her and tried to kidnap her children. Afterward the defendant was arrested for breaking into the victim's home. From jail, the defendant called her to say he would not disseminate pictures of her using drugs if she would "not get him in trouble."<sup>79</sup> At his behest, the defendant's mother and brother spoke to the victim about "dropping the charges" and the defendant gave his brother an extensive list of retaliatory actions he would take against the victim. After this incident but before the trial, the victim and defendant married, and she disavowed the previous sworn statement at trial.<sup>80</sup> Although the case does not specify, it is a valid assumption that victim's children were present when the defendant attempted to kidnap them, as well as when he broke into their home. Initially rejected for insufficiency of the evidence, the Supreme Court of Ohio upheld the appellate court's dismissal.<sup>81</sup>

## **V. CULTURAL COMPETENCE MUST BE REQUIRED, WITH ON-GOING TRAINING AND GUIDANCE FOR ALL INTERVENERS.**

**A. *All interveners must ensure that their staffs reflect the diversity of the communities they serve.*** Victims, offenders and their children report increased confidence in providers who look like them and share their backgrounds. It is also important that staff and clients have access to publications coming out of communities of color to provide a more balanced view. In addition to the usual *Newsweek* or *Better Homes and Gardens* magazines, offices should add those periodicals focusing on people of color, such as *Essence*, *Jet*, *Latina*, *Hispanic*, *Asian American*, *Ebony*, *Emerge*, etc. The presence of magazines from communities of color can help send the message that your office embraces diversity and is committed to being educated about how to improve its practices.

**B. *Supervisors should ensure on-going training on cultural competence.*** Without additional training, many interveners (especially whites) base their opinions on stereotypes and misinformation prevalent in our culture. The William Monroe Trotter Institute has documented that *eighty-five percent* of the information about people of color, disseminated by major media outlets, is negative.<sup>82</sup> Such biased misinformation cannot help but impact the professional decisions being made regarding hiring, firing, promotions, etc. As legal scholar Richard Delgado articulates, "white people rarely see acts of blatant or subtle racism, while minority people experience them all the time."<sup>83</sup> Thus, employers must ensure that they make available to staff publications from communities of color (a few of the mainstream ones are listed in a.), and that these are available in court and service agencies' waiting areas.

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<sup>79</sup> *State v. Cress*, 858 N.E.2d 341 (Ohio 2006) The defendant admitted to police officers that he was using the photographs as a "scare tactic against her."

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Kirk A. Johnson, MEDIA IMAGES OF BOSTON'S BLACK COMMUNITY, A RESEARCH REPORT, William Monroe Trotter Institute at the University of Massachusetts, Boston (1987).

<sup>83</sup> Delgado *supra* note 7 at 407.

Changes in U.S. immigration laws and patterns of re-settlement have substantially impacted the numbers of those foreign born interacting with the legal system. For instance, upwards of 60 percent of Asian Americans were not born in America; a rate ten times that of the U.S. population.<sup>84</sup> Thus, in some communities, many of the victims and offenders may not be familiar with the American justice system and are understandably suspicious of any governmental involvement in family matters.<sup>85</sup> Compounded by the backlash against immigrants and general attitude of intolerance toward "difference," efforts to improve interventions with families of color may be sabotaged by local bigotry.<sup>86</sup>

**C. *The disproportionate arrest, prosecution, and incarceration of youth and adults of color must be remedied.*** As is typical in many jurisdictions, Milwaukee County reports that although African-Americans constitute just 24 percent of the population, they represent 66% of the domestic violence arrests that find their way to the district attorney's office. Whites are 62 percent of the populace, but surface in just 32 percent of the domestic violence cases reviewed by prosecutors.<sup>87</sup> To its credit, Milwaukee County has established a Judicial Oversight Initiative Committee (JOIC) to address the disparity, in part by studying the city vs. suburban police responses. In the more white suburbs, the Committee found batterers were often issued municipal citations and paid fines, while those of color in the City of Milwaukee tended to be arrested, charged with state crimes and prosecuted. The JOIC Report states that, "The problem lies in the fact that it appears that some people in our community, depending on where they live, their race, ethnicity, income or occupation, are not being held to the same standard of accountability."<sup>88</sup>

Nationwide, juveniles of color comprise just 32 percent of the youth population yet constitute 67 percent of the juveniles in secure detention facilities.<sup>89</sup> Federal and state studies indicate that youth of color experience a "cumulative disadvantage" as a result of being unfairly treated at every juncture in the system. In comparing white vs. minority youth before the court for the same offenses, African American juveniles with no prior admission had a six (6) times greater likelihood of being incarcerated than did the white youth. Hispanic juveniles had a three (3) times greater chance of being incarcerated than the white youth.<sup>90</sup>

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<sup>84</sup> Karen Wang, *Battered Asian American Women: Community Responses From the Battered Women's Movement and the Asian American Community*, ASIAN LAW JOURNAL 3 (1996), as cited in Id. at p. 198.

<sup>85</sup> For more information see, *Programs, Battered Immigrant Women: Role of Advocates* (Nov. 14, 2002) <<http://endabuse.org/programs>>.

<sup>86</sup> See e.g. Charlotte Pierce-Baker, *SURVIVING THE SILENCE, BLACK WOMEN'S STORIES OF RAPE* (1998).

<sup>87</sup> David Doege, *Police practices are behind racial disparities, panel suspects*, Milwaukee J. & Sentinel 05B (August 20, 2001) 2001 WL 9374110.

<sup>88</sup> Id. Officials from the District Attorney's office, the Suburban Police Chief's association and key judges have been meeting to review domestic violence intervention practices and plan improved responses.

<sup>89</sup> *Disproportionate Minority Confinement*, JUVENILE JUSTICE BULLETIN 2, OJJDP (2002) available at (<http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf>); see also, generally, "Race as a Factor in Juvenile Arrests" <http://www.ncjrs.gov/App/Search/SearchResults.aspx?txtKeywordSearch=189180&fromSearch=1>.

<sup>90</sup> *And Justice For Some*, Report by the National Council on Crime and Delinquency, as reported in THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES' UPDATE ON "MINORITY YOUTH IN JUVENILE JUSTICE," p. 6, (Jan. 9, 2001). For example, in Texas, juvenile referrals to probation for

Similarly, adults of color face dramatically disproportionate rates of arrest, prosecution and incarceration.<sup>91</sup> While African-Americans constitute just 13 percent of all drug users, they represent 35 percent of defendants arrested for possessing drugs, 55 percent of those receiving convictions, and 74 percent of those being incarcerated.<sup>92</sup> Some states' records of disparate racial dispositions are even more pronounced, as evidenced by seven states in which African-Americans comprise 75-90 percent of all incarcerated drug defendants.<sup>93</sup> The racial disparity in arrest rates, coupled with media attention, perpetuates the misconception that whites do not use drugs as often as African-Americans, when the opposite is true. Former drug czar William Bennett clarified that, "The typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb."<sup>94</sup>

Annually, close to half of the 700,000 marijuana arrests are Latinos. Such imbalanced practices permeate every phase of the criminal justice system with little redress by powerful legal and legislative stakeholders,<sup>95</sup> and often, disastrous consequences for the convicted men of color. Criminal drug and felony convictions can preclude receipt of financial aid for college or technical schools, and result in denial of public housing, emergency financial assistance, the right to vote and apply for civil service jobs and the military.<sup>96</sup> Currently, 13 percent of African-American adult males (1.4 million) are disenfranchised by virtue of criminal convictions.<sup>97</sup>

While incarceration of all females increased eighty-eight percent from 1990 to 1998,<sup>98</sup> two-thirds are women of color, most of whom are African-American.<sup>99</sup> Of further concern, the

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misdemeanor and felony offenses also reflect a disheartening disparity based on race. Although African American youth are just 13 percent of the juvenile population, they reflect 23 percent of the juvenile referrals. 51 percent of Texas youth are white, yet only 38 percent of them have been adjudicated in the juvenile court system. Hispanic youth account for 39 percent of the referrals, and are 36 percent of the juvenile population. Fabelo, T., (2001) *Profiles of Referrals to Selected Juvenile Probation Departments in Texas*, Criminal Justice Policy Council Report prepared for the 77th Texas Legislature, p. 8.

<sup>91</sup> Deborah Small, *The war on drugs is a war on racial justice*, 68 SOC. RESEARCH (Oct. 1, 2001) 2001 WL 24181757.

<sup>92</sup> *Drugs and Human Rights. Who Goes to Prison for Drug Offenses: A Rebuttal to the New York State District Attorneys Association*. Human Rights Watch World Report, 1999. <http://www.hrw.org/campaigns/drugs/ny-drugs.htm>, site accessed December 29, 2002.

<sup>93</sup> Id. Note that California and New York annually incarcerate more Latino and African-American men than are graduated from universities and colleges. More than 94 percent of New York inmates serving time for drug offenses are Latino or African-American. At least 15 states incarcerate African-American drug offenders 20 to 57 times more often than white drug offenders. Small, *supra* note 45.

<sup>94</sup> Holly Sklar, *Reinforcing Racism with the War on Drugs*, CHAOS OR COMMUNITY? SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS (1995).

<sup>95</sup> Small, *supra* note 45.

<sup>96</sup> Id.

<sup>97</sup> *US Elections 2000-Losing the Vote: The Impact of Felony Disenfranchisement Laws*, Human Rights Watch World Report (November 8, 2000) at <http://www.hrw.org/campaigns/elections/results.htm>. Site visited Dec. 29, 2002.

<sup>98</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Special Report: Women Offenders* 6 (1999) (hereinafter *Speical Report*) as cited in Paula Johnson, INNER LIVES, VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 5 (2003).

<sup>99</sup> *Special Report, id.* at 6-7.

Bureau of Justice Statistics (BJS) predicts a *ninety-five percent* increase in the rate of imprisonment for African-American women, at the same time it projects a fifteen percent increase for white women.<sup>100</sup> Overwhelmingly, women's offenses are nonviolent, yet punitive sentencing continues to be the norm.<sup>101</sup> Additionally, from 1986 to 1991, the nation saw an 828 percent increase in the number of African-American women arrested on drug charges. Pregnant women of color are also about ten times more likely to be reported for substance abuse, though studies indicate that pregnant white women abuse drugs and alcohol at higher rates. Research has shown that drug and alcohol abuse rates are higher for pregnant White women than pregnant Black women, but Black women are about 10 times more likely to be reported to authorities under mandatory reporting laws.<sup>102</sup>

The criminal justice system's racial bias contributes to many battered women of color feeling reluctant to call the police for help; family and community must take precedent as the legal system has proven it is not one upon which she can rely for access to legal remedies, including those likely to garner safety.<sup>103</sup> It is hoped that more jurisdictions will follow the lead of Milwaukee County to remedy racial inequities. The challenge for courts and legal professionals is to balance the cultural influences with legal doctrine designed to protect victims, while holding the perpetrators responsible.

***D. All community education materials must positively reflect the rich diversity of our communities.*** All posters, brochures, PSA's, instructional videos, etc. should portray the valued diversity of the people whom we want to serve and are on our staff. As a model, the domestic violence posters from the Family Violence Prevention Fund and the National Domestic Violence Hotline not only depict people of diverse races and cultures, but are printed in several languages as well.<sup>104</sup> We must educate ourselves about the resources within our communities that are available to serve people of color and determine what are the unmet needs. For example, you will want to know if there exists a battered women's support group conducted in Spanish, or if the area needs African-American batterer's intervention counselors. Similarly, when addressing the needs of mentally ill or substance abusing litigants,<sup>105</sup> every effort should be made to ensure that interventions reflect the nexus between race, culture and discrimination against such parties. When services are race and culture-specific, they are utilized in greater numbers and with higher success rates.

## **VI. THE CORRELATION BETWEEN FAMILY VIOLENCE AND JUVENILE DELINQUENCY INDICATES THAT EARLY INTERVENTION IS ESSENTIAL.**

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<sup>100</sup> Id. at 10, table 24 (emphasis added).

<sup>101</sup> Johnson, *supra* note 36 at 6.

<sup>102</sup> Small, *supra* note 45.

<sup>103</sup> Linda A. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, WIS. L.REV. 1003, 1020 (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1243, 1257 (July 1991); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1243, 1257 (July 1991).

<sup>104</sup> You may obtain these domestic violence community education materials easily adaptable for your area from the Family Violence Prevention Fund by calling #1-800-END ABUSE or the National Domestic Violence Hotline at #1-800-799-SAFE.

<sup>105</sup> See *infra* Section V.

**A. Children who grow up in a violent family are more likely to abuse others or to be victims of abuse, as adolescents and adults.**<sup>106</sup> Those children who do not replicate the abuse generally have had at least one adult protecting them or clearly speaking out against the violence. Children need not be directly beaten in order to take on violent and delinquent behavior: it is enough for them to witness their mother's abuse. The Massachusetts' Department of Youth Services found that children growing up in violent homes had a six times higher likelihood of attempting suicide, a twenty-four percent greater chance of committing sexual assault crimes, a *seventy-four percent* increased incidence of committing crimes against the person, and a fifty percent higher chance of abusing drugs and/or alcohol.<sup>107</sup> Another study comparing youth who were delinquent vs. those who were non-offending found that a history of family abuse was the primary distinction between the two groups.<sup>108</sup> Such children are in pain and they are self-medicating in response to an adult community seemingly content to disregard the violence in our families.

**B. Adolescent and teen boys often try to protect their mother from a violent partner, particularly when they see adults failing to intervene.** One study found that 63 percent of the young men between the ages of 11 and 20 convicted of murder had killed their mother's batterer.<sup>109</sup> In *Thompson v. Oklahoma*, 15 year-old William Wayne Thompson killed his brother-in-law who had been brutalizing William's sister for years, with impunity from the authorities.<sup>110</sup> In ruling that the Eighth and Fourteenth Amendments bar executing an adult for murder committed as a 15 year-old minor, the U.S. Supreme Court acknowledged that William's motive was to protect his sister from her husband's violence.<sup>111</sup>

**C. Almost without exception, adolescents who kill are from homes with acute levels of intrafamily violence, and many have been sexually abused.**<sup>112</sup> It has been well documented for decades that these youth are often direct witnesses to and victims of sustained, extreme

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<sup>106</sup> See, Chantal Bourassa, *Co-Occurrence of Interparental Violence and Child Physical Abuse and Its Effect on the Adolescents' Behavior*, 22 J. OF FAMILY VIOLENCE 691 (November 2007) (reporting that "co-occurrence of interparental violence and child physical abuse has a significantly greater negative impact on behavior than does exposure only."); Frederica L. Lehrman, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE, 1-24 (1996).

<sup>107</sup> Susan Guarino, *Delinquent Youth and Family Violence: A Study of Abuse and Neglect in the Homes of Serious Juvenile Offenders*, Massachusetts Dept. of Youth Services Publication #14,020-200-74-2-86-CR, pp. 5, 36 (1985). Note, the Texas Youth Commission has also conducted an unpublished study documenting the high correlation between domestic violence and juvenile delinquency.

<sup>108</sup> G. Miller, *Violence By and Against America's Children*, 17 J. OF JUV. JUSTICE DIG. 6 (1989).

<sup>109</sup> Hal Ackerman, THE WAR AGAINST WOMEN: OVERCOMING FEMALE ABUSE 2 (1986).

<sup>110</sup> *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

<sup>111</sup> *Id.* at 860 (noting that "Thompson brutally and with premeditation murdered his former brother-in-law, Charles Keene, the motive evidently being, at least in part, Keene's physical abuse of Thompson's sister.").

<sup>112</sup> See, e.g., Haizlip, Corder & Ball, *The Adolescent Murderer in The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); Murray Straus, *Domestic Violence and Homicide Antecedents*, 62 Acad. Med. 446 (1986); Murray Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164 (A. Lincoln & M. Straus eds. 1985).



violence.<sup>113</sup> In their homes violence is modeled as the means by which problems are resolved and is generally considered acceptable.<sup>114</sup>

## VII. TEEN DATING ABUSE

**A. State laws rarely protect teen dating abuse victims.** Although one in three teenagers will suffer physical abuse in a dating relationship,<sup>115</sup> most legislatures provide either inadequate protections or none at all.<sup>116</sup> This lack of legal remedies poses many challenges for teens seeking help in escaping dangerous relationships. Since usually teen victims are close in age to their batterers,<sup>117</sup> protective orders should be permitted against minors. States should permit teen victims to obtain protective orders without mandating that adults be involved in the process.<sup>118</sup>

**B. Teen dating violence may predict victim and offender patterns which may continue without effective, early interventions.**<sup>119</sup> Teen batterers must be held responsible for their misconduct in order to decrease the likelihood that they will carry such notions of entitlement into adulthood.

**C. School based dating violence intervention programs should be implemented in collaboration with domestic violence advocates.** Austin's Safeplace shelter began a Teen Dating Violence Project (TDVP) in 1988, offering 24-week therapeutic peer support groups in their public schools, first just for victims, but expanding to perpetrators in 1991. Barri Rosenbluth, who directs the Safeplace School Based Intervention Programs, has used the *Expect Respect* curriculum, which teaches the warning signs of batterers, including excessive use of power and control.<sup>120</sup> Ms. Rosenbluth explains that early on she surveyed some teen victims who reported on-going, increasingly violent behavior by their partners, but an

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<sup>113</sup> See, e.g., Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 J. Am. Acad. Child Psychiatry 307, 315-18 (1979); Sendl & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 Am. J. Psychiatry 423 (1975).

<sup>114</sup> See, e.g., Murray Straus, *FAMILY TRAINING IN CRIME AND VIOLENCE* 182-84 (1985).

<sup>115</sup> Mary M. Harrison, *Equal Partners*, *TEACHING TOLERANCE* 42 (Fall 1997); *See also*, Dept. of Justice, *Bureau of Justice Statistics Special Report: Intimate Partner Violence*, (May 2000)(reporting that about one in three high school students has been or will be involved in an abusive relationship.).

<sup>116</sup> See, AL, AK, AZ, AR, CO, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MS, MO, MT, NE, NV, NM, NY, NC, ND, OH, PA, SC, SD, TN, TX, U, VT, VA, WV, and WI, as cited in Lisa Lorenz, Brandy Davis, Kavita Ramakrishnan, and Sheila Chun, *Do State Domestic Violence Laws Protect Teens?* 18 DOMESTIC VIOLENCE REPORT 1, 15 (October/ November 2007) (noting the lack of laws providing "for minor victims seeking protection from domestic and dating violence").

<sup>117</sup> U.S. Dept. of Justice, *Bureau of Justice Statistics: Intimate Partner Violence in the U.S.* (2004) (reporting that when the victims were ages 12 – 14, the abuser was under 18 in 90% of the cases; with 15 – 17 year old victims, 50% identify the batterer as under 18).

<sup>118</sup> Lorenz, et al., *supra* note 90 at 15.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

unwillingness to break off the relationships. When asked to raise their hands if they thought all men were violent, every girl responded affirmatively. It was then that the focus shifted from simply warning the victims about abusive behaviors, to teaching them how to set limits, protect themselves and expect respect and equality in their relationships.<sup>121</sup> Cisco Garcia, who now heads the *Expect Respect Project*, includes gender, race, culture, and other relevant topics as part of the revised curriculum.<sup>122</sup>

***D. Innovative interventions must be pursued.***

Barrie Levy, a psychotherapist who has written three books on teen dating violence, cautions that the signs of abuse may not be easy to detect. Some warning signs include controlling behavior, extreme jealousy, withdrawal from friends and hypervigilance toward obeying the partner's rules. Ms. Levy suggests that each partner should be approached separately if abuse is suspected, though neither partner may be willing to acknowledge the problem. Rather than trying to stop all contact, Levy cautions adults to focus on safety. For example, a teacher, probation officer, judge or advocate might say, "I understand that you love him, but I can see you're being hurt." A critical next step is to provide information and referrals for where the teen can get help.<sup>123</sup>

**VIII. BATTERERS SHOULD NOT BE AWARDED JOINT OR SOLE CUSTODY OF CHILDREN.<sup>124</sup>**

Women with children suffer IPV at more than twice the rate of those who are childless.<sup>125</sup> Data further indicates that each additional child in a home increases the chances of serious male violence by 28%.<sup>126</sup> Given that children are often either direct or indirect targets of family violence,<sup>127</sup> courts should better protect them in custody and visitation orders. Yet, abuse victims frequently report that courts minimized or ignored the violence when making custody decisions.<sup>128</sup>

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<sup>121</sup> Id. at 44.

<sup>122</sup> In 1998 Safeplace received a Centers for Disease Control grant for more than \$500,000. to expand the program to elementary, middle and high schools in the Austin area. For further information on their program, including a copy of the *Expect Respect* curriculum (\$35.), contact Safeplace at #512-385-5181.

<sup>123</sup> Harrison, *supra* note 89. at 43.

<sup>124</sup> See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VANDERBUILT L. REV. 1041 (1991) and discussion *infra* at 6e.

<sup>125</sup> A. Jones, A. Gielen, J. Campbell, J. Dienemann, J. Kub, P. O'Campo, et al., *Annual and Lifetime Prevalence of Partner Abuse in a Sample of Female HMO Enrollees*, 9 WOMEN'S HEALTH ISSUES 295 (1999) as cited in Megan H. Bair-Merritt, William C. Holmes, John H. Holmes, Jamie Feinstein and Chris Feudtner, *Does Intimate Partner Violence Epidemiology Differ Between Homes With and Without Children? A Population-Based Study of Annual Prevalence and Associated Risk Factors*, 23 J. OF FAM. VIOLENCE 325, 329 (July 2008) (hereinafter *Does Intimate Partner Violence Epidemiology Differ Between Homes With and Without Children?*).

<sup>126</sup> A. DeMaris, M. Benson, G. Fox, T. Hill and J. Van Wyk, *Distal and Proximal Factors in Domestic Violence: A Test of an Integrated Model*, 65 J. OF MARRIAGE & THE FAMILY 652 (2003) (as cited in id. *Does Intimate Partner Violence Epidemiology Differ Between Homes With and Without Children?*)

<sup>127</sup> See notes 5 and 7 and accompanying text.

<sup>128</sup> See Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do For Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 254 (1999) (noting that "Often survivors report that the abuse

**A. Men who batter their partners are likely to also abuse their children.**<sup>129</sup> One study estimated a *seventy percent* co-occurrence of partner and child abuse in violent families.<sup>130</sup> In New York, it was reported that half of the children whose mothers are abused are likely to be victims of physical abuse.<sup>131</sup> In most cases, the abuse of the children ends when the children are removed from the batterer's environment and placed exclusively with their mother.<sup>132</sup> Additionally, the more serious the battery of the mother, the more severe the child maltreatment.<sup>133</sup>

**B. After parental separation, there is increased risk that the batterer will physically, sexually and/or emotionally abuse the children.**<sup>134</sup> Post-separation, batterers will often use the children as leverage to coerce the victim to return; whether promising gifts for them or invoking guilt for depriving them of a father-figure.<sup>135</sup> Children report being routinely grilled by the batterer regarding their mother's actions, dress, social life and spending habits, in flagrant disregard for the emotional toll exacted.<sup>136</sup> Children being molested by a parent frequently do not report the abuse for some time, making prosecution and accountability extraordinarily difficult.<sup>137</sup> The typical lack of physical evidence and witnesses only

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perpetrated against their children and them was deemed irrelevant or trivial in determining permanent custody.”) hereinafter *What the Legal System Should Do For Children in Family Violence Cases*).

<sup>129</sup> Lundy Bancroft, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 239 (2002); Susan Schechter, Jon Conte and Loretta Fredrick, *Domestic Violence and Children: What Should the Courts Consider?* in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual, ed. National Council of Juvenile and Family Court Judges Family Violence Project (March 1993); Evan Stark and Anne Flitcraft, *Women and Children At Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SVCS 97 (1988), as cited in Barbara J. Hart, *Children of Domestic Violence: Risks and Remedies* (1992) in COURTS & COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY Conference Manual (1993); Holcomb, *supra* note 71, at 127.

<sup>130</sup> Suzanne H. Jackson, *Child Abuse*, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 5-17 (1996); Evan Stark & Anne Flitcraft, *Woman-Battering, Child Abuse, and Social Heredity: What is the Relationship?*, MARITAL VIOLENCE (1985).

<sup>131</sup> R. Messinger & R. Eldridge, New York Task Force on Family Violence, BEHIND CLOSED DOORS: THE CITY'S RESPONSE TO FAMILY VIOLENCE (1993); see also Mildred Pagelow (1990) *supra* note 3, reporting that more than half of those who batter their wives also abuse their children.

<sup>132</sup> Lee H. Bowker, Michelle Arbitell, and J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVES ON WIFE ABUSE (1988).

<sup>133</sup> Lee H. Bowker, Michelle Arbitell, & J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse*, in Kersti Yllo and Michele Bogard (Eds.) PERSPECTIVES ON WIFE ABUSE (1988), as cited in Barbara Hart (1992) *supra* note 16.

<sup>134</sup> *Developments in the Law—Legal Responses to Domestic Violence: Battered Women and Child Custody Determinations*, 106 HARV.L. REV. 1597, 1612 (1993); and U.S. Dept. of Justice, *Report on the Nation of Crime and Justice: The Data* (1993).

<sup>135</sup> Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 232 (1995).

<sup>136</sup> David Adams *supra* note 5 at 25.

<sup>137</sup> See, Arthur T. Pomponio et al., eds., INVESTIGATION AND PROSECUTION OF CHILD ABUSE AND NEGLECT 35 (2004) (noting that “Delayed disclosure is the norm rather than the exception with abused children.”).

compounds the difficulties, with temporal delays increasing the likelihood of destroyed evidence.<sup>138</sup>

**C. Children are traumatized by witnessing the abuse, whether their pain and rage are turned inward or vented on others.** Frequently, the children have witnessed the domestic abuse, either by being present in the same room or hearing it.<sup>139</sup> They are traumatized by seeing their parent harmed, and often express anger at themselves for not being able to protect the abused parent. Some children are furious with the abuser, while others are upset with the victim for not figuring out how to leave and protect herself and the children. After age five or six, some children may disrespect the victim for her perceived weakness, and identify with the batterer.<sup>140</sup> Still other children risk injury when intervening to try to protect their mother or siblings from the batterer.<sup>141</sup> Children who witness domestic violence demonstrate the same symptoms as physically or sexually abused children, including psychosomatic, psychological and behavior dysfunction.<sup>142</sup>

**D. Courts should presume that a batterer is not fit to be the sole or joint custodian of the children.**<sup>143</sup> Just such a presumption was *unanimously* passed by Congress in 1990, in response to the realization that too many batterers were able to present well in court and obtain custody of the children.<sup>144</sup> Most states now require, as does Texas,<sup>145</sup> that courts must consider evidence of domestic violence in making custody determinations.<sup>146</sup> In fact, Texas case law has created a *preference* that the non-violent parent be appointed managing conservator (sole physical custodian).<sup>147</sup> However, too often the courts have minimized or rationalized the abuse, as well as its impact on the children.<sup>148</sup> Thus, family advocates applaud Louisiana's 1992

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<sup>138</sup> Susan Morison & Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 Child Abuse & Neglect 595, 596 (1992) (noting the infrequency of physical or medical evidence).

<sup>139</sup> Daniella Levine, *Children in Violent Homes: Effects and Responses*, 68 FLA. B. J. 38, 62 (Oct. 1994).

<sup>140</sup> Laura Crites and Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, THE JUDGES JOURNAL (Spring, 1988).

<sup>141</sup> Davidson, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFE ABUSE PATTERN 119 (1978).

<sup>142</sup> See Phillip C. Crosby, note, *Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U.L. REV. 483, 500 (1997); Lynne R. Kurtz, note, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB.L.REV. 1345, 1350 (199); Peter Jaffe, et. al, CHILDREN OF BATTERED WOMEN, (1990); ; B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 AL. L. Rev. 1109, 1113 (Spring 1995); and D. Kalmus, *The Intergenerational Transmission of Marital Aggression*, 46 J. MARRIAGE & FAM. 11-19 (1984).

<sup>143</sup> See Kurtz, Id.; and See generally, Violence Against Women Office, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, sec. 3 (December 2, 1999) <<http://www.vae.umn.edu/Vawnet/custody.html>>.

<sup>144</sup> H. Con. Res. 172, 101st Cong. (passed 9-27-90, passed unanimously 10-25-90).

<sup>145</sup> See e.g., Texas Family Code sec. 153.004(a) mandating that the court consider evidence of domestic violence in deciding which parent should receive custody.

<sup>146</sup> Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, JUV. & FAM. COURT JOURNAL 43 (1992).

<sup>147</sup> *Lewelling v. Lewelling*, 796 S.W.2d 164, 168 (Tex. 1990).

<sup>148</sup> See, *What the Legal System Should Do For Children in Family Violence Cases*, supra note 127; see also, e.g. *Pena v. Pena*, 986 S.W.2d 696 (Tex. Appeals – Corpus Christi 1998) While the Court found that there was “uncontroverted testimony” concerning three incidents of physical violence against the mother by the father, these

amendment to its custody code, which includes the above-referenced presumption against custody to the batterer, but also specifies that the abusing parent can only obtain supervised visitation *and* must successfully complete a batterer's intervention program.<sup>149</sup> The "best interest of the child" standard requires that abusers *not* receive joint or sole custody of their children.

**E. *Contrary to popular belief, most fathers who attempt to gain custody of their children do so successfully.***<sup>150</sup> Certainly, in some of those cases the father was the more fit parent. However, in other instances the battered mother lost custody of her children because she had no access to legal counsel and did not know how to defend herself against the well-financed attorney of the batterer.<sup>151</sup> One reason this fact should scare us is that the majority of batterers grew up witnessing their fathers beating their mothers,<sup>152</sup> confirming that domestic violence is a learned behavior. Even with legal representation, it can take years for the victims to prove that the batterers used death threats, alienated the children, hid assets, and otherwise continued their pattern of total control throughout the divorce process.<sup>153</sup> In the mean time, the children are learning that violence works; it is an acceptable means to obtain what you want. Thus, the generational cycle will continue unless our children are taught, *with our actions*, that: (1.) *Most men are not violent to their partners and children;* (2.) *there is no excuse for domestic violence;* and (3.) *the abusive behavior will not be tolerated.*

**F. *Psychologists' Child Custody Recommendations Frequently Ignore Domestic Violence.*** Surveying psychologists from 39 states, researchers found that of the criteria used to make custody decisions, a history of domestic violence was seen as relevant by just 27.7% of respondents.<sup>154</sup> This study's findings are shocking given that over forty states' statutes *require* judges to consider domestic violence in custody decisions. Particularly disturbing were the

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did not constitute a pattern of abuse as they are not connected. Thus, the Court allowed the batterer to obtain sole legal custody of their children. *Id.* at 696. But *see also*, *Huesers v. Huesers*, - N.W.2d - (N.D., 1997) in which the state Supreme Court set aside the trial court's custody award to the abusive father after finding that the trial court had excused three prior incidents of domestic violence by explaining that the wife had provoked the violence; as reported in 29 JUVENILE AND FAMILY LAW DIGEST 1646 (May 1997); and based on the author's 20 years of experience working with tens of thousand of abuse victims in the courts.

<sup>149</sup> La. Rev. Stat. Ann. sec. 9.364.

<sup>150</sup> See Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?* 28 WM. MITCHELL L. REV. 601, 608 n. 37 (2001) (asserting that "Empirical studies document that batterers are more likely to seek and obtain custody than other men, often because the courts will not adequately consider past violence of the fathers."); *see also*, *Summary of Findings in Domestic Violence, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, SUPREME JUDICIAL COURT* 79 (1989) (Finding that *seventy percent* of fathers were granted custody who requested it.).

<sup>151</sup> Based on the author's thirty-one years of working with abuse victims in the courts.

<sup>152</sup> Nancy Lemon & Peter Jaffe, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, 2 (1995).

<sup>153</sup> *See e.g. Woman Gets \$18 Million In Divorce Fraud Case*, New York Times, June 15, 1997, p. 14, col. 5, describing a jury verdict awarding Joyce Lozoya \$6 million in compensatory damages and \$12 million in punitive damages against her ex-husband, Raymond Cohea Gracia. In 1989, Mr. Gracia was awarded custody of the couple's four children, though he had threatened to kill his wife if she persisted in trying to obtain custody and visitation rights, and had hidden assets.

<sup>154</sup> *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 (3) FAM. L. Q. 565 (1996), as cited in Joan Zorza, *Domestic Violence Seldom Considered in Psychologists' Child Custody Recommendations*, 2 DOMESTIC VIOLENCE REPORT 65 (June/July, 1997).

factors that custody evaluators did believe were more important than a history of abuse. 75% of the psychologists believed that sole or joint custody should not be granted to a parent who “alienate[s] the child from the other parent by negatively interpreting the other parent’s behavior.”<sup>155</sup> For psychologists without training in the dynamics of domestic violence, the abused parent’s efforts to protect herself and her children could easily be misinterpreted as intentionally alienating the batterer-parent. This in spite of the American Psychological Association’s determination that there exists no scientific basis for the theory of parental alienation syndrome.<sup>156</sup> Surprisingly, just 54.7% stated they would recommend sole custody being given to the primary caretaker, while 25% weighed economic stability as a key factor.<sup>157</sup> Clearly, it is the lawyer’s responsibility to identify and engage psychologists who have received training regarding domestic violence and its adverse impact on children.

**G. *Battered Mothers Frequently Make Many Courageous Efforts to Protect Their Children From the Abuse.*** A 1998 shelter outreach project found that one of the issues of most concern to battered women was addressing the adverse impact of the abuse on the children,<sup>158</sup> yet often the victims are blamed for being unable to stop the batterer’s violence. The Massachusetts’ Department of Social Services (DSS) Domestic Violence Unit is to be commended for their extensive efforts to identify battered mothers and provide more appropriate interventions, in the context of child protection cases. By providing on-going training to all staff, as well as regional domestic violence advocates within DSS offices, they have been able to assist many abuse victims in accessing legal assistance and other resources. Such steps can obviate the need to remove the non-abused children, while better protecting the battered mothers.<sup>159</sup>

**H. *Based solely on their status as abuse victims, battered mothers should not be denied child custody.***<sup>160</sup> In *Lewelling*, the Texas Supreme Court was clear: “We hold that evidence that a parent is a victim of spousal abuse, by itself, is no evidence that awarding custody to that parent would significantly impair the child. Any other result is contrary to the public policy of our state. . . . The legislature has also determined that removing a child from a parent simply because she has suffered physical abuse at the hands of her spouse is not in the best interests of our state.”<sup>161</sup>

**IX. ENSURE SAFE VISITATION: CHILDREN SHOULD BE EXCHANGED AND/OR SUPERVISED AT A CERTIFIED VISITATION CENTER.**

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<sup>155</sup> Zorza, Id. at 72.

<sup>156</sup> See 1 (6) DOMESTIC VIOLENCE REPORTS 11, 12 (1996), as cited in Id.

<sup>157</sup> Id.

<sup>158</sup> Edward W. Gondolf, *Service Contact and Delivery of a Shelter Outreach Project*, 13 JOURNAL OF FAMILY VIOLENCE 131, 143 (June 1998).

<sup>159</sup> For additional information, the Mass. Dept. of Social Services Domestic Violence Unit may be contacted at #617-617-727-3171.

<sup>160</sup> *Lewelling v. Lewelling*, *supra* note 47 at 168.

<sup>161</sup> Id. at 167-168.

**A. Abuse victims and children often face renewed violence in the course of visitation, necessitating lawyers and judges prioritizing safety concerns.**<sup>162</sup> In recognition of the highly volatile atmosphere in visitation settings, Louisiana is to be commended for their emphasis on victim (adult and child) safety. As previously noted, Louisiana presumes that neither joint or sole custody can be awarded to a perpetrator of adult or child abuse, but requires supervised visitation until the perpetrator has successfully completed a batterer's intervention program.<sup>163</sup> The National Council of Juvenile and Family Court Judges also proposes that abusers should be limited to supervised visitation until they have completed a certified program *and* had a batterer's expert evaluate them.<sup>164</sup>

**B. Visitation Center staff must be fully trained in the dynamics of domestic violence in order to keep the child and adult victims safe.** Well-intentioned, but ill-informed, providers can greatly endanger all parties involved. Several domestic violence victims have reported that the Kids Exchange Visitation Center allows their staff person to accompany the batterer and child *to the batterer's home* during supervised visits.<sup>165</sup> Not only is this practice contrary to the purpose of supervised visits (child safety), but also places the staff person at risk and unnecessarily creates liability for the Center. At the Center there should be guards or security personnel, as well as other employees, to ensure that the batterer stays within the limits of non-violent behavior. The more child-focused Visitation Centers, such as those in Houston,<sup>166</sup> and in Brockton, Massachusetts,<sup>167</sup> require that all staff (including the security personnel) receive training on family violence dynamics, as well as the clear policies designed with victim safety in mind.

**C. Where there is evidence of serious domestic violence, courts should assume that any visitation with the battering parent should be supervised.**<sup>168</sup> Supervised visitation must *not* be conducted by any relative or friend of the batterer, and any associated costs should be paid by the battering parent.<sup>169</sup> Further, the ABA House of Delegates on Unified Family Courts' resolution suggests that courts should: (1) ensure that children only be exchanged for visitation in protected places; (2) allow only supervised visitation (with the batterer paying costs); (3) prohibit visitation (supervised or otherwise) unless the batterer has completed a specific batterer's intervention program; and (4) allow visitations only when the batterer has abstained from possessing or consuming alcohol or drugs for a designated time prior to and during

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120 See, Karen Oehme and Sharon Maxwell, *Florida's Supervised Visitation Programs: The Next Phase*, 78 FLA. B.J. 44 (Jan. 2004).

<sup>163</sup> La. Rev. Stat. Ann. sec. 9.364.

<sup>164</sup> FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1990), reprinted in 41 JUV. & FAM. CT. J. at 17-18 (1990).

<sup>165</sup> Based on the author's own experience of victim reports.

<sup>166</sup> For further information on their "Safe Program", run by Marinelle Timmons at the Victim Assistance Centre, and their strategy of using primarily volunteers to staff the Center and structuring visits to run concurrently, call #713-755-5625.

<sup>167</sup> For further information and information on starting a Visitation Center, contact Pat Keller, Director, Brockton Visitation Center, 180 Belmont St., Brockton, MA 02401, #508-583-5200.

<sup>168</sup> Howard Davidson, *Custody and Visitation*, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, p. 14 (August 1994).

<sup>169</sup> Id.

visitations.<sup>170</sup> Additionally, when appropriate, the courts can deny overnight visitations, mandate that abusers who have threatened kidnapping must post bond to ensure the children's return, maintain confidentiality of the victim and children's address, and be open to other creative conditions which will promote victim safety.<sup>171</sup>

## **X. CHILD PROTECTION AND BATTERED MOTHERS**

### *A. Expecting Battered Mothers to Always Be Able to Protect Their Children*

Only recently has legal scholarship addressed the correlation between domestic violence and child abuse.<sup>172</sup> There is much disagreement between advocates and the public regarding whether battered mothers sufficiently protect their children from their partners' abuse. Professor Elizabeth Schneider notes that society assumes mothers should be able to shield their children from all harm and criminally penalizes those who cannot—regardless of the obstacles.<sup>173</sup> Absent from much of the child protective system's case planning and interventions are the abusive fathers.<sup>174</sup> Child protection expert Professor Jeffrey Edleson notes that the failure to include batterers in the interventions to make adult and child victims safe, renders the abusers both invisible and unaccountable.<sup>175</sup> He asks, "If child protection systems and the juvenile courts are truly concerned over safety in families, why are they usually ignoring the very person who is creating the unsafe environment?"<sup>176</sup> Edelson goes on to lament the increasing trend of charging abused mothers with failure to protect, while ignoring the empirical data indicating that batterers pose the greatest danger to children. He cites studies reporting that, "most families involved in child fatalities were two-person caretaker situations where a majority of the perpetrators were the father of the child or the boyfriend of the mother."<sup>177</sup>

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<sup>170</sup> Id.

<sup>171</sup> Conrad N. Hilton Foundation, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, MODEL CODE PROJECT OF THE FAMILY VIOLENCE PROJECT, National Council of Juvenile and Family Court judges, sec. 405 (1994), as cited in Id. (For further information on the Model Code and other issues related to Visitation, Custody and Child Protection in the context of domestic violence, contact the National Resource Center on Domestic Violence and Child Protection #1-800-52-PEACE.); See Judith Lennett, et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB.INT.L.J. 501 (Winter, 1997).

<sup>172</sup> See Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, in 1 CURRENT PERSP. IN PSYCHOL., LEGAL & ETHICAL ISSUES 195 (1990); see also V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L. J. 229 (1996); see also Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress as a Defense For Battered Women Who Fail to Protect*, 85 CALIF. L. REV. 993 (1997); see also Leslie E. Daigle, *Empowering Women to Protect: Improving Intervention With Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287 (1998).

<sup>173</sup> See FEMINIST LAWMAKING, *supra* note 15, at 157.

<sup>174</sup> Jeffrey L. Edleson, *Responsible Mothers and Invisible Men, Child Protection in the Case of Adult Domestic Violence*, 14 J. OF INTERPERSONAL VIOLENCE 294 (April 1998).

<sup>175</sup> Id.

<sup>176</sup> Id. at 296.

<sup>177</sup> Id.



Professor Bernadine Dorn cites the formidable challenges of financial dependence and fear of violent retaliation: “Fathers, step-fathers and “boyfriends,” as well as larger social institutions, are absent during the legal and moral adjudication of mothers.”<sup>178</sup> Unfortunately, however, many do not share the depth of understanding evidenced by Schneider and Dorn, as even those who might be sympathetic toward a battered woman who has killed in self-defense have little compassion for one charged with failing to protect her child.<sup>179</sup> Mothers are expected to be able to protect themselves, yet they are expected to forfeit their lives to protect their children.<sup>180</sup>

### *B. Legal Standards*

A battered woman may face removal of her children, and even termination of parental rights if she cannot stop her abuser’s violence. When defining child abuse, many states intentionally include “one whose parent knowingly allows another person to commit the abuse.”<sup>181</sup> Under this standard, a battered woman’s parental rights may be terminated if she cannot stop the abuse,<sup>182</sup> regardless of her realistic ability to do so. Child protection caseworkers and prosecutors have wide-ranging discretion in such cases, typified by the broad wording of the District of Columbia’s statute, defining an abused child as: “a child whose parent, guardian, or custodian inflicts or fails to make reasonable efforts to prevent the infliction of physical or mental injury upon the child.”<sup>183</sup>

### *C. Gender, Race, and Class Bias*

Gender, race, and class bias are prevalent in case handling of mothers charged with failing to protect their children.<sup>184</sup> For example, although Andrea Yates methodically drowned her five small children, she was not given the death penalty. The media and public focused on her status as a white, middle class suburban mother, overwhelmed by successive births, home schooling, and mental illness. There can be little doubt that if Andrea Yates had been a substance-abusing woman of color or a welfare mother, there would have been little sympathy for the causes of her

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<sup>178</sup> Bernadine Dorn, *Bad Mothers, Good Mothers and the State: Children on the Margins*, 2 UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 1,2 (1995).

<sup>179</sup> See Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability For Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579 (1998).

<sup>180</sup> See *id.* at 652 (providing example of probation officer arguing for the death penalty for a mother with no criminal record, saying “[I]n my opinion, it is atrocious for a mother not to risk her life—everything, to save her child;” this is not a stand based in black letter law).

<sup>181</sup> See Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, in WOMEN'S HEALTH, POLITICS AND POWER: ESSAYS ON SEX/GENDER, MEDICINE AND PUBLIC HEALTH 312 (Elizabeth Fee & Nancy Krieger eds., 1994) (citing New York and Connecticut as examples).

<sup>182</sup> See Marie Ashe & Naomi Cahn, *Child Abuse: A Problem for Feminist Theory*, in WOMEN'S HEALTH, POLITICS AND POWER: ESSAYS ON SEX/GENDER, MEDICINE AND PUBLIC HEALTH, 181-84 (1994).

<sup>183</sup> D.C. Code Ann. § 16-2301 (23) (Supp. 1994), as cited in Stark, *supra* note 28 at 250.

<sup>184</sup> See, e.g., Dennette M. Derezotes, *Examining Child Maltreatment and the Impact of Race in Receipt of Child Welfare Services in the United States* (2002) Report for the Family Violence Prevention Fund available at [www.mincava.umn.edu](http://www.mincava.umn.edu) (reporting that although African-American children were only 15 percent of the U.S. population in 1998, they represented 31 percent of the substantiated cases in child protection systems, and accounted for 45 percent of the out-of-home placements. Conversely, white children were 66 percent of the population, yet showed only 36 percent placements out-of-home. (*Id.* at 6)).

murderous rampage.<sup>185</sup> Race and class bias further isolate battered women, particularly those of color, whose abusers threaten to file false reports with Child Protective Services (“CPS”),<sup>186</sup> or in those jurisdictions in which police routinely notify CPS when responding to domestic violence calls in which children are visible at the scene.<sup>187</sup>

African-American children are overrepresented in the foster care system, with 38% of the total population being Black/Non-Hispanic, 37% White/Non-Hispanic, and 8% identified as “other races/ethnic origins.”<sup>188</sup> All other factors being constant, children who are Black, and to some extent those who are Hispanic, have a greater likelihood than white children of ending up in the foster care system.<sup>189</sup> Placement in foster care is thus highly raced, with African-American children facing the prospect of foster care at dramatically disproportionate rates.<sup>190</sup> While African-American children are more likely to be removed from their homes, they also have the least prospect of either family reunification or adoption. Furthermore, they remain in foster care for the longest durations, yet are most often not given necessary services.<sup>191</sup> As Professor Zanita Fenton eloquently articulates,

An honest assessment of these combined statistical effects leads us to understand that Black children in foster care or at risk of removal from their homes are the most disadvantaged. These realities concern the entire Black community and, ultimately, how the needs of its children are addressed. Meaningful and effective services for the needs of the majority of children in foster care can only be realized when these disproportionate effects visited upon the Black community are directly addressed.<sup>192</sup>

#### D. *In Re Nicholson*

Typical of the practice in many states, New York City’s Administration for Children and Families (“ACS”) routinely charged battered mothers with the offense of “engaging in

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<sup>185</sup> Bob Herbert, *Deciding who will live, who will die is never fair*, THE NEW YORK TIMES, March 18, 2002, at 18, col. 4.

<sup>186</sup> Child Protective Services (“CPS”) refers to the state agency charged with investigation and services’ provision with children who are abused or neglected, and their families. Variations on this term abound, as for example, Massachusetts calls its child protection agency The Department of Social Services (DSS). I will use the generic CPS to encompass all such agencies herein.

<sup>187</sup> See, e.g., Coker, *supra* note 149 (noting that some police departments mandate that child protective services are notified with each domestic violence call in which children are found at the crime scene).

<sup>188</sup> Nat’l Adoption Info. Clearinghouse, Foster Care National Statistics 5 (2003), available at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.pdf>; see also U.S. Dep’t of Health and Human Servs., Admin. for Children and Families, The AFCARS Report 2 (2005), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report10.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.pdf).

<sup>189</sup> U.S. Dep’t of Health and Human Servs., Children’s Bureau, National Study of Protective, Preventive and Reunification Services Delivered to Children and Their Families (1997), [www.acf.hhs.gov/programs/cb/pubs/97natstudy/raceethn.htm](http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/raceethn.htm).

<sup>190</sup> See, Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 7-10 (2002).

<sup>191</sup> *Id.* at 13 – 14.

<sup>192</sup> Fenton, *Colorblind Must Not Mean Blind to the Realities Facing Black Children*, *supra* note 10 at 86.

domestic violence,” and removed their children without the requisite court orders.<sup>193</sup> The *In Re Sharwline Nicholson, et al.*<sup>194</sup> case prompted U.S. District Court Judge Jack Weinstein to find that low-income battered women threatened with losing their children faced a Kafkaesque situation, in part because of the “sham” system of court-appointed counsel. He stressed that ACS was guilty of the “pitiless double abuse of these mothers” and had violated their constitutional rights.<sup>195</sup> Judge Weinstein’s scathing decision said these practices were rooted in “benign indifference, bureaucratic inefficiency and outmoded institutional biases.”<sup>196</sup> *Nicholson* implicates class, race, and gender bias as the majority of the *Nicholson* plaintiffs and eighty-five percent of New York City’s foster children are African-Americans, Hispanics, or immigrants.<sup>197</sup> Although it is proven that domestic violence occurs across all socio-economic strata, *Nicholson* illustrates that child protective agencies rarely intervene with affluent families.<sup>198</sup>

Judge Weinstein’s landmark decision also found that ACS often charged battered mothers with neglect solely on the basis of their being battered, and neither helped the mothers flee the abuse nor held the batterers responsible. Furthermore, ACS often placed children in foster care without good cause, failed to properly train its staff about domestic violence, and encouraged this pattern of improper conduct in its written policies. Citing violations of the Fourth, Ninth, Thirteenth and Fourteenth Amendments, Judge Weinstein also denounced ACS for its blatant disregard for the plaintiff’s due process rights.<sup>199</sup>

In addition to awarding Ms. Nicholson \$150,000, with similar amounts for the other plaintiffs, Judge Weinstein also ordered ACS to dramatically change its practices. ACS was ordered to stop taking children from battered mothers whose only “offense” was being abused,<sup>200</sup> and to coordinate with domestic violence advocates to design improvements for its handling of such cases.<sup>201</sup> Judge Weinstein specified that ACS should make reasonable efforts

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<sup>193</sup> See William Glaberson, *Removal of Children From Homes of Battered Women is Rebuked*, THE NEW YORK TIMES, March 5, 2002 at 1. (describing *In Re Nicholson*, in which Sanctuary for Families filed a class action suit on behalf of all similarly situated battered mothers).

<sup>194</sup> Memorandum and Preliminary Injunction, CV 00-2229, CV 00-5155, CV 00-6885 (March 11, 2002).

<sup>195</sup> See *id.* at 163.

<sup>196</sup> *Id.*

<sup>197</sup> Chris Lombardi, *Justice For Battered Women: Victims of Domestic Violence Defend Their Right to Keep Their Children*, 2002 WL 2210679 (July 15, 2002) (describing *In Re Nicholson*’s two-month trial that included forty-four witnesses, including Nicholson, nine other mothers in similar situations and numerous experts.)

<sup>198</sup> See *id.*

<sup>199</sup> *Child Abuse, Neglect & the Foster Care System 2002: Effective Social Work and the Legal System; The Attorney’s Role and Responsibilities*, Practicing Law Institute, Order No. C0-001M, p. 238 (March, 2002) Judge Weinstein stated that the plaintiff’s Thirteenth Amendment rights were violated when they were denied control of their children and stigmatized. *Id.*

<sup>200</sup> *In re Nicholson*, 181 F.Supp.2d 182 E.D.N.Y., Jan. 3, 2002; The court held, “(1) preliminary injunction would issue prohibiting ACS from separating a mother, not otherwise unfit, from her children on basis that, as a victim of domestic violence, she was considered to have “engaged in” domestic violence, and (2) compensation for attorneys appointed to represent mothers threatened with separation from their children was to be increased in order to allow for adequate representation of the mothers.”

<sup>201</sup> Weinstein cited ACS’s 1993 pilot “Zone C Project,” in which child abuse cases were screened for domestic violence, then created domestic violence advocate and ACS caseworker teams to intervene with the family. As a result, removals of children dropped significantly. Similarly, in 1999, a “Zone A Project” was implemented, adding the collaboration of the police and increasing the batterer’s arrests to 50 percent. At the same time, 42 percent of

to increase the safety of battered mothers and their children by removing abusers, providing shelter, and assisting victims in obtaining protective orders and prosecuting batterers.<sup>202</sup> He mandated that ACS staff receive domestic violence training and that removal of children should be the option of last resort, utilized only after ACS has made good faith efforts to safeguard the mother. To facilitate adequate representation for the battered mothers, he ordered New York State to raise its hourly rate for court appointed Family Court lawyers, doubling their compensation to \$90 per hour.<sup>203</sup> Judge Weinstein also identified model programs to which ACS could turn for guidance, such as the Dade County Dependency Court Intervention Project,<sup>204</sup> and emphasized that the protection of battered mothers is most often the best way to protect the children.<sup>205</sup>

#### *E. When the Battered Mother Will Not Protect Her Children*

Perhaps most difficult are the cases in which a battered mother will not separate from the person harming her and/or her children. For a lawyer, ethical and moral conflicts may arise as clearly counsel cannot represent both parent and child in the case, whether it is a termination of parental rights or criminal matter.<sup>206</sup> Sadly, in some cases, even after the court and a child protective agency advise the battered mother that her rights will be permanently terminated if she does not separate from the abuser, she may still be unable or unwilling to do so.<sup>207</sup> Sometimes a domestic violence shelter advocate can provide free, on-going counseling and safety planning, with the goal that eventually this abuse victim will leave her abuser. The dilemma is that if, in the mean time, the children are placed in danger, an advocate or lawyer may be placed in the position of reporting the battered woman to a child protective agency.<sup>208</sup>

Interveners should use the strongest possible language in making a battered client aware of the consequences of her actions, while being respectful and listening to the abused woman's issues. The battered mother may have such low self-esteem that she cannot imagine life without her partner, but can imagine being without her children.<sup>209</sup> In such cases, it can be

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the victims were able to obtain orders of protection. Not surprising, these improvements produced large decreases in child removals, down to just three percent of the cases. In spite of such success, the Project was discontinued. *Id.*

<sup>202</sup> Additionally, Judge Weinstein ordered that ACS create a simply written pamphlet, in English and Spanish, explaining the rights of battered women and their children in such circumstances. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Judge Cindy Lederman has established this model program in spite of Miami's challenges of extraordinarily high caseloads, rich diversity among litigants, overtaxed social services, undocumented and immigrant families, and extremely low income of its litigants. *Id.*

<sup>205</sup> This principle includes the premise that a battered mother will be afforded a myriad needed services, ranging from childcare to job training, and law enforcement to education. *Id.*

<sup>206</sup> *See, e.g., State v. Tammy S. and Jerald, supra* note 332.

<sup>207</sup> *See, e.g., Id.*

<sup>208</sup> This option is not offered without reserve and great trepidation. However, in many states counsel is a mandatory reporter of suspected child abuse and may, in addition, feel a moral compulsion to do all that is possible to protect the children. The argument follows the theme of allowing the battered mother to make whatever decisions for herself that she deems appropriate, but that, at some point, the state may need to intervene if the children's safety is jeopardized.

<sup>209</sup> *See generally, Judith L. Herman, TRAUMA AND RECOVERY* (1992);

quite helpful if the battered mother is willing to attend a support group, speak with an experienced advocate or counselor, or read brief articles about abusive relationships. For some abused mothers, this will be their first exposure to the concept of personal rights, such as hearing that she does not deserve to be abused. For those battered mothers who are also child abuse and/or sexual assault survivors, they may assume that abuse is the status quo.<sup>210</sup>

#### *F. Misapplication of Domestic Violence Theories*

Citing Lenore Walker's "Cycle Theory," some courts and child protective agencies have justified assuming the children are at risk because, once battered, the mother is likely to continue "the cycle" with either this or another abuser.<sup>211</sup> In *In re Betty J.W.*,<sup>212</sup> J.B.W. had beaten and attempted to sexual molest his daughter. Mary W., the mother, reported the abuse to a child protective agency after a few days delay, because she was unable to escape from J.B.W. In another instance in which she tried to protect her daughter, Mary was threatened with a knife and beaten.<sup>213</sup> Even so, the trial court ruled "that Mary W. failed to protect her children by failing to keep J.B.W. away and by not separating from him,"<sup>214</sup> and cited Lenore Walker's cycle theory in describing Mary's inability to leave J.B.W. On the basis of this assumption, the children were placed in foster care. Fortunately, the case was overturned on appeal by the West Virginia Supreme Court.<sup>215</sup> It is important for advocates, lawyers, and other interveners to point out that many domestic violence experts believe that the "power and control" theory of domestic violence is often a more accurate depiction of the dynamics.

#### *G. Use of Experts in Failure to Protect Cases*

Expert testimony may assist the court in understanding what may appear to be the inappropriate behavior of a battered mother charged with failing to protect her child. In *People v. Daoust*<sup>216</sup> a domestic violence expert testified that a when a victim faces persistent danger of violence, it is logical that she would lie to appease the batterer. The defendant-boyfriend, Tod Daoust, severely abused Teresa Hoppe's daughter while baby-sitting. When Hoppe suggested taking the child to the hospital to treat the injuries, Daoust threatened that he would "take care of her" and "finish" the daughter. Hoppe finally did bring her daughter to a hospital, and the staff found brain injury, serious bruising, and hot water burns. Initially, Hoppe told the police that she had disciplined her daughter and claimed not to have a boyfriend, but later acknowledged that she had accepted blame because of her grave fear of Daoust.<sup>217</sup>

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<sup>210</sup> Id. and based on the author's experience with numerous victims in such circumstances over 25 years.

<sup>211</sup> Stark, Id. See Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, in *WOMEN'S HEALTH, POLITICS AND POWER: ESSAYS ON SEX/GENDER, MEDICINE AND PUBLIC HEALTH* 312 (Elizabeth Fee & Nancy Krieger eds., 1994) (citing New York and Connecticut as examples).

<sup>212</sup> 371 S.E.2d 326 (W.Va. 1988), as cited in Id. at 250.

<sup>213</sup> Id. at 332.

<sup>214</sup> Id.

<sup>215</sup> Id. at 333.

<sup>216</sup> 577 N.W.2d 179 (Mich. Ct. App. 1998).

<sup>217</sup> *Two Recent Decisions Admit Evidence of Prior Bad Acts and Expert Testimony*, DOMESTIC VIOLENCE REPORT 85 (August/ September 1999).

Because Hoppe reported that Daoust had not *hit* her, it was considered novel that the expert testimony on Battered Woman Syndrome (BWS) was admissible, which is surprising given that Daoust had repeatedly raped Hoppe. The court was likely persuaded by evidence of Daoust's constant threats to kill Hoppe and her daughter, his extreme verbal abuse, tight control of her money and all activities, and his frequent raping of Hoppe. After the trial court convicted Daoust of second degree child abuse, he appealed, alleging that the evidence of BWS was improperly admitted. The Court of Appeals determined that the BWS was relevant and necessary to understand Hoppe's early lies about Daoust's not harming her daughter. Evidence of Daoust's prior abuse of Hoppe's daughter was also deemed admissible since it was probative of the relationship dynamics, consistent with BWS.<sup>218</sup>

Particularly in cases with unsympathetic defendants, an expert may be the battered defendant's only hope to explain her state of mind and lack of resources. In *In Re Glenn G.*,<sup>219</sup> the mother was accused of failing to protect the children from sexual abuse by their father, which sometimes occurred in her presence. The court found that not only must the mother be permitted to offer BWS as her defense but also that the charges against her would be dismissed as she had no capability to protect her children from the abuse.<sup>220</sup> While it is beyond the scope of this Article to address this issue comprehensively, lawyers representing battered women on failure to protect charges must carefully strategize the psycho-social minefields inherent in such cases.<sup>221</sup> Finally, given that most child protection staff, jurors, judges and lawyers will not understand such thinking, counsel may want to consider using an expert in cases where the battered mother is being charged with not adequately protecting her children from the abuser.

## **XI. RESPONDING TO CHILDREN AT THE CRIME SCENE**

### **A. Law Enforcement Response to Children at the Crime Scene**

1. ***Every police incident report must document both those children living in the home and those present at the crime scene.*** In reviewing hundreds of domestic violence incident reports in the early 1990's, we discovered that rarely were children mentioned unless they had been so badly beaten that they had visible injuries. In an effort to collect data on this cohort of children, it was necessary to add two boxes to incident report forms: one box to note the names and ages of children living in the home and the second to list those present at the crime scene. This distinction was necessary as there could be five children living in the home, but only two present at the crime scene because the others had been sent to a neighbor when the violence erupted or they happened to be away from home on that date. Based on the assumption that the incident to which the police are responding is not the first, every effort must be made to offer services to all children traumatized from witnessing the abuse and/or being the target.

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<sup>218</sup> Id.

<sup>219</sup> 657 N.Y.S.2d 464 (Fam. Ct. 1992).

<sup>220</sup> See id. at 470.

<sup>221</sup> For additional resources and technical assistance, counsel may contact the National Council of Juvenile and Family Court Judges' Resource Center on Domestic Violence and Child Protection at [www.ncjfcj.org](http://www.ncjfcj.org) or 1-800-52-PEACE.

**2. Talk with children alone.** The interviewed children expressed great trepidation about responding to the officer's questions in the presence of their parents. When asked if answering the officer's questions might put them at risk for retaliatory abuse, the vast majority stated that they would get beaten sooner or later anyway, and they wanted the chance to tell their story. Certainly, not all children felt safe describing the violence in their home, but a surprising number stated emphatically that they wanted officers to talk with them and seek their help.

**3. Sit at the child's level to interview.** Many of the children insisted that all the officers in Travis County were at least ten feet tall. When asked, "Don't they lean over to speak with you?" One five year-old responded, "Yes, and they have really big faces, too." Thus, the effort must be made to sit or kneel at the child's level, to establish rapport and more readily gain the child's trust.

**4. Look for children who have hidden under covers, in closets, and under beds.** In asking children what they did when the fighting started, many – particularly younger ones – hid in three primary places: under covers, in closets, and under beds. This information has been helpful for law enforcement officers who can look for the children quickly if they are not immediately visible at the scene. Further, the children asked that we warn them before pulling off the covers or opening a closet door, specifically by saying something like, "I'm an officer and I'm here to protect you. I'm going to count out loud to five and then I'll open the door."

**5. Go over the Youth Safety Plan<sup>222</sup> with the child.** Advocate Gayla Kidd collaborated with a consortium of church groups in Huntsville, Alabama to fund "911 Child Safety Bags" for children. The bags contain a children's coloring book addressing being safe in the home when violence starts, a small box of crayons, and a children's safety plan. Huntsville Police officers carry boxes of the 911 Child Safety Bags and leave one with each child when making *any* response call. The idea is that many abused and traumatized children will not come to our attention, thus leaving them with every child – regardless of the reason for the officer's presence – we increase the likelihood that dramatically more children receive the safety planning information they need.

**6. Take photos to document the child's trauma.** Children should be photographed if they have visible injuries and if they appear traumatized. For example, one officer photographed a four year-old girl who was huddled in the corner, clutching her Teddy Bear and sobbing. Although the girl could not describe to the officer what she had witnessed, her visible trauma spoke volumes to the court. At the crime scene, the girl's mother had identified her boyfriend as the person who had punched her repeatedly. On the witness stand, the mother recanted, saying that she was clumsy and sustained the bruises on her face when she fell over a coffee table. In my closing argument, I was able to hold up the photo of the four year-old and say, "Ladies and gentleman, this photo is not consistent with a child who has witnessed her mother accidentally trip over a coffee table. It is consistent with a child who has witnessed her mother get beaten up." The jury returned a guilty verdict within twenty minutes, but one juror said,

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<sup>222</sup> The Children's Safety Plan is an action plan for how to stay alive, geared to those living in a violent home. The plan can be downloaded, for free, from [www.abanet.org/domviol/pubs.html](http://www.abanet.org/domviol/pubs.html). It is not copyrighted in order to facilitate easy replication.

“We didn’t like the Mom; we couldn’t figure out why she’d lie for that guy. But we convicted because we couldn’t get the picture of that little girl out of our minds.”<sup>223</sup>

## **B. Dual Arrest Also Harms Children**

When police unnecessarily arrest both parents, children may be displaced into foster care, and removed from their schools and homes.<sup>224</sup> Understandably confused as to why their battered mother would be arrested, children can easily come to distrust a legal system that repeatedly punishes the victim.<sup>225</sup>

## **XII. THE COEXISTENCE OF FAMILY VIOLENCE AND SUBSTANCE ABUSE INCREASES DANGER TO CHILDREN.**

***A. A chemically dependent batterer needs treatment for both his decision to batter and his decision to abuse substances.*** Abusers, their families and interveners too often use the substance abuse as an excuse for the violence, focusing only on the addiction instead of the combined problems. It has been proven that batterer’s intervention programs are more effective if the substance abuse is also treated.<sup>226</sup> In this way the intervener can confront the batterer’s “denial, rationalizations and faulty logic” regarding both the violence and substance abuse.<sup>227</sup> Judges can order random urinalysis or hair tests to determine whether the batterer is abusing drugs or alcohol and if so, whether he is in compliance with the court’s order to abstain.<sup>228</sup>

***B. Interveners must utilize a screening tool to determine which batterers are substance abusers.*** Specific assessments should be in place to determine the “the nature and extent of the individual’s battering pattern and substance abuse problem.”<sup>229</sup> The screening must accurately identify the severity and pattern of substance of abuse, to assist the intervener in assessing the level of possible danger to the victim.<sup>230</sup> Such screening should occur as early as possible, whether in a juvenile or family drug court, probation or parole intake units, or batterer’s intervention program.

***C. Since the victim is at greater risk for serious injury if the batterer is chemically dependent, all safety planning must include screening for such behavior.*** One study found that, at the time of committing their crimes, 60% of the batterers were under the influence of alcohol,<sup>231</sup> while another found that fully 92% of victims report that their batterers used drugs

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<sup>223</sup> I handled this case as a prosecutor in Norfolk County, MA. in 1991.

<sup>224</sup> See, Laurel A. Kent, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 Wis. L. Rev.1337, 1355 (2001).

<sup>225</sup> Id.

<sup>226</sup> Oriel, *supra* note 6, at 495 ; and Gorney, *supra* note 6, at 229.

<sup>227</sup> See Gorney, *supra* note 6 at 235.

<sup>228</sup> In Travis County, Texas courts many judges will order immediate urinalysis tests to determine if a litigant has used substances, and if such tests indicate continuing use, random tests are then ordered for the future.

<sup>229</sup> Albert R. Roberts, *Substance Abuse Among Men Who Batter Their Mates*, 5 J. SUBSTANCE ABUSE TREATMENT 87 (1988).

<sup>230</sup> See Gorney, *supra* note 6, at 232.

<sup>231</sup> Roberts, *supra* note 6, at 85.



or alcohol on the day of the offense.<sup>232</sup> Furthermore, men who drink heavily are more likely to commit violence crimes than those who do not.<sup>233</sup>

***D. Pre-release and sentencing conditions should include provisions addressing any substance abuse matters given that drunkenness dramatically increases recidivism.*** The judge can order that the batterer is prohibited from using drugs or alcohol,<sup>234</sup> whether the offender is an adult or juvenile. Recent studies indicate that even one episode of inebriation during the first three months after sentencing makes the batterer *three and a half times more likely to reassault* his partner.<sup>235</sup> When compared with abusers who seldom drank, those who drank on a daily basis were *sixteen times more likely to batter* their victims again.<sup>236</sup> Interestingly, researchers found that employment status of the offenders did not have an impact on their likelihood of recidivism.<sup>237</sup> The judge will also want to seriously consider ordering the substance abusing batterer into treatment, as participation of such services decreases the risk of renewed violence by *thirty to forty percent*.<sup>238</sup>

***E. Depression or mental illness in combination with chemical dependency significantly increased the likelihood of the user battering his children and/ or partner.*** When the abuser was alcoholic and had either antisocial personality disorder or recurrent depression, researchers found an 80 to 93% rate of violence.<sup>239</sup> Another study reported that severe psychopathology increases the probability of re-assault two fold.<sup>240</sup> For the batterer who grew up in violent home, alcohol abuse raised the chances of repeating the violence.<sup>241</sup>

***F. Chemically dependent victims are usually at greater risk for further harm, whether they are abusing prescription, over-the-counter or street drugs.***<sup>242</sup> Substance abusing victims are often forced to return to the batterer, since many shelters will not accept alcoholics or addicts.<sup>243</sup> One study found a higher rate of substance abuse among battered women,<sup>244</sup> but

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<sup>232</sup> Daniel Brookoff, et al., *Characteristics of Participants in Domestic Violence Assessment at the Scene of Domestic Assault*, 277 JAMA 1369, 1371 (1997).

<sup>233</sup> Oriol, *supra* note 6, at 495.

<sup>234</sup> Most states' statutes include general language similar to Texas, where a judge may order the abuser to "perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence." TEXAS FAMILY CODE 85.022(a)(3).

<sup>235</sup> Alison Snow Jones and Edward W. Gondolf, *Time-Varying Risk Factors for Reassault Among Batterer Program Participants*, 16 J. of FAMILY VIOLENCE 345 (December 2001).

<sup>236</sup> *Id.* at 353.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 355.

<sup>239</sup> Donald G. Dutton, THE DOMESTIC ASSAULT OF WOMEN, PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 13 (1988).

<sup>240</sup> Jones and Gondolf, *supra* note 196 at 355.

<sup>241</sup> Oriol, *supra* note 6, at 496.

<sup>242</sup> See Jeanne McCauley, et al., *The "Battering Syndrome": Prevalence and Clinical Characteristics of Domestic Violence in Primary Care Internal Medicine Practices*, 123 ANNALS OF EMERGENCY MED. 737, 741 (1995); and See Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must be Aware to be Effective*, 264 JAMA 940, 943 (1990).

<sup>243</sup> Margaret Parrish, *Substance Abuse, Families and the Courts*, 3 J. HEALTH CARE L. AND POL'Y 191, 205 (1999). However, Tulsa's Domestic Violence Intervention Services is a model shelter in its provision of services to chemically dependent abuse victims. For more information, they can be reached at 918-585-3170.

that the vast majority of victims did not abuse drugs or alcohol.<sup>245</sup> Most of the users started drinking in response to the domestic violence.<sup>246</sup> When the interveners are unresponsive, hostile, blaming or otherwise unwilling to assist the victim, the victim's hopelessness can precipitate self-medication. White and Native American women showed higher rates of alcoholism than African American or Hispanic women.<sup>247</sup> However, even battered women who were not addicted, but had been drinking when the abuse occurred, were less likely to find sympathy in the courts.<sup>248</sup>

## **XII. FAMILY MEMBER'S MENTAL HEALTH ISSUES MUST BE CONSIDERED IN CRAFTING INTERVENTIONS TO PROTECT CHILDREN IN VIOLENT HOMES.**

A. *Batterers with thought disorders have an elevated probability of committing renewed violence against their victims.*<sup>249</sup> As mentioned previously, when depression or other mental illnesses are combined with substance abuse, the rate of violence ranged from 80 to 93 percent,<sup>250</sup> thus indicating the need for early identification of both problems.

B. *Child and adult victims encumbered with mental health disorders have a more difficult time staying safe.* Much research has documented that prolonged stress can permanently harm neurons in the hippocampus, a part of the brain involved with memory. However, studies have also shown that antidepressants can reverse the stress-induced harm to the cells by stimulating growth of hippocampal nerve cells.<sup>251</sup> This is important information not only for lawyers to be able to relate to judges and probation officers, but also to share with the battered offenders who may be helped by taking antidepressants and/or seeing a therapist. Battered women are over-represented among those suffering from depression, and, not surprisingly, those incarcerated report even higher levels of mental illnesses.<sup>252</sup>

Many interveners complain that some battered women seem to enter into successive abusive relationships, as though victims choose batterers. Rather, several decades of research indicate

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<sup>244</sup> Id. at 742; and see Glenda Kaufman Kantor & Murray A. Straus, *Substance Abuse as a Precipitant of Wife Abuse Victimizations*, 15 AM. J. DRUG & ALCOHOL ABUSE 173, 179 (1989).

<sup>245</sup> Kaufman & Strauss, Id. at 179.

<sup>246</sup> See Randall *supra* note 203, at 943.

<sup>247</sup> Margaret E. Goldberg, *Substance Abusing Women: False Stereotypes and Real Needs*, 40 SOCIAL WORK 789, 791 (1996).

<sup>248</sup> See Murphy & Potthast, *supra* note 6, at 94 (1999); and Deborah Capasso Richardson and Jennifer L. Campbell, *Alcohol and Wife Abuse: The Effect of Alcohol on Attributions of Blame for Wife Abuse*, 6 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 51, 53 (1980).

<sup>249</sup> Jones and Gondolf, *supra* note 99 at 349. See also, D. Saunders, *Prediction of Wife Assault in J. Campbell, ASSESSING THE RISK OF DANGEROUSNESS: POTENTIAL FOR FURTHER VIOLENCE OF SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS*, pp. 68-95 (1995); and R.M. Tolman and L.W. Bennett, *A review of quantitative research on men who batter*, 5 J. of INTERPERSONAL VIOLENCE pp. 87-118 (1990).

<sup>250</sup> Dutton, *supra* note 103 at 13.

<sup>251</sup> Erica Goode, *Antidepressants Lift Clouds, But Lose 'Miracle Drug' Label*, THE NEW YORK TIMES, June 30, 2002, p. 18, col. 3.

<sup>252</sup> Angela Browne, *Violence Against Women By Male Partners: Prevalence, Outcomes, and Policy Implications*, 48 AM. PSYCHOL. 1077 (1993); see also, M.C. Astin, K.J. Lawrence, and D.W. Foy, *Posttraumatic Stress Disorder Among Battered Women: Risk and Resiliency Factors*, 8 VIOL. VICTIMS 17 (1993).

that victims in multiple violent relationships show elevated rates mental illness, such as of self-defeating personality disorders, depression, and Post Traumatic Stress Disorder (PTSD).<sup>253</sup> Since childhood physical and sexual abuse increase the risk of PTSD,<sup>254</sup> counseling interventions should address the lifespan of abuse. As might be expected, the length and severity of the abuse appear to directly correlate to the degree of depression and mental illness. Those battered women with chronic and severe personality disorders are more likely to have been raised in violent families, and tend to stay with a batterer longer.<sup>255</sup>

#### **XIV. CHILDREN ARE ADVERSELY IMPACTED BY INADEQUATE CHILD SUPPORT.**

**A. *A primary cause of child poverty in the United States is the nonpayment of child support.*** More than 80 percent of all non-custodial parents either pay nothing or less than 15 percent of their income for child support.<sup>256</sup> Currently, approximately \$35 billion in child support is owed to our children.<sup>257</sup> The Office of Management and Budget (OMB) warns that were child support orders fully enforced, child poverty could be reduced by 47 percent.<sup>258</sup>

**B. *The number one reason that abuse victims return to the abuser is a lack of financial resources.*** Obtaining the child support not only increases the likelihood that the children will be taken out of poverty, but also that they will not be again forced to return to the violent home with their mother. For too many domestic violence victims, the child support check is all that keeps them off welfare/TANF, for their minimum wage employment cannot sustain even a family of two. Tennessee provides just \$185 for a parent with two children and Texas allows \$228., while more than half of all states pay less than \$400. per month for a family of three.<sup>259</sup> Given that the federal poverty guidelines are being revised from \$16,000. per year for a family of four up to \$19,000., it is understandable that welfare is an appealing option for domestic violence survivors.

**C. *Batterers often use nonpayment of child support as a means of harassing the victim and forcing her to return.*** Pennsylvania found that the most common factor among those men who did not pay child support was their shared propensity for committing domestic violence

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<sup>253</sup> Frederick L. Coolidge and Laura W. Anderson, *Personality Profiles of Women in Multiple Abusive Relationships*, 17 J. of FAMILY VIOLENCE 117 (June 2002); The authors explain that behavior may rise to the level of a personality disorder by virtue of the “symptoms’ pervasive, enduring, and disrupting consequences.” Id. at 129.

<sup>254</sup> Id. at 120.

<sup>255</sup> Id. at 119.

<sup>256</sup> Jessica Pearson & Esther Ann Griswold, *A Preliminary Look at Client Experiences with the Good Cause Exemption to Child Support Cooperation Requirements*, 2 DOMESTIC VIOLENCE REPORT 1 (June/July 1997).

<sup>257</sup> Richard Wolf, *Welfare’s Problem Child, The Difficulty of Tracking Down Deadbeat Parents and Enforcing Child Support Is Threatening Efforts to Get Welfare Families Back On Their Feet*, USA TODAY, June 16, 1997, p. 3A, col. 2.

<sup>258</sup> OMB child support

<sup>259</sup> Peter T. Kilborn, *Welfare All Over the Map*, *The New York Times*, December 8, 1996, p. E3, col. 1. Note that most of the states providing higher benefits are in the north, where heating and winter-related costs negate the small differential.

crimes.<sup>260</sup> Thus, the “get tough” approach to child support enforcement is particularly necessary with batterers because they are the most willing to use the withholding of payments to further harass, threaten and frighten their victims.<sup>261</sup>

**D. Regular child support payments can obviate the need for public assistance.** As is logical, the battered mother who is a custodial parent has an easier time maintaining employment and is less likely to need welfare assistance if the children’s father is regularly paying child support.<sup>262</sup> When attempting to leave welfare, consistent child support payments can also expedite the transition if they become a reliable income stream.<sup>263</sup>

**E. Swift, sure sanctions for nonpayment of child support have proven quite successful.** Tulsa’s Judge Linda Morrissey reports an amazing 93% collection rate, within thirty days, for employed batterers. She says that if they do not comply with the court’s child support order within one month, they are sent to jail. For those unemployed, Judge Morrissey requires that they produce written documentation of their good faith efforts to obtain a job.<sup>264</sup> She argues that if court orders are not fully enforced in a timely manner, the non-paying parent rightly assumes there is no need to comply. If, on the other hand, the county jail awaits those unwilling to support their children, it is far more likely that the payments will be forthcoming.

**F. Child support enforcement agencies can do much to increase victim safety and facilitate timely collection.** First, the forms package for requesting assistance in the collection of child support must be greatly simplified and standardized across the country. The problem is exacerbated by the fact that virtually every form of public assistance also requires prolific forms, from public housing, unemployment, free/reduced lunch, W.I.C., and welfare, to day care, social security disability, Medicaid, and food stamps. One form could be used to apply for all public assistance, with *limited* additional forms added for programs needing other specific information. The forms must also be available in Spanish, and, to the degree possible, in other languages represented in the client community.

*Second*, each case with a history of domestic violence should be flagged as high risk, triggering safety planning by the child support case staff, referrals to local support services, and notice to the court to take reasonable steps to protect the victim.

*Third*, the state agency must expedite the payment process, ensuring that they collect the money and monitor enforcement. For example, New Hampshire law allows that any party in a domestic violence case may request that the child support payments be made to the New Hampshire Division of Human Services (DHHS). Neal Carter, Supervisor of the Office of Program Support for the Claremont Office of D.H.H.S., makes it part of standard operating

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<sup>260</sup> Interview with Barbara Hart, Legal Counsel for the Pennsylvania Coalition Against Domestic Violence, October 4, 1996.

<sup>261</sup> *Id.*, based on the study conducted by PCADV.

<sup>262</sup> Carl Formoso, *The Net Impact of Child Support Payments on Work and Welfare Outcomes in Washington State*, 12 CHILD SUPPORT REPORT 6 (December 2000).

<sup>263</sup> *Id.* at 7.

<sup>264</sup> Presentation by Judge Linda Morrissey, Oklahoma Domestic Violence Conference, May 2, 1997, Tulsa, Oklahoma.

procedure to have payments made through their office. Mr. Carter believes this takes from the victim the possibly dangerous task of trying to collect support payments, and relieves the batterer of the temptation to further harass the victim by making late payments or none at all.<sup>265</sup>

*Fourth, client intake must include a screening mechanism to identify abuse victims and ensure they are not penalized if they are unable to disclose their batterer's whereabouts.* The intake staff must *initiate* questions about abuse of adults and children in the household (or relationship) during the first meeting, in order to assess the immediate safety issues. With any client reporting prior or current abuse, a civil protection order should be discussed in the context of completing a SAFETY PLAN, then referring the victim to local domestic violence programs.

Fifth, on-going client services must include safety planning. Contrary to popular belief, leaving the batterer does not ensure safety. In fact, separation violence is likely.<sup>266</sup> Attempting to leave the batterer can cause the abuse to escalate, resulting in an increase in the likelihood of the victim being murdered.<sup>267</sup> Since the child support staff may be the only persons with whom the victim has outside communication, it is necessary to integrate safety planning into every contact. ***Safety planning must become an integral part of every child support staff member's work with domestic violence victims and their children, whether or not the victim later returns to the perpetrator.*** Safety planning should take place with every contact, including phone and in-person conversations. This need not be overly burdensome, but, similar to protocols instituted within the medical and mental health communities, the victim would be asked, "Have you been hit or scared since the last time I saw you?"<sup>268</sup>

The attached Safety Plan brochures, for adults and youth,<sup>269</sup> provide action steps to help victims and children stay alive, but have a more universal application. Child support offices could, in their recorded message, offer to send an Adult or Youth Safety Plan, and routinely include a Safety Plan with mailings to applicants. Staff can encourage the Courts to implement a policy in which a child support order, protection order, family or criminal case will not be dismissed prior to an advocate completing a Safety Plan with the victim. Staff must have policies which prioritize victim safety, while fairly handling the enforcement efforts.

*Sixth, child support staff should collaborate with the courts and advocates to ensure that protective orders include adequate child support.* The Claremont, N.H. Office of Child Support

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<sup>265</sup> Neal J. Carter, CREATING A WORKING RELATIONSHIP BETWEEN CHILD SUPPORT & DOMESTIC VIOLENCE SUPPORTIVE SERVICES, Office of Child Support Enforcement, New Hampshire Dept. of Health & Human Services, Claremont, N.H., p. 2, Sept. 4, 1997.

<sup>266</sup> Barbara Hart, *supra* note 16.

<sup>267</sup> Ronet Bachman & Linda E. Saltzman, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1,4 (1995), as cited in Deborah M. Goelman, "Safety Planning," THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, THE AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, 2-11 (1996)..

<sup>268</sup> Safety planning should take place with every contact, including phone and in-person conversations. This need not be overly burdensome, but, similar to protocols instituted within the medical and mental health communities, the victim would be asked, "Have you been hit or scared since the last time I saw you?"

<sup>269</sup> See *infra* note 15 for information on obtaining Safety Plans.

Enforcement has worked closely with local domestic violence programs and assisted with inter-agency trainings to ensure that the protection orders not only included provisions for child support, but specified the amount.<sup>270</sup>

*Seventh, child support staff can collaborate with the courts and domestic violence advocates to ensure that the child support provisions of the protective order are made into permanent orders.* The Claremont, N.H. Office of Child Support Enforcement has adopted a policy of taking each protective order and immediately opening the case to facilitate enforcement. One critical step the Office takes is to make the protective order into a permanent order. Usually this involves filing a motion in Superior Court, incorporating the protective order with any arrearages which exist, then entering a new Superior Court order for ongoing support. The Superior Court's child support order can be added to the divorce decree.<sup>271</sup>

Similarly, Judge Bill Jones, one of four Domestic Violence Court judges in Charlotte, North Carolina, reports that two days per week they have a child support enforcement staff member present in their courtroom. All protection order and other cases that involve child support are set for those days, thus, best utilizing all staff time. Judicial economy is achieved by freeing the judges to handle the safety and other legal matters. Paternity acknowledgment can be accomplished on the spot, with support amount determined and wage withholding forms filed. Their child support enforcement office then files that child support action as its own *permanent* case, enabling the child support order to remain in effect past the one year expiration date of the protective order. Victims appreciate the "one stop shopping" approach, allowing them to obtain child support along with the protective order and/or other civil remedies.<sup>272</sup>

## **XV. MUTUAL PROTECTIVE ORDERS PLACE CHILDREN IN GREATER DANGER.**

A. *The legislative intent of protective orders is to prevent further harm to the true abuse victim(s).* The court must be careful to only provide relief to the injured party. While this may sound obvious, some batterers are able to obtain mutual orders simply by saying, "I want her to stay away from me, too." Sometimes counsel for both parties will stipulate to mutual orders as it may appear to be a harmless concession. However, mutual orders are problematic for *all* parties involved: it can be a set-up for the abuser who is much more likely to re-offend without the clear prohibition. For the true victim and children, their safety is needlessly compromised.

B. *Mutual protective orders are problematic for the police to enforce, as it is difficult for them to ascertain who is the true abuse victim.* Law enforcement officers should not be placed in the position of attempting to determine which party deserves the protection and which one should be arrested for abuse. Often responding late at night or on the week-end, and hampered by time and staffing constraints, officers must be provided with clear orders if we expect them to protect the victims.

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<sup>270</sup>Neal Carter, *supra note* 110 at 1.

<sup>271</sup>*Id.* at 3.

<sup>272</sup> Judge Bill Jones presentation at "Effective Responses to Family Violence: National & Local Perspectives" Conference at Florida Coastal Law School, Jacksonville, FL., April 15, 1998.

**C. Children are further traumatized when they fail to see the true victim provided protection and witness the batterer gain powerful leverage via a mutual order.** Not only is the adult victim endangered by mutual orders, but the children also are placed at greater risk for future harm. Our children need to see that the laws will protect them in their homes as well as on the street, regardless of how smooth the batterer is. The court allows the batterer to successfully nullify the protective order's possible safety net when mutual orders are permitted.

**D. Since victims are often condemned for staying with the abuser or requesting to dismiss orders, the victims brave enough to seek protection should be treated seriously.** Unless the court finds that mutual combat has taken place,<sup>273</sup> and absent one party acting in self-defense, orders issued to both parties will have a chilling effect on the true victim coming forward for help again.

## **XVI. MEDIATION TOO OFTEN IGNORES CHILDREN'S SAFETY ISSUES.<sup>274</sup>**

**A. Regardless of the mediator's skill, the victim is endangered for disclosing any information about the batterer's behavior.** Since there is little the victim can reveal without fear of retaliation, the mediator's attempts to negotiate a peaceful resolution can only be viewed as disingenuous. The power imbalance between victim and offender is too great: what is the victim supposed to give in exchange for safety?<sup>275</sup> Custodial interference and prolonged custody battles are common tactics of batterers after separation. The victim must have a forum which will treat the renewed abuse seriously and make clear to the batterer that his behavior will not be tolerated.<sup>276</sup> We do not mediate civil rights' offenses because persons of color have a *right* to be free from abuse *and* the offender is to receive the unequivocal message that racist behavior will not be tolerated. If the court insists that mediation must occur, ensure that the victim and offender are not in the same room,<sup>277</sup> and that the parties have legal counsel present.<sup>278</sup>

**B. Batterer's experts report that most batterers will not negotiate in good faith.** Mediation relies on the assumption that both parties will enter all agreements with the intention of compliance. However, since batterers operate on the premise that they are *entitled* to use violence to achieve their goals, mediation is an inappropriate venue to attempt resolution of

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<sup>273</sup> Det. Charles Masino, Chief of the Phoenix Police Dept's Domestic Violence Unit, states that mutual combat arrests should occur in no more than 3% of the arrests, and that even that number is probably too high, and that mutual orders place the officers at greater risk because the abuser has not been given a clear message.

<sup>274</sup> Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAMILY AND CONCILIATION COURTS REV. 335 (July 1999); and *infra*.

<sup>275</sup> Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 322 (Summer 1990); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOM. L.J. 272 (1992).

<sup>276</sup> *Id.*

<sup>277</sup> Harvey I. Hauer, *Making Mediation Work*, FAMILY ADVOCATE, American Bar Association's Family Law Section Journal, p. 27 (Spring 1997).

<sup>278</sup> Unrepresented women tend to feel coerced and have greater difficulty participating. Eric Galton. MEDIATION: A TEXAS PRACTICE GUIDE p. 100 (Texas Lawyer Press, 1993), as cited in Melanie Kane-Gonzales, *supra* note 83 at 28.

domestic violence.<sup>279</sup> Given that most mediators are not familiar with the complex dynamics of family violence and the batterer's relentless persecution of the victim, without sufficient, ongoing training mediators cannot be expected to effect safe resolutions.<sup>280</sup>

**C. State's Alternative Dispute Resolution Statutes should be amended to prohibit mediation in cases involving domestic violence, subsequent to confidential screening of incoming cases.** A case in point is the policy statement of the Texas Alternative Dispute Resolution Statute, which rightly encourages amicable resolutions of disputes, with particular emphasis placed on conservatorship, possession and child support matters.<sup>281</sup> Although there now exists a provision for abuse victims to opt out,<sup>282</sup> too many lawyers are unaware of the pitfalls of mediation, thus endangering their clients. Such provisions lead many courts to mistakenly assume they need only refer contested family matters to mediation.<sup>283</sup> While Texas mediators must complete a 40-hour training, with an additional 24 hours of instruction for those dealing with family cases,<sup>284</sup> "domestic violence" is not a required component. Further, since there is no state or private entity to certify completion of the trainings or to accredit the programs, one should be designated with input from experienced domestic violence case practitioners.

**D. For all the same reasons listed in A, B and C, couple's counseling is also dangerous and ill-advised.** Battered women's advocates have long opposed mediation in domestic violence cases, largely for safety reasons.<sup>285</sup> It has, therefore, been difficult to understand why some legal advisors would then refer their battered and batterer clients for couple's counseling where the same power imbalance and lack of protections exist.

## **XVII. ECONOMIC EMPOWERMENT OF THE ADULT VICTIM INCREASES CHILD SAFETY.**

**A. Given that the lack of money forces many victims to return to the perpetrator, attorneys and courts must provide information about achieving economic self-sufficiency.** Part of improving our interventions with abuse victims and offenders is to expand the notions of what constitutes the practice of law; to make the driving force the response to the question, "What action will increase victim safety?"<sup>286</sup> For many victims, part of that answer lies in their need for money. Thus, a critical component of safety planning is economic empowerment.

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<sup>279</sup> David Adams, *supra* note 5.

<sup>280</sup> Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2131-32 (1993).

<sup>281</sup> V.T.C.A. Civil Prac. and Rem. Code sec. 154.002.

<sup>282</sup> INSERT LAW

<sup>283</sup> See e.g. the Travis County standing order that all jury trial cases, and those non-jury matters longer than half a day, must be referred to mediation. "Order concerning Mediation of Cases Set on the Merits, Travis County District Clerk's File No. 121,012 In the District Courts of Travis County, Texas, pg. 1 (1998); Currently 29 states allow some form of mediation in divorce cases. Rita Henley Jensen, *Divorce- Mediation Style*, 83 ABA JOURNAL 56 (February, 1977).

<sup>284</sup> V.I.C.A. *supra* note 125 at sec. 154.052.

<sup>285</sup> Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39, 44 (1990).

<sup>286</sup> Attorney Loretta Fredrick, speaking at Minnesota Legal Services Domestic Violence Conference, August, 1994.



**B. While domestic violence spans all income groups, fleeing it is exacerbated by lack of financial resources and job skills.** Upper income abuse victims often report that the perpetrator controls all the finances, intentionally precluding access to even minimal living expenses. Without information about job and educational opportunities, too many victims are forced to return to the abuser. It is imperative that all interveners incorporate into their practices a mechanism for asking victims about their economic status, their life plans and then, creating a step-by-step “action plan” to achieve financial independence. Children, teens and some batterers can also benefit from this process. Many professionals, such as attorneys (whether prosecution, defense, family or other), physicians (whether surgeons, pediatrician, obstetrician-gynecologists or other), and a range of professionals may initially think that it is beyond the purview of their job to delve into matters of economic empowerment with abuse victims or offenders. However, if life-planning is the best mechanisms to achieve safety, that professional then has the legal obligation to engage in such a process and make appropriate referrals.

**C. Even as an emergency resource, welfare benefits are increasingly unavailable to domestic violence victims, making efforts at economic empowerment all the more necessary.** Welfare programs fail to provide enough money with which to support a family of any size, given that three-quarters of the states pay less than \$400. per month in benefits for a family of three. Additionally, when adjusted for inflation, every state has reduced their welfare benefits from 1970 to 1996, ranging from Texas slashing theirs by 68 percent to California cutting 18 percent. Currently, a family of three in Tennessee receives just \$185. per month, Texas provides \$201. per month in welfare benefits, while the same family in Washington state would get \$546.<sup>287</sup> Not surprising, then, that for women and children, family violence is the leading cause of homelessness and poverty.<sup>288</sup> In the climate of current backlash against the poor, true reform offering meaningful job and education counseling, training and connections must be insisted upon from our government and the private sector. It is incumbent upon the community to ensure that the focus shifts to enable victims to *empower themselves*, utilizing the resources made available through the above initiatives, including *affordable* and safe child care.

## **XVIII. EFFECTIVE BATTERER’S INTERVENTIONS PROGRAMS MUST ADDRESS THE HARMFUL PARENTING BEHAVIOR OF ABUSERS.**

Batterer’s intervention programs should not be viewed as a panacea, particularly without other community support services in place.<sup>289</sup> Certainly, they have a greater chance of reducing

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<sup>287</sup>Peter T. Kilborn, “Welfare All Over the Map,” *The New York Times*, December 8, 1996, p. E3, col. 1. Note that most of the states providing higher benefits are in the north, where heating and winter-related costs negate the small differential.

<sup>288</sup> U.S. GAO, GAO/HEHS-95-28, WELFARE TO WORK 12 (1994); WASHINGTON STATE INST. FOR PUB. POLICY, OVER HALF OF THE WOMEN ON PUBLIC ASSISTANCE IN WASHINGTON STATE REPORTED PHYSICAL OR SEXUAL ABUSE AS ADULTS (1992); Jody Raphael, *Domestic Violence and Welfare Reform*, POVERTY & RACE, Jan./Feb. 1995, at 19; Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991); Maria Arias, *Lack of Housing for Domestic Violence Victims*, N.Y. L.J., July 26, 1988, at 3 (reporting that between 35% to 40% of the homeless population of New York City consists of battered women and their children); see B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 SOC. WORK 350 (1985). As cited in Lynn Hecht Schafran, *There’s No Accounting For Judges*, 58 ALB. L.REV. 1063, 1074 (1995).

<sup>289</sup> Contact the Battered Women’s Justice Project for information about reputable batterer’s intervention programs and general information regarding batterers: #1-800-903-0111.

recidivism if the police and courts treat domestic violence seriously and will ensure that sanctions result from violations. Batterer compliance with court orders appears largely predicated on the *system* in place: that is, swift and sure response to the violence, continuing court review of his behavior or dedicated probation monitoring, and periodic risk assessments.<sup>290</sup> Comprehensive, recent research indicates that arrest and court-ordered batterer's intervention programs appear to result in sustained violence cessation.<sup>291</sup>

Lawyers representing batterers also wield much influence in their clients' attitudes toward counseling and intervention programs.<sup>292</sup> Just as counsel would say to a recidivist drunk driver client, so too a batterer should be told, "You can't keep doing this. You have to choose to stop or you may ruin your life." Some defense attorneys now condition their representation on the batterer making diligent efforts to successfully complete a certified batterer's intervention program, as this appears to be most helpful to the client.<sup>293</sup> As a starting point, it is helpful to learn more about the perpetrators. The following "batterer profile" is not meant to describe every abuser, but rather to offer several generalized, common characteristics in an effort to provide insight, and thus, better shape the programs with which we try to help the offenders choose not to be violent.

***A. Batterer's public behavior is frequently quite different from their private actions.***<sup>294</sup>

Many abusers are charming, charismatic and non-violent around others, and indeed, even with the victim -- at first. It is important for family, friends, co-workers, judges and others to not challenge the victim's credibility based on the batterer's stature and public behavior. Experienced batterer's experts report that public behavior is not an accurate predictor of who will commit violence toward a partner.

***B. Most batterers do not have a problem with anger or "poor impulse control," rather they exert what Dr. David Adams calls "a planned pattern of coercive control."*** Since many of us were sending perpetrators to short-term "anger management" programs in the belief that we were helping, it was shocking to learn from renowned batterer's experts that most abusers are not "out of control" or angry. On the contrary, they use anger to manipulate and control their partners and children. As Paul Kivel, the co-founder of the Oakland Men's Project, says, "Anger is not the problem."<sup>295</sup>

***C. Excusing and minimizing the violent behavior is a common tactic of batterers.***

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<sup>290</sup> Edward W. Gondolf, BATTERER INTERVENTION SYSTEMS; ISSUES, OUTCOMES AND RECOMMENDATIONS 199 (2002).

<sup>291</sup> Id. at 200.

<sup>292</sup> Lee S. Rosen, *Zealous and Ethical Representation of Batterers* in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, pp. 2-25 to 2-28 (1996).

<sup>293</sup> Id.

<sup>294</sup> David Adams, *supra* note 5 at 23.

<sup>295</sup> Paul Kivel, UNLEARNING VIOLENCE: A BREAKTHROUGH BOOK FOR VIOLENT MEN AND ALL THOSE WHO LOVE THEM, How To Replace Domestic Abuse With New Rules and New Roles, Real Power and Responsible Action, p. 100 (1992).

1. ***“I lost control.”*** Some abusers believe that they “lost it”,<sup>296</sup> but batterer’s experts tell us that probably less than five percent of batterers are “out of control”. By listening to perpetrators *and* examining their behavior, counselors have learned that the violent behavior is most often deliberate.<sup>297</sup> While there are some batterers who exhibit generalized violence, most will not assault the police officer who gives them a speeding ticket or their boss who yells at them for being late to work. Indeed, most abusers with a criminal record have either assaulted other intimate partners or been convicted of drunk driving or substance abuse offenses.<sup>298</sup>

2. ***“S/he drove me to it”*** is an excuse of batterers who are intent to blame others for their violent behavior.<sup>299</sup> Dr. Adams explains that those abusers who have not been held accountable are quick to divert attention from their crimes by claiming to be the *real* victim. Too often, he says, the focus becomes the victim’s behavior, which “is a disservice to the abuser because it reinforces his denial of responsibility.”<sup>300</sup>

3. ***“I was drunk so you should forget it.”*** ranks high among the abuser’s excuses. In spite of the high correlation between substance abuse and domestic violence,<sup>301</sup> batterer’s experts report that, while the alcohol or drugs might act as a disinhibitor, they do not *cause* the violence. Therefore, it is imperative that abusers who exhibit both violence and substance abuse, have two separate problems for which they must be held accountable and get help.<sup>302</sup>

4. ***The batterer’s manipulation of the children frequently increases after separation ranging from direct threats to forcing their collusion in further harassment of the battered victim.***<sup>303</sup> Batterers may demand that the children spy on their mother, then report any interactions with males or behavior he considers suspicious. In the presence of the children, cursing, name-calling, threats and excessive criticism of the victim are also common. Particularly when a protective order prohibits direct contact, many abusers use the children to relay their threatening messages or pleas to return home.<sup>304</sup>

5. ***In order to reduce recidivism, batterer’s intervention programs must be long-term,***<sup>305</sup>

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<sup>296</sup> Id. at 119.

<sup>297</sup> Bancroft, *supra* note 94 at 113.

<sup>298</sup> Nancy Isaac, Donald Cochran, Marjorie Brown, and Sandra Adams, *Men Who Batter, Profile From a Restraining Order Database*, 3 ARCH. FAM. MED. 50 (Jan. 1994).

<sup>299</sup> David Adams, *supra* note 5 at 24.

<sup>300</sup> Id.

<sup>301</sup> Id. at 25, citing studies reporting from 48 to 70 percent correlation between substance abuse and family violence.

<sup>302</sup> Id.

<sup>303</sup> Id. at 24 and 25.

<sup>304</sup> Anne Ganley, Ph.D., presentation to Washington State Judges Domestic Violence Conference, November 18, 1999 in Seattle, WA. (Dr. Ganley has 23 years experience running batterer’s intervention programs.)

<sup>305</sup> Experts suggest that a minimum of one year is essential since many batterers do not even emerge from the denial phase for about six months. At the Pivot Project in Houston, the Men’s Education Network in Tyler (TX.) and Family Services of Beaumont, (TX.) Inc., batterers are encouraged to continue attending sessions after completing the standard program. As with Man Alive, some of these “graduates” are then able to confront the new batterers entering the program with a myriad excuses. At the Family Diversion Network in Austin (TX.) and the Women’s Haven of Tarrant County batterers who have finished their program can attend a weekly support

*culturally competent*,<sup>306</sup> *and behavior-based*<sup>307</sup>, *with community support to provide sanctions for new incidents*<sup>308</sup> *and on-going partner contacts*.<sup>309</sup> Professor Gondolf's research indicates that while almost half of the men recidivated within the 4-year follow-up, most did so within the first 9 months after starting a batterer's intervention program. 2 ½ years after the initial assault, more than 80% of the men had not recidivated within the prior year, and at the 4-year mark, more than 90% had not reassaulted their partners for at least a year.<sup>310</sup> Furthermore, Dr. Gondolf reports a decrease in the severity of the reassaults, as well as a pronounced reduction in the verbal abuse, threats and controlling behaviors of the batterers. The most accurate indicators for the recidivist batterers were the victims' predictions of further abuse and the men's intoxication, in addition to those typical of other violent offenders: a lengthy criminal record and prior severe assault against intimate partners.<sup>311</sup>

Former batterer Hamish Sinclair runs a long-term batterer's intervention program, called Man Alive, in San Francisco, Sacramento and Marin Counties in California, as well as in the California Prison System. Man Alive is a *three year* program, designed to allow successful participants to act as co-facilitators in their last year. Mr. Sinclair states that his program's success is due in part to its length, but also to the fact that participants are taught both that their violence is inexcusable *and* that they can go back to their communities to teach others to be non-violent.<sup>312</sup>

6. ***Ensure that adolescent batterers' programs have an intervention methodology and curriculum that focus on victim safety and offender accountability.*** The Massachusetts Department of Public Health has promulgated *PILOT PROGRAM SPECIFICATIONS for Intervention with Adolescent Perpetrators of Teen Dating and Domestic Violence*. The eleven-page outline provides guidelines for establishing such a program, complete with sections addressing 3.3 *Minimum Qualifications For Program Staff*, 4.0 *Intervention Methodology*, 4.1 *Inappropriate Methods*, 4.2 *Educational Component* (with ten suggested topic areas), 5.0 *Client*

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group. For more information about batterer's intervention programs, contact the Battered Women's Justice Project at #1-800-903-0111 (they are one of five national domestic violence resource centers).

<sup>306</sup> See Oliver J. Williams and R.Lance Becker, *Domestic Partner Abuse Treatment Programs and Cultural Competence: The Results of a National Survey* in VIOLENCE and VICTIMS (1994).

<sup>307</sup> See above discussion as to the contraindication of "Anger Management" programs since domestic violence is not about the inability to control anger, but, rather is based on the abuse of power and control with violence. Thus, Dr. David Adams asserts, batterers need to be taught that they will be held responsible for their actions, just as everyone else is.

<sup>308</sup> The Quincy (MA.) Court Probation Department's Domestic Violence Unit (Chief Andy Klein and Deputy Chief Bruce Carr) takes a tough, no-nonsense approach to batterers who violate the terms and conditions of their pre-trial release or sentences. By establishing a "revocation session" every Tuesday morning, Presiding Judge Charles Black further reinforces the message that there will be sanctions for the violation of protective or any other court orders.

<sup>309</sup> Beth Ledoux, a survivor and veteran legal advocate, also served as the post-conviction liaison with victims at the Quincy (MA.) Court Probation Department. As a result of her on-going contacts and safety planning, the Court was able to dramatically increase the number of victims reporting violations and seeking obtaining the help they needed to escape.

<sup>310</sup> Gondolf, *supra* note 146.

<sup>311</sup> *Id.* at 202.

<sup>312</sup> Presentation by Hamish Sinclair, Sacramento County District Attorney's Domestic Violence Conference, Sacramento, CA., May 5, 1998.

*Intake*, 5.1 *Evaluation* (of batterers) and various other necessary sections.<sup>313</sup> Nashville's *TeenPEACE* (Project to End Abuse through Counseling and Education) provides intensive group sessions for adolescent males who have assaulted a female and are on probation. Through the juvenile court, the 12-week program intervenes with at-risk youth. "Through knowledge attainment, skill building and attitude change, *TeenPEACE* helps participants end domestic violence in their relationships and in their community. *TeenPEACE* helps participants identify the abusive or controlling behaviors they use and teaches them *abstinence based* skills for solving conflicts and handling disappointments in a positive and non-abusive manner."<sup>314</sup>

7. ***Ensure that prevention programs are undertaken in the schools to teach our youth non-violent tactics for problem solving.*** Since 1989, Austin's *Expect Respect* program has provided a stellar model of school based intervention and education, operating in elementary, middle and high schools. In addition to classroom presentations, they offer support groups, individual counseling as well as staff training and technical assistance, and evaluation. Fully administered by the *SafePlace* shelter, the program was able to exponentially expand as a result of their receiving a Centers for Disease Control grant.<sup>315</sup>

8. ***Ensure that attorneys, law enforcement and other powerful batterers are disciplined according to the law.*** Attorneys who batter their partners are violating the American Bar Association's Model Code of Professional Conduct, as well as state law.<sup>316</sup> Several states have taken such cases seriously. New Jersey's Supreme Court, in *In the Matter of Lawrence G. Magid*,<sup>317</sup> and in *In the Matter of Salvatore Principato*,<sup>318</sup> ruled that these lawyers' conviction for assault against their partners constituted a violation of Rule 8.4. Not only did the Court order a public reprimand of the lawyers, but also stated: "We caution members of the bar, however, that the court in the future will ordinarily suspend an attorney who is convicted of an act of domestic violence."<sup>319</sup>

Similarly, anyone convicted of specific misdemeanor domestic violence crimes or while subject to a Protection Order is prohibited from possessing guns or ammunition under the 1996 amendment to the Gun Control Act of 1968.<sup>320</sup> This law, also known as the Lautenberg Amendment (so named for the bill's sponsor, Frank Lautenberg (D-N.J.)), applies to law enforcement officers, as well as all other citizens.

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<sup>313</sup> This document, dated May 14, 1999, may be obtained from the Massachusetts Department of Public Health at # (617) 624-5497.

<sup>314</sup> From the *TeenPEACE* brochure, PEACE, Inc. 211 Union Street, Suite 615, Nashville, TN 32701, phone # (615)255-0711.

<sup>315</sup> From the *Expect Respect, SafePlace School-Based Services, Promoting Safe & Healthy Relationships for All Youth*, brochure and hand-out, dated January 14, 1999. The *Expect Respect* Curriculum is available for \$35. or a free information packet, from phone # (512) 385-0662, SafePlace attn: Expect Respect, P.O. Box 19454, Austin, TX 78760.

<sup>316</sup> Rule 8.4 specifies that it is a professional misconduct for a lawyer to "(b) commit a criminal act. . ."; as cited in Heidi McNeil, *disciplining Attorneys Who Have Battered Their Partners*, 1 DOMESTIC VIOLENCE REPORT 1 (April/May 1996).

<sup>317</sup> 655 A.2d 916 (N.J. 1995).

<sup>318</sup> 655 A.2d 920 (N.J. 1995).

<sup>319</sup> McNeil, *supra* note 151 at 2.

<sup>320</sup> Gun Control Act, 18 U.S.C. 922 (g).

**XIX. ALL RELEVANT STAKEHOLDERS SHOULD PARTICIPATE IN THEIR LOCAL FAMILY VIOLENCE COUNCIL TO ENSURE CHILDREN'S ISSUES ARE ADDRESSED.<sup>321</sup>**

Across the country, lawyers, advocates, judges, law enforcement, probation officers and other interveners have been instrumental in starting and maintaining Family Violence Councils, found to be one of the best mechanisms for reform.

**A. *Judges and lawyers are particularly powerful systems' change agents and have the responsibility to work toward improving the courts.*** To address the concern of some judges that such involvement might compromise their obligation to maintain the appearance of neutrality, Judge Stephen Herrell<sup>322</sup> has written an article assuring them that it is, in fact, their *responsibility* to become involved in improving the justice system. Judge Herrell argues that, not only should judges serve on family violence councils, but can be instrumental in bringing together the necessary players to create an effective system.<sup>323</sup> Starting, chairing and/or serving on a Family Violence Council can increase the morale of judges, practicing attorneys, court staff and the myriad community players who participate.

**B. *The Family Violence Council must be multi-disciplinary, diverse and inclusive.*** Not only does the Council need the court-related personnel (prosecutors, advocates, law enforcement, probation/parole, clerks and judges), but also defense and family law attorneys, child protective services, CASA's, clergy, educators, legal aid, corrections, public housing staff, survivors, medical and mental health providers, business representatives, and other interested citizens. It is essential that the racial and cultural diversity of the community be reflected within the Council membership. Additionally, within each profession invited to attend, the top decision-makers should also bring their front-line staff. The police chief is wanted for his/her power to ensure solid policies, but the officers who directly respond to domestic violence calls are needed, as well.

**C. *The Council should probably have rotating co-chairs, with most of the work done in committees.*** All members should have an opportunity to co-chair meetings, setting the agenda, sending out notices and running the meeting. There are some rare exceptions, in which a judge or other member serving as chair is adept at keeping the momentum of the Council, while making ensuring maximum utilization of all participants. Sometimes a Council can be re-energized by involving more members in the leadership roles and becoming action focused. If the Council's work is done in designated committees (maybe children/ Child Protective

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<sup>321</sup> See Leonard Edwards, Honorable, *Reducing Family Violence: The Role of the Family Violence Council*, JUV. & FAM. COURT J. 1-17 (1992); Edwin Kelly, *The Judge's Role in Domestic Violence Cases*, N.H. BAR J. 37-41 (June 1994); and for packet of information call the National Council of Juvenile and Family Court Judges Family Violence Project #1-800-52-PEACE.

<sup>322</sup> Judge Stephen B. Herrell is the '97-'98 President of the National Council of Juvenile & Family Court Judges. He is a judge in the Multnomah County Court in Portland, Oregon.

<sup>323</sup> Stephen B. Herrell, Honorable, *The Judge as Key Player in an Effective Community Response to Family Violence*, FAMILY VIOLENCE: STATE-OF-THE -ART COURT PROGRAMS, National Council of Juvenile and Family Court Judges, (1992).

Services issues, court issues, legislative, shelter, etc.), each committee is free to set its own agenda, recruit the needed players and avoid any one issue taking over the larger meetings.

**D. Meetings should be held monthly, at a convenient location and with snacks.** No community is so lacking in family violence-related problems that they can afford to meet less frequently than monthly. Minimal as it may seem, refreshments can help create a positive association with Council meetings.

**E. An action-oriented, three-prong approach should be taken toward problem solving.** The first prong involves the Council participants honestly identifying the challenges and problems their community faces. Second, they name who is responsible for ensuring the needed changes happen. Finally, the Council must devise an action plan, utilizing their members, to bring about the reforms.<sup>324</sup>

## **XX. TO BEST PROTECT CHILDREN, ALL EMPLOYERS SHOULD ADOPT POLICIES TO ADDRESS DOMESTIC VIOLENCE IN THE WORKPLACE.**

Employers can play a powerful role in helping stop domestic abuse and can be held liable for their failure to adequately protect victims in the workplace.<sup>325</sup> The family of Francesca LaRose agreed to a settlement of \$350,000. from Houston's State Mutual Life Assurance Company and the Duddleston Management Company, after Ms. LaRose was murdered at work in 1995. Ms. LaRose had requested that her employer help protect her from ex-boyfriend, Patrick Thomas, who had threatened to murder her. Sadly, her employer's response was to admonish Ms. LaRose to keep her personal problems out of the workplace.<sup>326</sup> Similarly, a San Francisco jury awarded \$5 million dollars to the families of a battered woman's co-workers, who were murdered at work by the woman's estranged husband. The victim's employer, the Equitable Life Assurance Society, denied assistance, thus endangering not only the victim, but her co-workers, as well.<sup>327</sup> Employers have a responsibility to provide all employees with a copy of written guidelines, covering treatment of victims and offenders in the workplace. At a minimum, employers should make available SAFETY PLANS and community resource information, and the National Hotline #1-800-799-SAFE.

Employers are urged to follow the Polaroid Corporation's model, which not only provides victims with company time for individual counseling and/or support groups, but also allows up to three weeks paid leave for victims to handle their affairs (go to court for a protective order or

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<sup>324</sup> See also Sarah M. Buel, *Family Violence Council to the Rescue to Coordinate Your Resources*, THE TEXAS PROSECUTOR 12 (July/August 1997).

<sup>325</sup> See e.g. *Yunker v. Honeywell, Inc.*, 496 N.W. 2d 419 (1993) for negligent response to threats; *Degenhart v. Knights of Columbus*, 420 S.E. 2d 495 (1992) for negligent retention and supervision; *Coath v. Jones*, 419 A.2d 1249 (1980) for negligent failure to warn; *Vaughn v. Granite City Steel*, 576 N.E. 2d 874 (1991) for premises liability; and 29 U.S.C. sec. 654(a)(1) OSHA regulations with general duty to provide safe workplace. See [www.cavnet.com](http://www.cavnet.com) for copy of excellent law student paper and model guidelines, *Employers Beware! Ignoring Domestic Violence Costs You Money* by Courtney McQuien (1999).

<sup>326</sup> Joseph Pereira, "Employers Confront Domestic Abuse," THE WALL STREET JOURNAL, March 2, 1995, p. B1, col.1.

<sup>327</sup> *Teipel v. Equitable Life Assurance Society* (1990).

bail hearing, move, etc.), and up to one year unpaid leave with a guarantee of their present job back. Dr. James Hardeman, the manager of their employee assistance program, also meets with every perpetrator-employee to explain that his continued employment is dependent upon not reoffending and the successful completion of a certified, one-year batterer's intervention program.<sup>328</sup> All employers, from police departments and hospitals, to two-person practices and courts, should have such a policy that makes victim safety a priority. If more employers adopt guidelines clarifying that we are here to help prevent further harm, many more victims and their children could be alive tomorrow. Additionally, batterers may obtain the interventions they need to avoid recidivism and possibly prison.

An outstanding model which could be replicated in most areas is the "Polaroid CEO Project". Polaroid's CEO Gary DiCamello recruited about sixty other Massachusetts' corporate CEO's to enlist their company's support in "adopting" a domestic violence program (mostly shelters) or visitation center. The corporations are not asked to give large cash donations, though they are certainly free to do so. Rather, the corporations work with their adopted programs to identify needs (such as maintenance, financial planning, fundraising, etc.) for which the company could help. One of Polaroid's additional contributions was to pledge to provide job training to one hundred battered women per year, enabling them to learn valuable job skills, while gaining economic empowerment and self-esteem. This is the program through which Newton-Wellesley (MA.) Hospital adopted their local shelter, providing free medical care and financial planning, among other assistance.

## **XXI. CONCLUSION**

As adult and child advocates, law enforcement, probation and parole officers, social workers, counselors, attorneys, judges and other interveners, we should be celebrating that domestic violence victims and children are increasingly turning to the courts for protection from abuse. Nashville's Police Lt. Mark Wynn says we have the privilege of making the law keep its promise to abuse victims: affording them equal protection, due process and freedom from domestic tyranny. As Lt. Wynn has shown with the remarkable efforts underway in Nashville, one key is applying *gentle, relentless pressure* to achieve the protections our victims deserve. 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," Juvenile Court Judge Dale Harris says, "Will our children and their mothers have homes they can run to or homes they must run away from?"<sup>329</sup>

### **Additional Resources**

1. Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged*, 27 Judges' J. 11 (Spring 1988).

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<sup>328</sup> To receive more information about the Polaroid Corporation's Domestic Violence Guidelines and other employer assistance, you may contact the Workplace Violence Project (of the Family Violence Prevention Fund) at #415-252-8900.

<sup>329</sup> Judge Dale Harris presides over the Juvenile and Family Court in Lynchburg, Va.



2. John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 *Future of Children* 21 (1999).
3. George W. Holden, Introduction: The Development of Research Into Another Consequence of Family Violence, in *Children Exposed to Marital Violence: Theory, Research, and Applied Issues* 1 (George W. Holden et al. eds., 1998).
4. Gina L. Kershaw, *The Child Witness as a Victim of Domestic Violence: Prosecuting the Batterer Under California's Child Abuse Statute*, 19 *J.JUV. L.* 196 (1998).
5. Julie Kunce Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, *CLEARINGHOUSE REV.* 295 (1996).
6. Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 *FAM. L.Q.* 393 (2000).
7. Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, 9 *Future of Children* 67 (1999).
8. Susan Schechter & Jeffrey L. Edleson, *Domestic Violence & Children: Creating a Public Response* 2 (2000) (developed for the Open Society Institute's Center on Crime, Communities & Culture).
9. Alan J. Tomkins, et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 *LAW & PSYCHOL. REV.* 137 (1994).
10. Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and Don't's, The How's and The Why's*, 29 *CREIGHTON L.REV.* 1587 (1996).
11. Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 *CLEARINGHOUSE REV.* 1113 (1996).

## **Appendix 6**

**ABA Center on Children and the Law**

**ABA Child Custody and Adoption  
Pro Bono Project**



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

Established in 1978 to improve children's lives through advances in law, justice, knowledge, practice, and public policy, staff lawyers, social science researchers, writers and editors work on an array of issues affecting children/youth. The Center also provides staff support to the ABA Commission on Youth at Risk. In addition to publishing the monthly *ABA Child Law Practice*, substantive projects or publications address:

- Adolescents aging out of foster care
- Adolescent health
- Animal cruelty and child protection
- Closed-circuit television and video recording of child victim statements/testimony
- Court improvement in child abuse/neglect (dependency) cases
- Education access/quality for children in foster care
- Enhancing legal representation of abused/neglected children
- Grandparents raising grandchildren and law-related issues
- Health matters affecting infants and toddlers in the child welfare system
- Court/child welfare agency enhancement of child safety, permanency, and well-being
- Immigration/child welfare law-related linkages
- Juvenile status offender legal representation improvement
- LGBTQ youth in foster care
- Non-custodial father enhanced involvement in the child welfare system
- Parent attorney skills development (in state-initiated child protection cases)
- Permanency barriers affecting children in foster care (state/county focused work)
- Substance abuse and its impact on children/youth
- Trial skills improvement for attorneys working in the child welfare system

Past Center family law-related projects have encouraged child-centered custody decisions by courts, enhanced child support enforcement, and improved prevention/intervention in parental kidnapping cases.



## **Enhancing the Representation of Children in Private Custody Cases:**

### **Resources and Lessons Learned from the ABA Child Custody and Adoption Pro Bono Project**

**2001-2008**

The American Bar Association Child Custody and Adoption Pro Bono Project operated from January 2001 to June 2008. The Project's mission was to enhance and expand the delivery of legal services to children involved in divorce, adoption, guardianship, unmarried parent, and civil protective order matters. The Project's focus was to design, implement, enhance and support programs and policies fostering children's well-being in custody cases, and to provide children meaningful participation in the process. The Project served and will continue to serve as a critical national resource in the important area of child custody.

This article summarizes the work of the project during its seven-and-a-half years. Although the Project no longer exists as a separate staffed entity, its legacy and benefits will continue through resources available at the American Bar Association and other entities committed to ensuring critical representation for children in private custody cases.

#### **I. History of the project**

In 1998, Ann Liechty, a dedicated child law advocate, received the ABA Pro Bono Publico Award. Only thirteen months later, in September 1999, Ann's life was cut short by cancer. In late 2000, Ms. Liechty's aunt and uncle, Melita and Bill Grunow, made a generous donation of over \$1,000,000 to the American Bar Association Fund for Justice and Education. The ABA formed a Planning Committee, which included Steve Scudder, Greg McConnell, Krista Kauper and Judy Williams. Glenda Sharp and members of the Family Law Section were soon added to the Committee. The Committee established a structure for the Project, which would be co-sponsored by the Standing Committee on Pro Bono and Public Service and the Family Law Section, and housed in the ABA Center for Pro Bono. The Planning Committee also set up an operating budget to run through August 31, 2005. The remaining funds were set aside in an endowment, their use to be determined further into the Project's life. It was later decided by Project staff and the Advisory Committee to use the endowed funds, as well as additional funds raised by the Project, to award grants to local programs, and to continue the Project through June 2008.

The Project's founding director, Linda Rio Reichmann, started in 2001. She and the Planning Committee soon established an Advisory Committee. After meeting with key constituents and experts from around the country, the staff and Advisory Committee set forth that the Mission and Goals for the ABA Child Custody and Adoption Pro Bono

Project, and the Director and Advisory Committee prepared a Project Plan and began to implement its action items.

## **II. Project mission and goals**

**Mission:** The mission of the Project was to enhance and expand the delivery of legal services to children involved in divorce, adoption, guardianship, unmarried parent, and civil protective order matters; to design, implement, enhance and support programs and policies fostering children's well-being in custody cases; to provide children meaningful participation in the process; and to continue to serve as a critical national resource in the important area of child custody.

### **Goals:**

- I. A demonstrable increase in the number of pro bono child custody projects and opportunities, and a corresponding increase in the number of pro bono attorneys and children served.
- II. Higher quality representation to children in child custody matters.
- III. Implementation of innovative delivery strategies designed to expand legal services access for children involved in child custody matters.
- IV. Children and parents who are better educated and informed about custody proceedings, results, and impacts.
- V. Heightened judicial sensitivity and knowledge in making decisions regarding children's custody.
- VI. Improved relationships between pro bono child custody attorneys and non-lawyer children's advocates, including doctors, psychologists, social workers, and teachers.
- VII. Greater support and participation in legislation impacting child custody matters.
- VIII. Improved coordination and communication among groups working at a national level on the complex issues involved in child custody.

## **III. Project Accomplishments**

The Child Custody and Adoption Pro Bono Project's activities have increased both the quantity and quality of representation for children in private custody cases. Following are the major accomplishments of the Project.

### **Training Series**

The Project developed a multi-disciplinary training series for staff and pro bono attorneys representing children in custody cases. The series covers the following topics: Introduction; Case Development; Cultural Competence; Ethical Considerations; Child Development; Alternative Dispute Resolution; Hearing the Child's Voice; Mental Health Experts, Tests and Services; Child Abuse and Child Sexual Abuse; and Domestic Violence. An extensive manual accompanies a videotape and DVD on each topic. The

training series video is almost eight hours in length. Courts, programs, and bar associations have used the training in whole or in part to train new and experienced children's attorneys.

Having completed production of the training series, the Project then launched an intense effort to widely implement the training program throughout the country. During the course of two years, the training series was distributed to 146 persons, programs, courts, and other entities. The entire series is now available on the Project's website.

### **State and International Laws—Research, Recommendations, and Publications**

The Project undertook three major research initiatives, all of which culminated in published original articles. The first was a 51-jurisdiction analysis of all laws governing appointment of representatives in divorce and unmarried parent cases. The resulting article was *Representing Children in Custody Cases: Where We Are and Where We Should Be Going*, published in the Children's Legal Rights Journal. The second effort looked at the laws in the 50 states, the District of Columbia, and the U.S. Territories on representing children in civil cases involving domestic violence and the relevance of domestic violence to decisions impacting children within custody cases. *Representing Children in Civil Cases Involving Domestic Violence* was published in 39 Fam. L. Q. 197 (2005). The last research endeavor looked at how children are advocated for and heard from in adoption and guardianship proceedings, and what courts and advocates should do differently. This article, entitled, *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings* was published in 41 Fam. L.Q. 365 (2007). Additionally, the Project had an article published in the April/May 2008 issue of GPSolo, the magazine of the ABA General Practice, Solo & Small Firm Division, entitled, *Impacting the Lives of Children through Pro Bono*.

### **Mini-grants:**

From 2002 – 2004, the Project awarded \$86,500 in mini-grants to 14 programs. \$40,000 was awarded in 2002, \$38,500 in 2003, and \$8,000 total in mentor grants.

### **Grant Advocate Program**

After the success of the mini-grants program, in 2004 the ABA Child Custody and Adoption Pro Bono Project launched a new campaign to establish a four- year grant program. The grants for each of these four years had a directed topic, as follows:

- 2005: Bringing Mental Health and Social Services into Child Advocacy Efforts
- 2006: Implementing Standards and Trainings for Children's Lawyers
- 2007: Lawyers and Law School Clinics Partnering to Serve Children
- 2008: Starting a Dialogue: Bringing People Together to Develop Pro Bono Child Representation Programs in Private Custody Cases



From 2005 through 2008, the Project awarded \$200,000 in grants throughout the country. The programs which received grants continue to do great work in this area and have provided recommendations for other programs interested in doing similar work.

### **Resource/Technical Assistance**

The project provided direct technical assistance to over 300 persons or entities. The forms of assistance included helping set up new programs, helping design and implement trainings, working with local courts, linking programs to other areas of expertise, drafting legislation and court rules, identifying funding resources, developing standards, and providing legal or policy research to help with reform efforts.

### **Child Custody Library**

The Project collected, abstracted, catalogued and placed over 300 documents in the Child Custody Resource Library. All of these documents are summarized and catalogued in an online database, easily accessible from the Project's web site.

### **Standards of Practice for Children's Representatives in Custody Cases**

The Project worked with the ABA Family Law Section to prepare and receive approval of Standards of Practice for Lawyers Representing Children in Custody Cases. These Standards were passed by the Family Law Section in May 2003 and adopted as official ABA policy in August 2003. The Standards have been widely circulated and many programs or jurisdictions are considering implementing all or parts of the Standards.

The Project's Director also served as an official Observer to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in its drafting of the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act. The Uniform Law Commission approved this Uniform Act in August 2007. The ABA Family Law Section voted to support the Act in the March 2008. The Act will be considered by the American Bar Association Board of Governors at its meeting in August 2008. It can be viewed at [www.law.upenn.edu/bll/archives/ulc/rarccda/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.htm).

### **Ann Liechty Child Custody Pro Bono Award**

The Project worked with the Standing Committee on Pro Bono and Public Service to obtain ABA approval to establish an annual Ann Liechty Child Custody Pro Bono Award. There have been six awards presented by the Project:

- **2002: Rebecca Rundgren, Denver, CO**
- **2003: Jacqueline Valdespino, Miami, FL**
- **2004: Toby Hollander, Portland, ME**
- **2005: Deborah Ebel, Atlanta, GA**
- **2006: Winston & Strawn, Chicago, IL**

- **2007: Patricia Yoedicke, Minneapolis, MN**

### **Presentations**

Project staff and consultants have made over 30 presentations about the project and its recommendations, and have conducted 16 substantive workshops. Some of the workshop topics were: Representing Children in Private Custody Cases; Working with Child Clients; Representing Children in Civil Cases Involving Domestic Violence; the Family Lawyer as Problem Solver; Standards for Lawyers Representing Children; and Interdisciplinary Training regarding Representing Children in Custody Cases. The Project also produced a program that is available free of charge at [www.abanet.org](http://www.abanet.org) as an ABA Audio CLE program, entitled Representing Children in Civil Domestic Violence Cases.

### **Child Custody Project List Serve**

The Project established and ran a list service open to anyone involved in child custody cases, particularly advocates for children. There were 175 subscribers to the list service. The project posted, on average, two items per week, and responded to inquiries from other subscribers. The list became an excellent mechanism for child advocates to exchange information, network, and enhance their own programs.

### **Child Custody Pro Bono Project Report and Directory**

In 2003 the Project completed a survey of all known programs representing children in private custody cases. The results were turned into a report and directory, which is posted on the project's web site. Many programs have used the directory as a resource to network with other programs, and volunteers have used the directory to find pro bono programs at which to volunteer.

### **Project's Web Site**

The project's web site, located at [www.abachildcustodyproject.org](http://www.abachildcustodyproject.org), provides information about the project as well as the results of research about laws and programs. Several of the project's resources and materials, including the training series, are available as free downloads from the website.

### **Networking and Creating a Culture around Representing Children in Private Custody Cases**

One of the major accomplishments of the Project was to help create understanding and support for the need for advocacy for children in private custody cases. Project staff and consultants have encouraged conversations throughout the country through the above activities, as well as through attendance at many meetings, conferences, symposiums, and conference calls.

#### **IV. Conclusion**

The important work of the ABA Child Custody and Adoption Pro Bono Project enhanced the quantity and quality of representation of children in private custody cases. Although the seven-and-a-half year work of the project came to an end in June 2008, its legacy and benefits will continue through resources available at the American Bar Association and other entities committed to ensuring critical representation for children in child custody cases.

The Project is extremely grateful to Bill and Melita Grunow, and to Dale and Valerie Liechty, for their substantial financial support, as well as their input and guidance throughout the Project, and their sharing of the passion that inspired Ann Liechty to dedicate much of her volunteer efforts to helping children. The legacy of the Project really belongs to Ann Liechty, as none of this work would have happened without the inspiration she provided to those who wanted to honor her work and her memory. On behalf of all of the children, attorneys, judges, and others who have benefited from this Project, we thank Ann and her family.

For further information about this Project, including contact information, please visit [www.abachildcustodyproject.org](http://www.abachildcustodyproject.org).