Guest Editors' Introduction

One important reason many women who are battered give for not leaving a violent relationship is fear of losing custody of their children (Kurz, 1995). There is certainly enough evidence from survivors' accounts that batterers often threaten to take custody of the children to prevent the victims from leaving the relationship or to force them back. Many batterers admit using these tactics and, also, threatening to challenge their victims for custody in the courts (Bancroft, 2004; Jaffe, Lemon, & Poisson, 2003). But what evidence is there that they can actually make good on such threats? Because courts, social services, and various professionals—not just the individual parents involved—have a role in determining custody and visitation outcomes, what is the real likelihood that a batterer can simply "take" or win custody?

Consistent with the fears of their clients, battered women's advocates have long maintained that the family courts are gender biased and particularly prejudiced against battered women, discounting the seriousness of their abuse and even punishing women who are abused for raising legitimate abuse and safety concerns. Fathers' rights proponents counter that women exaggerate or falsely raise domestic violence allegations for tactical gain. Yet as the studies in this issue show, women do not gain anything tactically by raising domestic violence allegations. Indeed, it is almost impossible for them to obtain court custody orders that adequately protect themselves and their children. Several background issues must be understood first, to understand how it is possible that courts are failing to protect children, particularly when 49 states have laws that require judges to consider domestic violence when making custody determinations (Tucker, 2004). The background issues are (a) the custody laws and recent changes in them, (b) the family systems frame-of-reference used by custody evaluators that influences the perspective of family courts; and (c)

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how the fathers' rights campaign has further discredited women and especially domestic violence victims, resulting in victim-perpetrator role reversal and greater gender bias against mothers.

CUSTODY LAWS

As the basis for custody awards changed from the "tender years" doctrine, which favored awarding mothers custody, at least when the children were young, to the "best interests of the child," which increasingly favored fathers, all mothers, and domestic violence victims in particular, were no longer guaranteed custody just because they were mothers. Instead, mothers have to fight for custody throughout the United States and Canada as if they are on a level playing field, something that most mothers never anticipated (Taylor, Barnsely, & Goldsmith, 1996), particularly when there are laws to protect children from being in the custody of abusive fathers.

The Model Code on Domestic and Family Violence, which the National Council of Juvenile and Family Court Judges adopted in 1994, included among its many provisions a chapter on family and children. Although parts of the code are now somewhat outdated (e.g., it barely discussed stalking, which was only emerging as a major domestic violence issue when the Model Code was being drafted), most of its provisions on custody and visitation remain largely valid. Specifically, Section 401 states,

> 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.

States that have adopted this provision have "presumption laws." Sections 402 to 406 provide for safety factors involving when visitation is appropriate and how it can be done safely, suggesting many specific terms, from a presumption permitting the victim to select the child's residence within or without the state (Section 403), ordering protective setting exchanges (Section 405), or ordering visitation to occur at supervised visitation centers

(Sections 405 to 406). Many specifics in Section 405 seek to protect the victim and child by keeping their addresses confidential, requiring the abuser to attend and complete a batterer intervention program, and/or refrain for consuming alcohol or controlled substances. Sections 407, 408(A), or its alternative 408(B) require any mediator to be trained in domestic violence and to screen any cases referred by a court for domestic violence. Ideally, the Code prefers that cases involving domestic violence that was proved or alleged not go to mediation unless the victim desires it and it can be done safely, including by having a supportive person (who could be an attorney or advocate) present. Although some states have adopted the Model Code custody and visitation language, very few of them have adopted all of the provisions as strongly.

FAMILY SYSTEMS DYNAMIC

For many reasons, battered women are particularly disadvantaged in custody disputes with their abusers. This will probably come as a surprise to those who have worked with domestic violence on the criminal justice side. However, it is important to note that the family court system uses a different frame of reference for domestic violence, having been strongly influenced by "family systems" professionals and not those with a criminal justice framework. Despite laws in every state that criminalize violence, family systems professionals perceive the violence as a breakdown in communication and not as a crime deliberately perpetrated by one individual. Even when violence is recognized, it is not regarded as salient to children (e.g., he may be a violent husband, but could still be a good father; Bancroft & Silverman, 2002). Those in the family court system often repeat the myth that the pressure of divorce makes good people behave badly, whereas those in the criminal court system are more likely to recognize that many, if not most batterers, are the same defendants returning to court repeatedly and often against new victims and with new crimes (Klein, 2004).

Ironically, when legislators and mental health professionals finally realize that domestic violence can hurt the children, they may blame the mothers for not having left sooner to protect the children. Rather than recognize that children are most resilient when they have a strong relationship with their abused mother,

they often recommend that custody be awarded to the state or to the batterer (Dunford-Jackson, 2004).

These disadvantages to battered women are further compounded because batterers are far more likely to fight for custody than are other fathers. They do so often with no prior interest in the children or real interest in winning, but rather to control, hurt, or demoralize or impoverish their victims, waging intensive campaigns against them (Bancroft & Silverman, 2002; Jaffe et al., 2003). Often, these campaigns emotionally and financially wear out battered women, or exhaust or even frighten their attorneys, with the result that many women end up giving up, being sold out, or having insufficient money to continue the endless court battles (Bancroft & Silverman, 2002; Jaffe et al., 2003).

The family systems outlook dominates among those who do mediation, act as custody evaluators, or are appointed as guardians ad litem to represent the children's best interests, most of whom are mental health professionals. Large numbers of the mental health professionals who make or at least greatly influence the custody decisions are still untrained in and lack a real understanding of the dynamics of domestic violence (Bancroft & Silverman, 2002; Cohn, Salmon, & Stobo, 2002). The judges and lawyers practicing in family and divorce courts repeatedly hear the family systems perspective from the experts who are supposed to be knowledgeable in mental heath issues, including domestic violence, and they typically adapt or seldom challenge the perspective.

Despite the Model Code, mediation is increasingly practiced in most states when custody or visitation is in issue, and often mediation is mandatory. States vary in who does the mediation, whether they are outsiders who must be paid or whether they work within the court system, usually at no financial cost to the parties involved. Mediation tends to favor fathers regardless of the method of mediation used (Bancroft & Silverman, 2002; Grillo, 1991).

INFLUENCE OF THE FATHERS' RIGHTS MOVEMENT

The Fathers' Rights movement has loudly proclaimed that men are disadvantaged in custody disputes, even though court gender bias studies almost always found that most mothers win custody largely by default. Yet in airing their grievances, they have been

successful in portraying batterers as victims, and this was given legitimacy through surrogate professionals such as Dr. Richard Gardner, who developed Parental Alienation Syndrome (PAS), a junk science that has no scientific basis (American Psychological Association, 1996). PAS turned the table on the victim, making her the aggressor, and urged not only that she be denied custody, but often even visitation. Even when PAS is not explicitly used, the belief that victims fabricate abuse allegations may still underlie decisions to give custody to the batterer, particularly when incest is alleged (Myers, 1997; Rosen & Etlin, 1996). One way is through the gentler sounding "friendly parent" laws and provisions that direct courts to give custody to the parent who encourages a better relationship between the child and the other parent, provisions that greatly disadvantage mothers and silence battered women who seek to protect themselves or their children. The fathers' rights movement has pushed many states to adopt joint or shared parenting presumptions. Most states with friendly parent provisions or joint or shared custody presumptions seldom clarify to courts that such provisions should have no weight in cases where there is domestic violence, often resulting in the abuse being given lower or no weight.

THE STUDIES REPORTED

This issue reports the results of four studies—all funded by the National Institute of Justice—that, for the first time, present systematically collected empirical evidence on the custody crisis facing battered women in America.

The question as to how many battered women lose custody of their children cannot be answered simply because the custody laws and practices governing normal custody arrangements vary from state to state, with the result that there are many different standards of comparison among the different jurisdictions. For example, in Florida, joint custody is the preferred arrangement, but parents may petition the court for sole custody in special circumstances. In addition, the data collected from courts typically involve contested custody cases, in which men who batter their intimate partners are likely to be overrepresented because they more often contest custody (American Psychological Association, 1996). There are also the issues of legal custody versus physical

custody and restricted or structured visitation, or conditions placed on visitation.

The studies in this issue deal with some of these multiple issues, with data collection having occurred in 9 of the 50 states. This is by no means the last word, but hopefully it is the first.

The first study in this issue was conducted in Washington State, which has the unusual requirement that all divorcing parents must file a parenting plan with the court. One parent files the plan, and the other is given an opportunity to respond. If both agree, the plan goes forward. If they do not agree, responses go back and forth until a plan is reached, either through mediation or a judicial decision. Domestic violence cases never go to mediation. It was not possible to distinguish contested cases from this database. Washington does not favor joint custody, and custody mostly goes to mothers (about 90%). Battered and nonbattered women did not differ on custody. Restricted visitation was more likely to be imposed on batterers rather than on nonviolent fathers, but only when the violence was known to the court. A great deal of documented violence was not known to the court.

Although the solution for Washington State may seem simple (to find ways to better inform the court about histories of violence), this may not necessarily be a good idea. We need to know more about how this information is used and why victims may not want the court to know about it. The second study, conducted further south in San Diego, found that revealing information about domestic violence could potentially backfire against a victim. That study, which compared custody mediation in cases with and without domestic violence, found that mediators who reported being aware of the existence of domestic violence in the relationship were less likely to recommend protected child exchanges than those who did not. Domestic violence victims were, at best, given comparable protection to nonabused victims; at worst, they received less protection.

A third study, conducted in New York Family Court, found that information about domestic violence does not appear to influence the court at all. This court almost never denied a custody or visitation petition, and no fathers enjoined by an order of protection (OP) were denied custody or visitation. Indeed, fathers enjoined by OPs were significantly more likely to get visitation than those who were not. The most likely reason is that fathers can get

arrested, charged with contempt in family court and with a crime in criminal court, if they violate an OP to have visitation with their children unless they obtain a visitation order, and the OP is limited by that visitation order. Fathers restrained by OPs, therefore, may be more persistent in their efforts to obtain visitation orders than fathers not restrained by OPs.

The fourth and final study in this issue deals with an evaluation of the efficacy of the Model Code in facilitating equitable custody outcomes for battered women. The study found that the Model Code seems to be having a positive effect in states where it has been enacted, except in a state with competing provisions. This was perhaps one of the most disturbing results to emerge from these studies. In Florida, a state that has enacted the Model Code, but also has a competing "friendly parent" provision, violent fathers were more likely to get sole custody of their children than the mothers who were the victims of domestic violence. Even in Model Code states, there were still a fairly large number who did not get custody, and they got no benefit in states that also had friendly parent provisions. However, we do not know in how many instances the court was aware of the history of violence.

Thus, one of the things we still need to know is how courts obtain, interpret, and use information on domestic violence—for example, from custody evaluators, mediators, guardians ad litem, and other professionals. In addition, we need to know more about education of judges, custody evaluators, mediators, and guardians ad litem on domestic violence, and specifically the content of the curricula that are used to educate each of these professionals. More information needs to be developed on the effects of friendly parent provisions on domestic violence victims and also presumptions favoring joint custody.

Hopefully, this issue will signal the beginning of a mission to develop information that will help policy makers and practitioners find ways to solve this vexing problem.

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