

Barriers to Justice for Battered Mothers and Their Children

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The purpose of this article is to alert those in CEE/FSU countries where domestic violence laws are being drafted and implemented to the interrelated issues of domestic violence and parents' relationships with their children. It is important for government agencies and non-governmental organizations, legislators, judges, prosecutors, police, child protection workers, and all those involved in drafting and implementing domestic violence laws to recognize these issues and ensure that battered mothers and their children are protected. Domestic violence, as used in this article, is defined as a pattern of power and control by one intimate partner over another through different forms of abusive, coercive and threatening behaviors.

Women who are both victims of domestic violence and mothers find themselves in a complicated and difficult relationship with abusers who are also the fathers of their children. Domestic violence victims may seek orders for protection, divorce, child custody and/or visitation, and may face action by the state to protect their children from abuse or neglect. According to two scholars, for couples with domestic violence in their history, "the probability of negative emotions and escalating conflict not only makes interacting uncomfortable...it also renders it dangerous because of the often volatile disposition of batterers." *From* Tubbs, Carolyn and Williams, Oliver, *Shared Parenting after Abuse*, in *Parenting by Men Who Batter*, 19, 21 (eds. Jeff Edleson and Oliver Williams, 2007).

The conflict, inherent danger and challenging nature of ending a relationship where there has been domestic violence necessarily impacts the children of that relationship. *From* Tubbs, Carolyn and Williams, Oliver, *Shared Parenting after Abuse*, in *Parenting by Men Who Batter*, 19, 21 (eds. Jeff Edleson and Oliver Williams, 2007). Children are not only affected by witnessing the domestic violence itself, but also when one or both parents may seek custody, visitation rights, child support, or face inquiries from child protection workers from the legal system.

Battered mothers and their children face numerous barriers to justice in the implementation of laws on child custody, visitation, child support, and child protection. Statistics demonstrate that both women and their children experience harm either as the victims of domestic violence or witnesses to it. International human rights law clearly states the rights of women and children to be free from violence, as do many national and state laws. However, barriers in the laws themselves or in the implementation of custody, visitation, child support, and child protection laws further harm battered women and their children. In addition, stereotypes, prejudicial attitudes, and myths often reinforce the barriers. The result is that women and children who have experienced or witnessed domestic violence are often re-victimized by the very legal systems meant to protect them.

Governments must break down these barriers by addressing and correcting the faulty assumptions in laws and legal systems, and by developing best practices and models to assist victims of violence and their children gain real access to

justice. Government officials and advocates in CEE/FSU countries who are beginning to address domestic violence should take note of the issues, best practices, and ways in which laws and legal systems on child custody, visitation, child support, and child protection are inextricably connected to laws on domestic violence. Laws and legal systems must protect women and children not further re-victimize them.

Statistics on Violence against Women and Children

According to the Family Violence Prevention Fund (FVPF), one in every three women in the world has experienced sexual, physical, emotional or other abuse in her lifetime. *From* Heise, L., Ellsberg, M. and Gottemoeller, M., *Ending Violence Against Women*, Population Reports, Series L, No. 11., December 1999. The United Nations Secretary General reports that “physical violence inflicted by an intimate partner” is the most common form of violence against women in the world. *From* Unite to End Violence Against Women Fact Sheet, United Nations Secretary General’s Campaign, United Nations Department of Public Information (DPI/2498), February 2008. The World Health Organization (WHO) reports that in forty-eight surveys from around the world, 10-69% of women stated that they had been physically assaulted by an intimate partner at some point in their lives. The WHO also reports that studies from a range of countries show that 40-70% of female murder victims were killed by an intimate partner.

In 2006, UNICEF estimated that between 133 and 275 million children witness domestic violence. *From* *Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF (2006). Domestic violence also makes children more likely to suffer harm or be victims. *From* Tubbs, Carolyn and Williams, Oliver, *Shared Parenting after Abuse*, in Parenting by Men Who Batter, 19, 22 (eds. Jeff Edleson and Oliver Williams, 2007). Both the likelihood of domestic violence against women and children, and the prevalence of child witnesses to it make it imperative to address the right to be free from violence in all its forms, and to ensure that this principle is embodied in the law and legal systems of each country.

International Human Rights Law Protects Women and Children from Violence

International human rights law enshrines the fundamental right of women and children to be free from violence. In fact, all human beings have the rights to life, liberty, and security of person; freedom from torture; equal protection under the law; and an effective remedy under international human rights law. Human rights advocates worldwide work to hold governments accountable for protecting women’s and girls’ right to be free from violence. The rights enumerated above are guaranteed when a state party ratifies the following international treaties: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). State parties are

responsible for protecting individual's rights, even if the state party is not the perpetrator of the human rights violation under international obligations arising from treaties and international customary law. Specifically, state parties are responsible for private acts of violence.

While states have indicated their acceptance of these rights and obligations, both governmental and non-governmental actors undermine these rights when they contend that property rights or privacy rights should supersede an individual's safety. In the 2006, the independent expert to the United Nations on violence against children explored the tension between individual rights and the right to a private and family life as enumerated in the Universal Declaration of Human Rights, article 16, and in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, articles 10 and 23, and concluded that "children's rights to life, survival, development, dignity and physical integrity do not stop at the door of the family home, nor do States' obligations to ensure these rights for children." *From* Pinheiro, Paulo Sérgio, Report of the independent expert for the United Nations study on violence against children, The United Nations Secretary General's Study on Violence against Children, 29 August 2006.

Likewise, the U.N. Secretary General, Ban Ki-Moon, has stated that "Violence against women is an issue that cannot wait. A brief look at the statistics makes it clear...No country, no culture, no woman young or old is immune to this scourge. Far too often, the crimes go unpunished, the perpetrators walk free...women and girls...have the right to live free of violence, today and in the future...[We must] stop the untold cost that violence against women inflicts on all humankind." *From* Remarks by Secretary General Ban Ki-moon to the Commission on the Status of Women, New York, 25 February 2008.

Stereotypes, Myths, and Attitudes Create Barriers to Justice

The unsubstantiated belief that women who are victims of domestic violence cannot protect their children because they are "susceptible to abusive relationships," and are ineffective caregivers is often be found in the legal system itself. *From* Quigley, Linda, *The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 Wm. & Mary J. Women & L. 867, 879 (2007). In addition to this prejudicial attitude, a number of other myths obstruct access to justice for battered women and their children. According to the American Bar Association's Commission on Domestic Violence, there are at least ten myths and corresponding facts to dispel the myths about domestic violence and custody of which advocates and attorneys should be aware.

One particularly striking myth is that "fit mothers don't lose custody." In fact, the article notes that victims of domestic violence who are mothers may not present themselves well in court during custody proceedings because of the emotional toll domestic violence has taken on them. *From* 10 Custody Myths and How to Counter Them, ABA Commission on Domestic Violence Quarterly E-Newsletter (July 2006). Another striking myth is that "abusive fathers don't get

custody.” In fact, abusive fathers do get custody about seventy percent of the time. *From American Judges Foundation, Domestic Violence and the Court House: Understanding the Problem...Knowing the Victim.* Another fact is that abusive fathers get custody as often as non-abusers, and are “more likely to seek sole custody than nonviolent [fathers].” *From 10 Custody Myths and How to Counter Them, ABA Commission on Domestic Violence Quarterly E-Newsletter (July 2006) citing American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and The Family, (1996).* Finally, not only are abusive fathers more likely to seek custody, they are also likely to use the court system to exercise power and control over victims. *From Ver Steegh, Nancy, Differentiating Types of Domestic Violence: Implications for Child Custody, Legal Studies Research Series, 41, 1393 (June 2006).* Family courts should be vigilant in preventing such manipulation and in dispelling the myths about child custody. These myths create barriers to battered women in custody and child support hearings, and when abusers attempt to gain visitation rights.

Laws and Legal Systems Create Barriers to Justice

Governments in CEE/FSU countries that are in the process of drafting and implementing new domestic violence laws should take note of the lessons learned in other jurisdictions and conversely, best practices that have developed. Laws on child custody and child abuse may actually fail to protect battered mothers and their children. Some states in the United States have taken important steps in incorporating research about domestic violence and its impact on children. It should be noted that laws on divorce, child custody and visitation, child support, and child protection are enacted by states in the United States rather than the United States federal government.

Child Custody Laws

The American Bar Association’s Commission on Domestic Violence has prepared a chart detailing the laws on child custody and domestic violence by each state in the United States. It documents each state’s law based on seven key questions related to child custody determinations. The answers to these questions are important because they reflect the public policy priorities of each state in protecting battered mothers and children. A summary of the states’ responses is provided beneath each question.

The term “best interest factors” generally means relevant factors that a judge will take into consideration when making a custody determination. The term “rebuttable presumption” means an inference about the facts of a case as presented, which may be overcome by contradictory evidence. The term “friendly parent” generally means the parent who is most likely to encourage contact between the other parent with the child. The term “CPO” means civil protection order also known as an “order for protection.”

- *Do best interest factors include domestic violence?*
 - Forty-three state laws explicitly include domestic violence as a best interest factor.
 - What does this mean?
 - Courts should be alert to the prevalence of domestic violence and consider its presence as a relevant best interest factor. Courts, in making a custody determination, should weigh domestic violence with all relevant factors, which protect the battered mother and her children.
 - Courts should be attentive to “patterns of coercive control” as well as the prevalence of domestic violence, and when relevant, make findings on parenting behaviors that fit these patterns. *From Ver Steegh, Nancy, Differentiating Types of Domestic Violence: Implications for Child Custody, Legal Studies Research Series, 41, 1419 (June 2006).*
- *Is there a rebuttable presumption against custody to the batterer?*
 - Twenty-five state laws explicitly create a rebuttable presumption against custody to the batterer.
 - What does this mean?
 - Courts must use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic violence has occurred between the parents. This can help protect the battered mother and her children.
- *Do the best interest factors include “friendly parent?”*
 - Thirty-two state laws include this factor, but four states explicitly provide that the factor doesn’t apply if domestic violence exists.
 - What does this mean?
 - In those states using this factor, if the domestic violence victim is judged as being “unfriendly” or not encouraging contact between the abuser and the child, this factor will weigh against her in the custody determination. The four states that provide that the factor doesn’t apply if domestic violence exists better protect battered mothers and their children. *See also Ver Steegh, Nancy, Differentiating Types of Domestic Violence: Implications for Child Custody, Legal Studies Research Series, 41, 1421 (June 2006).*
- *Is there a rebuttable presumption of joint custody?*
 - Twenty-three state laws create a rebuttable presumption of joint custody, but four states provide that the presumption may be overcome by the presence of domestic violence.
 - What does this mean?

- Except in those four states, joint custody is awarded without considering domestic violence and its impact upon a battered mother and her children.
- *Is there representation for the child?*
 - Thirty-three state laws provide for representation for the child typically called a “guardian ad litem” (GAL).
 - What does this mean?
 - Generally, GALS advise the court on issues related to custody and parenting time or visitation in cases where custody or parenting time is sought or if there is reason to believe the child is a victim of domestic violence or child abuse or neglect. GALS also conduct investigations into the child’s best interests. Problems arise when the GAL does not recognize the dynamics of domestic violence in a family context and denigrates, denies or overlooks its existence.
- *May child custody and child support be incorporated into the civil protection order (CPO)?*
 - Forty-seven state laws incorporate child custody into the CPO, but some of those states provide that the custody determination is temporary or time-limited.
 - Thirty-eight state laws incorporate child support into the CPO, but some of those states provide that the child support determination is temporary or time-limited.
 - What does this mean?
 - In those states that incorporate at least temporary child custody decisions into their CPO, children who witnesses domestic violence are more likely to be protected from witnessing such violence again.
 - In those states that incorporate at least temporary child support decisions into their CPO, battered mothers are more likely to be awarded temporary child support from the abuser to assist in caring for their children.
- *Can the court enter a CPO as to the child? Who can file?*
 - Forty-five state laws explicitly provide that a court may enter a CPO in favor of a child.
 - Of these states, some provide that a parent or guardian may file for a CPO on behalf of a child while others allow adult relatives and household members to file; other states allow other representatives or guardian ad litem to file; other states allow police to file.
 - What does this mean?
 - The states that allow the court to enter a CPO as to a child are more likely to protect children in households where domestic violence is alleged.

Governments in CEE/FSU countries in the process of drafting and implementing new domestic violence laws should consider the following:

- Amend existing child custody laws to include domestic violence as a relevant factor in considering the best interests of the child;
- Create a presumption against custody to the batterer in domestic violence cases involving a pattern of power and control by one intimate partner over another through different forms of abusive, coercive and threatening behaviors;
- Screen to exclude the presence of domestic violence before considering the “friendly parent” factor in custody determinations.
- Provide representation for children in child custody and visitation/parenting time cases and ensure that representatives are well-trained on the dynamics of domestic violence; and
- Allow courts in granting CPOs to order at least temporary child custody and support to the non-violent parent, and allow courts to enter a CPO as to the child.

Child Abuse Laws

Child abuse and neglect laws may also create barriers for battered mothers and their children. In fact, some state laws may contain problematic definitions of child abuse and neglect such as language stating that a child is abused or neglected when her parents “[allow] to be created or inflicted upon [a] child a physical or mental injury.” In fact, this definition has resulted in children’s removal from the home for current or even future exposure to domestic violence. *From* Quigley, Linda, *The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 *Wm. & Mary J. Women & L.* 867, 879 (2007).

According to the Children’s Bureau of the United States Department of Health and Human Services, three states or territories explicitly refer to domestic violence in their child abuse and neglect laws. Washington State provides that the child witnessing domestic violence is not in and of itself neglect or maltreatment. On the other hand, Puerto Rico, a United States territory, Montana, and West Virginia provide that a child who witnesses domestic violence or violence against someone who lives with the child is a victim of abuse. *From* *Definitions of Child Abuse and Neglect: Summary of State Laws*, Child Welfare Information Gateway (April 2007). The intent of these laws may have been to protect children, but in fact they often result in children being taken away from their battered mothers.

The issue of who must report child abuse and neglect may also be problematic for battered mothers and their children. There are two categories of reporters, mandated and voluntary. In the past, some state laws have made judges mandatory reporters of child abuse. This resulted in the removal of children from the home when mothers filed protective orders and were forced to describe the domestic violence which caused them to seek protection. *From* Quigley, Linda, *The Intersection Between Domestic Violence and the Child Welfare System: The Role Courts Can Play in the Protection of Battered Mothers and Their Children*, 13 *Wm. & Mary J. Women & L.* 867, 880 (2007). But according to the U.S. Department of Human Services Child Welfare Information Gateway, judges are

not currently among the mandated reporters. *From Mandated Reporters of Child Abuse and Neglect, Child Welfare Information Gateway (January 2008).*

Policy and practice guidelines have been developed to assist courts in addressing domestic violence and child maltreatment cases. In a handbook developed for the National Council of Juvenile and Family Court Judges, Jeff Edleson and Susan Schechter identify four guiding principles and recommendations that child protection workers, domestic violence organizations, and courts should apply. First, these entities should “create safety, enhance well-being, and provide stability for children and families.” Second, these entities should “try to keep children affected by maltreatment and domestic violence in the care of their non-offending parent, whenever possible.” Third, these entities should create a “service system with many points of entry.” Lastly, these entities should “design a differential response system” that distinguishes between less serious and extremely dangerous family situations and interventions appropriate to each situation. *From Jeffrey Edleson and Susan Schechter, Effective Intervention in Woman Battering & Child Maltreatment Cases: Guidelines for Policy and Practice, National Council of Juvenile and Family Court Judges (6 February 1999).*

Governments in CEE/FSU countries in the process of drafting and implementing new domestic violence laws should review child abuse and neglect laws to ensure that children who witness domestic violence are not necessarily categorized as abused or neglected children. At the same time governments should ensure that children are protected from violence and not placed in the custody of a violent parent.

Visitation Laws

In cases involving domestic violence, visitation, also known as parenting time, may or may not be appropriate. But, decisions about visitation by the court should not be made without considering the safety of the child. The National Council of Juvenile and Family Court Judges has published a Model State Code on Family Violence, which advises that courts should not “endanger a child or adult victim of domestic violence in order to accommodate visitation by a perpetrator of domestic or family violence.” But, the Code does permit visitation if precautionary measures are taken to protect the safety of the child.

The Code also recommends that state agencies administer specialized visitation centers for victims of domestic violence and their children where supervised visitation with the batterer parent may take place. *From Model State Code on Family Violence, National Council of Juvenile and Family Court Judges (1994).*

Governments in CEE/FSU countries in the process of drafting and implementing new domestic violence laws should ensure that they review visitation laws and at a minimum, consider the recommendations in the Model State Code on Family Violence.

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