When child custody disputes collide with a history of domestic violence, children are likely to get hurt. Aside from court proceedings that involve child abuse or neglect, there are five main points where issues of child custody intersect with domestic violence, including (1) when victims seek protective orders; (2) during divorce proceedings; (3) when parenting time is being decided; (4) when child protective services become involved with the family; and (5) when a parent removes a child from one country to another because of domestic violence. There are different considerations at each of these points, but the common goal in each situation should be the best interests of the child and the safety of the non-violent parent. Each of these circumstances is considered at greater length on this website at Domestic Violence and Child Custody, [http://www.stopvaw.org/Child_Custody_Issues.html](http://www.stopvaw.org/Child_Custody_Issues.html). This article focuses on the intersection of child custody and domestic violence in divorce proceedings.

When couples divorce, abusive parents often use custody proceedings as a way to continue a campaign of control and coercion against the former spouse.¹ Studies show that 25 to 50 percent of disputed custody cases involve domestic violence ² and that batterers are more likely to seek sole custody than non-abusive fathers ³ and they are just as likely as non-abusive fathers to receive custody.⁴ Most U.S. states require a court to consider domestic violence in making custody awards and the laws of 22 states, plus the District of Columbia, have presumptions against joint custody in cases where domestic violence has occurred. ⁵ Still, courts often fail to identify and consider violence in custody decisions, even when there is a history of substantial domestic abuse.⁶ Not only are children harmed by witnessing domestic violence, men who assault their partners parent differently even when they do not abuse their children.⁷ They are less involved with their children than other fathers, and they use negative parenting methods such as spanking, anger and shaming.⁸ They tend to undermine the other parent’s authority⁹ and are generally poor role models for developing healthy relationships and conflict resolution.¹⁰

Against this background of batterers requesting and receiving custody of their children, a trend toward a presumption of joint physical custody (JPC) is reflected in the laws of numerous states in the United States¹¹ and elsewhere in the world. The danger of presumptive JPC is the belief that “shared parenting” is good for all children. It places the rights of parents, even abusive parents, above the safety and well-being of children. A presumption of JPC creates additional obstacles to making sure that custody goes to the non-violent parent.

Batterers often continue and even escalate their abuse following separation and divorce.¹² Not only does JPC increase contact between a batterer and his children, it also greatly increases contact with the victim,¹³ creating opportunities to maintain control and continue or escalate violence toward the victim and their children.¹⁴ As a result, JPC has
negative outcomes for children in such families because it prolongs their exposure to the 
violence.\textsuperscript{xv}

Even when custody is not contested, a presumption of JPC may give unfair advantage to 
batterer-parents in custody negotiations. The presumption strengthens batterers’ position 
in negotiations, and works against parents who want to protect their children from 
unsupervised contact with a violent parent. Protective parents face an enormous legal 
hurdle to convince the court that JPC is not in the best interests of the child.\textsuperscript{xvi} For 
example, under the “friendly parent” doctrine, custody is awarded to the parent who is 
most likely to foster the child’s relationship with the other parent.\textsuperscript{xvii} Because battered 
women may fear that their abuser will also harm the children, they are unlikely to be 
considered a “friendly parent” under the doctrine. Even when joint custody is not 
mandated by the court, JPC is dangerous for families that have experienced violence. 
Victims may not truly agree to JPC voluntarily, but may acquiesce as the result of 
pressure and fear.\textsuperscript{xviii}

Australia amended its Family Law Act in 2006\textsuperscript{xix} to create a presumption of equal shared 
parental responsibility, including requiring courts to consider that the child spend equal 
time or “substantial and significant time” with each parent. Although the legislation 
included an exception for child abuse or family violence, several reports identified 
significant problems in the legal system’s response to domestic violence.\textsuperscript{x} In response 
to these reports, the government passed new amendments to the Family Law Act in 2011\textsuperscript{xxi} 
giving priority to a child’s safety in determining the best interests of the child, and 
making it easier to bring allegations of family violence and sexual abuse before the court. 
Key changes to the law include broadening the definitions of “family violence”\textsuperscript{xxii} and 
“abuse;”\textsuperscript{xxiii} directing courts to give greater weight to a child’s safety as a primary 
consideration in determining the child’s best interest; and removing the “friendly parent” 
provision as a consideration in determining custody.

A recently passed family law in British Columbia, Canada\textsuperscript{xxiv} provides an example of 
legislation that places the safety and best interests of the child first when couples separate 
or divorce. The act makes the best interests of the child the only consideration in deciding 
issues related to the child and uses the following criteria to determine the best interests:

- History of care of the child,
- Impact of family violence on the child’s safety, security or well-being,
- Child’s preferences, as appropriate, and
- Any civil or criminal proceedings relevant to the child’s safety and well-being.

The act also gives courts the tools to deal with family violence by defining the term; 
identifying risk factors to be considered in cases involving violence; and making safety 
the key goal of the best interests of the child test.

A briefing paper prepared for the United Nations Special Rapporteur on Violence Against 
Women in the United States\textsuperscript{xxv} includes the following recommendations regarding 
domestic violence and child custody in divorce:
• Courts should develop policies and protocols to improve their capacity to identify, differentiate and account for domestic violence and its impact on children and battered parents to craft safe and appropriate parenting arrangements.
• Courts should be required to consider any history of domestic violence in determining custody, including prior protective orders and domestic violence criminal convictions.¹
• Judges, court personnel and guardians ad litem should be trained regarding post-separation abuse, domestic violence and child abuse.
• Courts should use a multi-disciplinary approach to custody evaluation by involving experts in domestic abuse, child abuse and mental health.
• Custody evaluators should be trained to recognize that men who commit domestic violence against their partners often commit other crimes, including child abuse.
• Judges should be required to prepare written findings of fact and conclusions of law to support their custody orders.
• “Friendly parent” statutes should be eliminated because they fail to adequately protect parents who fear harm to themselves and their children.
• Mediators should assess whether it is appropriate to terminate settlement negotiations and/or institute safety precautions when a history of domestic violence is revealed. Mandatory face-to-face mediations between the parties should be eliminated.
• Courts should design custody transition plans to protect domestic abuse victims.


xii See Presumptive Joint Physical Custody Group, “Report Under House File 1262,”
http://www.dorsey.com/files/Publication/e4b13be7-ad61-4bf0-8576-0bf7516c365/Presentation/PublicationAttachment/e5398e22-49e8-41c7-8df4-0f9f3df54e1/JointPhysicalCustody_WhitePaper01_09_09.pdf.


xvii Davis, et al. at 14.


The new, broader definition of “family violence” includes socially and financially controlling behavior and exposing a child to family violence. 2011 Amendment at § 4AB.

The new, broader definition of “abuse” includes serious neglect and causing a child serious psychological harm, such as subjecting or exposing the child to family violence. 2011 Amendment at § 4(1).
