

**Domestic Violence and Child Custody:
The Dangers of a Presumption of Joint Physical Custody
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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. 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.ⁱ Studies show that 25 to 50 percent of disputed custody cases involve domestic violenceⁱⁱ and that batterers are more likely to seek sole custody than non-abusive fathersⁱⁱⁱ and they are just as likely as non-abusive fathers to receive custody.^{iv} 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.^v Still, courts often fail to identify and consider violence in custody decisions, even when there is a history of substantial domestic abuse.^{vi} Not only are children harmed by witnessing domestic violence, men who assault their partners parent differently even when they do not abuse their children.^{vii} They are less involved with their children than other fathers, and they use negative parenting methods such as spanking, anger and shaming.^{viii} They tend to undermine the other parent's authority^{ix} and are generally poor role models for developing healthy relationships and conflict resolution.^x

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 States^{xi} 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.^{xii} Not only does JPC increase contact between a batterer and his children, it also greatly increases contact with the victim,^{xiii} creating opportunities to maintain control and continue or escalate violence toward the victim and their children.^{xiv} As a result, JPC has

negative outcomes for children in such families because it prolongs their exposure to the violence.^{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.^{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.^{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.^{xviii}

Australia amended its Family Law Act in 2006^{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.^{xx} In response to these reports, the government passed new amendments to the Family Law Act in 2011^{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"^{xxii} and "abuse;"^{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^{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^{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.

ⁱ Frederick, L. , “Questions About Family Court Domestic Violence Screening and Assessment,” *Fam. Ct. Rev.*, Vol. 46, Issue 3, (2008), pp. 523-530, cited in *Violence Against Women in the United States*, at p. 58, para. 68.

ⁱⁱ Kibitz, S., National Center for State Courts, “Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers,” (1997), cited in *Violence Against Women in the United States*, at p. 58, para. 69.

ⁱⁱⁱ Reichler, J. M. , & N. Erickson, “Custody, Domestic Violence and a Child’s Preference,” *Domestic Violence Rep.*, Vol. 8, (June/July 2003), p. 66 (citing Bancroft, L. & J. G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, (2002), pp. 98 – 129), cited in *Violence Against Women in the United States* at p. 58, para. 69.

^{iv} Kernic, M. A. et al., “Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence,” *Violence Against Women*, Vol. 11, (Aug. 2005), p. 991 cited in *Violence Against Women in the United States* at p. 58, para. 69.

^v ABA Comm’n on Domestic Violence, Child Custody and Domestic Violence by State (Feb. 2008), <http://www.abanet.org/domviol/docs/Custody.pdf>, cited in *Violence Against Women in the United States* at p. 59, para. 70.

^{vi} Meier, J. S., “Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions,” *J. Gender Soc. Pol’y & Law*, Vol. 57, (2003), p.667, (internal citations omitted), cited in *Violence Against Women in the United States* at p. 59, para. 71.

^{vii} Edleson, J.L. & O.J. Williams (eds.), *Parenting by Men Who Batter: New Directions for Assessment and Intervention*, (2007), cited in *Violence Against Women in the United States and the State’s Obligation to*

Protect, Civil Society briefing papers on community, military and custody submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo in advance of her Mission to the United States of America January 24 – February 7, 2011, at p. 57, para. 67, www.law.virginia.edu/vaw.

^{viii} Holden, G.W. & K.L. Ritchie, “Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women,” *Child Development*, Vol. 62, Issue 2, (1991), pp. 311-327; Holden, G.W. , J.D. Stein, K.L. Ritchie, S.D. Harris & E.N. Juries, “Parenting Behaviors and Beliefs of Battered Women,” in *Children Exposed to Marital Violence: Theory, Research and Applied Issues*, p. 185, (G.W. Holden, R. Geffner & E.N. Juries eds., 1998), all cited in *Violence Against Women in the United States*, at p. 57, para. 67.

^{ix} Bancroft, L. & J. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, (2002); Levendosky, A.A. & S.A. Graham-Bergmann, “Mothers’ Perceptions of the Impact of Abuse on their Parenting,” *Violence Against Women*, Vol. 6, No.3, (2000), pp. 247-271, all cited in *Violence Against Women in the United States*, at p. 57, para. 67.

^x Jaffe, P.G. , C.V. Crooks & N. Bala, “A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes,” *J. Child Custody*, Vol. 6, (2009), pp. 169-188, cited in *Violence Against Women in the United States*, at p. 57, para. 67.

^{xi} See Presumptive Joint Physical Custody Group, “Report Under House File 1262,”

http://www.dorsey.com/files/Publication/e4b13be7-ad61-4bf0-8576-0afb7516c365/Presentation/PublicationAttachment/e5398e22-49e8-41c7-8df4-09f3ddf54e1/JointPhysicalCustody_WhitePaper01_09_09.pdf.

^{xii} Crooks, C. et al., “Factoring in Effects of Children’s Exposure to Domestic Violence in Determining Appropriate Post-Separation Parenting Plans,” in *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues* (Barry Goldstein & Mo Hannah eds., 2009), cited in Davis, G., K. Lizdas, S. Tibbets Murphy, and J. Yauch, “The Dangers of Presumptive Joint Physical Custody,” Battered Women’s Justice Project, Minneapolis, MN, (2010) p. 3,

http://www.bwjp.org/files/bwjp/articles/Dangers_of_Presumptive_Joint_Physical_Custody.pdf.

^{xiii} Jaffe, P. G. et al., “Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans,” *Fam. Ct. Rev.*, Vol. 46, No. 3, (2008), p. 515, cited in Davis, et al. at 82.

^{xiv} Saunders, D. G., “Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors and Safety Concerns,” (2007),

http://www.vawnet.org/Assoc_Files_VAWnet/AR_CustodyRevised.pdf; Jaffe, et al., both cited in Davis, et al.

^{xv} See, e.g. Kitzmann, K.M. et al., “Child Witnesses to Domestic Violence: A Meta-analytic Review,” *J. of Consulting & Clinical Psychol.*, Vol. 71, Issue 2, (2003), pp. 339-52; Wolfe, D.A. “The Effects of Children’s Exposure to Domestic Violence: A Meta-analysis and Critique,” *Clinical Child & Fam. Psychol. Rev.*, Vol. 6, No. 3, (2003), pp. 171-187, cited in Davis, et al.

^{xvi} Davis, et al. at 14.

^{xvii} See Dore, M., “The Friendly Parent Concept: A Flawed Concept for Child Custody,” *Loyola Journal of Public Interest Law*, Vol. 6, (2004), pp. 41 – 56, <http://www.stopfamilyviolence.org/info/custody-abuse/friendly-parent/the-friendly-parent-concept-a-flawed-factor-for-child-custody>.

^{xviii} See, Bryan, P. E., “Killing Us Softly: Divorce Mediation and the Politics of Power,” *Buff. L. Rev.* Vol. 40, (1992), pp. 441-523; “The Coercion of Women in Divorce Settlement Negotiations,” *Denv. L. Rev.*, Vol. 74, (1997), p. 931; and “Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion,” *Buff. L. Rev.* Vol. 47, (1999), p. 1153 cited in Davis, et al. at 14.

^{xix} Family Law Amendment (Shared Parental Responsibility Act), (2006)

<http://www.comlaw.gov.au/Details/C2006A00046>.

^{xx} Australian Institute of Family Studies, “Evaluation of the 2006 Family Law Reforms,” (Dec. 2009), <http://www.aifs.gov.au/institute/pubs/fle/summaryreport.html>; Chisholm, R., “Family Courts Violence Review” (27 Nov. 2009), http://www.ag.gov.au/Documents/Chisholm_report.pdf; and Family Law Council, “Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues,” (Dec. 2009), http://www.ag.gov.au/Documents/Family_Violence_Report.pdf.

^{xxi} Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011,

http://www.austlii.edu.au/au/legis/cth/bill_em/fllavaomb2011623/memo_0.html.

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

^{xxiii} 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).

^{xxiv} Family Law Act, Bill 16 – 2011, Part 4, Division 1, sections 37 & 38,
http://www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm#section1.

^{xxv} *Violence Against Women in the United States*, p. 62 – 63, para. 88 – 97.