

Final Report of the Child Custody and Visitation Focus Group

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Introduction

In March 1999, over a span of three days, a distinguished group of judges, attorneys, battered women's advocates, academics, and others were invited to gather together at the University of Nevada, Reno to identify and discuss the complicated issues surrounding the overlap between domestic violence and child custody and visitation. *(See List, National Council of Juvenile & Family Court Judges, end of document, for a list of participants).*

This Child Custody and Visitation Focus Group was hosted by the Family Violence Department of the National Council of Juvenile and Family Court Judges and supported by the Violence Against Women Office, Office of Justice Programs, U.S. Department of Justice. The purpose of the focus group not only was to inform the Department of Justice about these overlapping issues, but also to identify desired responses or possible solutions to problems.

Identifying the Issues and Developing the Vision-The Process

Based on their formidable expertise, participants at the focus group were invited to engage in a prioritization process from which eight topics were identified as the most important to the majority of participants. These topics included:

“Misguided” processes

Substantive law problems

Systems barriers

Blatant discrimination

Safety

Focus on the child

Fathers' rights movement

Lack of resources

After these topics were identified by the entire focus group, participants then broke into self-selected small groups to identify key issues and propose solutions for each topic. Although the groups were directed to identify issues and possible solutions within each topic, they were not asked to prioritize their ideas or gain any kind of consensus for their ideas either within the small group or the entire focus group.

What follows are the reports given by these small groups, as well as reports about the perceived training needs of various professionals dealing with overlapping issues of domestic violence and child custody and visitation.

Misguided Processes

- “Processes are disjointed-there is no coordination among different areas of ‘the system’ dealing with the same family.”
- “Courts often encourage parties to ‘settle’ issues to look for an easy way out.”
- “There is an unlawful delegation of judicial authority and discretion to guardians ad litem, Court Appointed Special Advocates, evaluators, and mediators.”
- “Batterer intervention programs often are used as a cure-all.”
- “Courts often order children into supervised visitation with uninformed supervisors.”

From a much longer list of possible issues, five major areas of concern for battered women and their children emerged: alternative dispute resolution and litigation, non-adjudication and judicial deferral, court procedures and post-adjudicatory processes, advocacy for children, and inadequate responses from other agencies. For purposes of its report, the group focused on identifying issues and developing recommendations in the following areas.

Court processes

Among misguided court processes are docketing and calendaring problems, inappropriate use of guardians ad litem (GALs) and Court Appointed Special Advocates (CASAs), and inadequate informational systems.

One solution put forward is the creation and promotion in each state of uniform model custody forms in different languages to ensure that battered mothers provide courts with adequate information about domestic violence and past court involvement. Additionally, effective support should be available for women attempting to fill out these model forms, including:

- the availability of an advocate;
- the elimination of filing and process serving fees;
- and records searches by courts themselves to determine whether prior legal decisions exist involving the parties.

Post-adjudicatory processes

Program standards need to be set for children’s services, supervised visitation centers, and batterer intervention programs to ensure courts are making referrals to effective programs. Courts also need to monitor programs on an ongoing basis to ensure they are in compliance with the established standards. When children are at risk of physical harm or kidnapping, generous emergency access to court should be available. This must be a priority on court dockets.

Alternative Dispute Resolution & Settlement

The non-adjudication and deferral of decision-making to social services, court services, or custody evaluators/psychological evaluators are major problems for battered women and their children. Kirkpatrick, Hadler, Geyer, and Steinmuller are making decisions about my kid’s

lives based on little or unsubstantiated information. Children have been taken from their mothers and given to convicted abusers by such uninformed, unqualified persons. Katie Holliday's secretary was appointed as a parent coordinator with no qualifications, and yet given this grave decision making authority.

Possible solutions include:

- judicial review of agreements to see if domestic violence was present in the pleadings, and whether the proposed order meets safety concerns;
- positively reinforcing mediation, negotiation, and litigation as viable options;
- requiring courts to make a finding of domestic violence when protection orders are issued, so this finding can be used in future custody litigation; and
- requiring evaluators to present their findings to the court instead of making recommendations.

CASAs, GALs, and Court-Appointed Attorneys for Minors

To ensure competent and well-informed practice by children's advocates, courts should establish the following safeguards as a condition of appointment:

- Standards
- Certification on domestic violence issues
- Rules of court that define their role
- Education
- Monitoring

Judges should not delegate decision-making to these advocates. Instead, GALs and CASAs should provide the court with information, but should not form recommendations about custody and visitation. When rendering their decisions, judges should be required to make explicit findings of fact to support their decisions.

Substantive Law

- "Many states do not have a presumption against custody to a batterer."
- "Many courts lack authority or funds to appoint attorneys to indigent battered women in protection order or custody cases."
- "Sometimes the rules of evidence limit a court's access to information about a batterer's history of violence or abuse."

- “In some states, teenage girls lack standing to seek restraining orders or custody orders.”
- “Usually judges are not required to make a finding of domestic violence in civil protection order cases, and this can have a negative impact on battered women and their children in later custody and visitation decisions.”

After identifying numerous issues in a wide range of topics, including civil protection orders, criminal law issues, procedural issues, and evidentiary issues, this small group decided to focus its attention on two main areas-family law and child protection.

Family Law Issues

Some states still have “friendly parent” provisions or joint custody presumptions embedded in their statutes. Unfortunately, these laws place battered women at risk of losing custody altogether, or sharing joint custody with a batterer. Either outcome places women and children at significant risk for further violence. In states where joint custody presumptions exist, the rationale seems to be a mistaken assumption that children always need contact with both parents and that batterers are not dangerous.

One proposed solution is the adoption of a presumption against custody to an abuser, or refinement of the “best interests of the child” standard to consider the impact of domestic violence appropriately. A refined “best interests” standard might include:

- determine who the nurturing/ psychological parent is;
- determine which parent will encourage and strengthen the bond between the child and the non-violent parent;
- examine the current relationship between the parents;
- determine which parent will encourage peer relationships by the child;
- make domestic violence a significant factor or presumption (including primary aggressor language);
- hear the voice of the child through court appointment of a well-trained, competent advocate; and
- eliminate “friendly parent” laws and expose the improper use of the “parental alienation syndrome” against battered women.

Child Protection Issues

In many jurisdictions, battered women and children face the following pressing issues:

the lack of standards regarding when Child Protective Services (CPS) should intervene with children who have witnessed domestic violence;

battered women charged inappropriately with failure to protect children;

the proliferation of child witnessing statutes, which may have criminal and child protection ramifications; and

the lack of standards in general about how CPS should intervene when domestic violence and child maltreatment overlap.

Possible solutions include:

- mandating the coordination of services to prevent removal and duplication of services;
- creating standards for CPS response (see above);
- giving courts authority to order appropriate remedies;
- refining confidentiality to promote safety for battered women and accountability of CPS workers and court personnel;
- requiring CPS to strengthen the bond between the children and the non-violent caretaker parent before removing the children;
- studying the impact of child witnessing statutes and opposing them until more information is available;
- mandating training for GALs, CASAs, evaluators, and judges; and
- establishing funding to carry out all of these recommendations.

Systems Barriers

“The diversity of jurisdictional structures in state courts and the lack of case-specific communication between them is a major problem.”

“Women’s advocates and children’s advocates don’t talk to each other resulting in a lack of information, training, and cross-disciplinary understanding.”

“Jurisdictional laws punish battered women who flee with their children.”

“There is a need for federal and state custody order registries.”

Instead of identifying issues and developing recommendations about specific systems barriers, this group presented general principles to assist communities in integrating and coordinating their systems.

Identifying and breaking down systems barriers

The group proposed a three-step process for courts, agencies, and systems to identify and resolve the barriers for battered women and their children. This process typically would include:

- coordination through the development of a community-based action plan with a consumer focus;
- case tracking and systems accountability to monitor judges and court functions; and
- resource assessment and development to implement the plan.

This approach would allow communities to develop solutions to their own systems barriers and produce a more unified court system with improved communication among the various players.

Blatant Discrimination

“Paternal access is of greater value than women’s or children’s safety.”

“Because of stereotyped roles, mothers must be perfect, but we expect little of fathers.”

“The assumption that men and women are equal negates the special role of the mother as primary caretaker and punishes stay-at-home mothers for not being economically self-sufficient, as well as working mothers for not staying at home.”

“The appearance of discrimination causes judges to bend over backwards in favor of involving dads.”

The group identified a number of issues that have an impact on battered women trying to gain custody of their children: gender bias, class bias, racial bias, heterosexism, cultural bias, and mother bias (which wasn’t discussed in any detail).

Gender Bias

Among the issues raised in this sub-category were the stereotyped roles of women, including the requirement for women to be ideal mothers, and male privilege, including society’s minimal expectations for fathers.

Class bias

Among the examples of class bias identified in this sub-category were:

the notion of “welfare queens” in our society;

the involvement of CPS in a family because of lower class status;

judgmental professionals;

economic barriers to gaining custody (through law or judicial beliefs);

stereotypes that domestic violence happens only in certain socio-economic groups; and

lack of access to family court (legal representation, witnesses, experts)

Racial bias

The small group also reported the following forms of racial bias that impact battered women and their children:

stereotypes that domestic violence is a part of a particular culture;

lack of diversity in all systems/services;
 lack of understanding of particular kinds of families;
 categorizing/generalizing;
 history of racism in the legal system; and
 lack of services.

Heterosexism

In this sub-category, the group identified stereotypes of the “proper family;” discrimination against lesbian mothers sanctioned by law; fear and cultural teachings; and lack of services.

Cultural Bias

It is difficult for women to gain access to appropriate services under the best of circumstances, but women who are disenfranchised from the power structure because they are immigrants, or do not speak English, have a particularly difficult time finding adequate representation. Because European culture is dominant, stereotypes can enter into custody decisions when the parties come from diverse cultural backgrounds.

Solutions

In identifying possible solutions, any actions taken must be comprehensive and address all of these biases. Solutions to the various forms of blatant discrimination that battered women and their children face include:

- analogizing this work to the human rights paradigm-lawyers can use human rights ideology and documents to eliminate discrimination against battered women;
- performing accountability audits in institutions/systems;
- providing cultural competency training for all-judges, custody evaluators, attorneys, CPS workers;
- exploring how to impose financial sanctions for discrimination and financial benefits for doing the right thing;
- writing a uniform model law addressing institutional bias issues;
- amending the Constitution to include the Equal Rights Amendment; and redefining the concept of “family” when making codes, e.g., including co-parents regardless of sex.

Safety

“Courts continue to appoint unqualified guardians ad litem and to rely on their failure to uncover evidence of abuse to grant custody and unsupervised visitation orders to abusers.”

“Safety is not a consideration in most custody decisions.”

“There is a presumption, regardless of the statutory language, that unless domestic violence has been committed against the children directly there is no need for supervision of visits.”

During the course of its deliberations, this small group identified and developed recommendations in five different areas. In sharing these conclusions, the group emphasized that the definition of “safety” for battered women and their children should be broad enough to include not just physical safety, but also emotional safety and well being.

Insufficient Safety Resources

A lack of safe space was identified as one of the biggest problems for battered women and their children. They need supervised visitation centers; legal strategies to protect domestic violence resources; safety planning; and increased financial and other resources for children, e.g., children’s advocates.

Modification of Custody and Visitation Orders

Another major problem for battered women is the absence of an expedient means to change or modify custody or visitation orders when problems arise. There should be some form of short-term contingency process that doesn’t require a battered woman to go back to court if the crisis/danger level escalates when visitation with a batterer is court ordered. When a mother does go back to court, the forums most conducive to helping battered women with these types of custody or visitation issues are a domestic violence court with flexibility, or a one-family, one-judge court.

Making Safety the Priority

Public opinion about the safety needs of children has to change; and communities must develop a heightened sense of shared responsibility for keeping children safe.

To accomplish these goals, the following strategies were identified:

including domestic violence and custody issues as required curricula in a variety of contexts, including law schools;

ensuring that public awareness campaigns clarify that a mother’s and child’s safety are connected;

exploring the possibility of safety as an affirmative defense for disobeying custody or visitation orders;

giving battered women and their children a period of stabilization during which the batterer has no visitation;

denying custody or visitation to batterers, when this is appropriate, and accomplishing this through further refinements in child custody laws and through judicial training. In this context, the presumption that joint custody is always in the children’s best interests needs to be challenged and safety should be looked at first.

Trusting Battered Women's Safety Plans

Information about women's safety plans should be presented to the court as part of its decision-making process. To ensure that every battered woman and child has support in developing an effective safety plan, more resources should be made available to advocates and others who engage in this type of safety-enhancing activity.

Research

Research is necessary to determine the impact and outcomes of various types of custody and visitation orders on children who have witnessed domestic violence. Specifically, research is needed to compare children who do not have visitation with abusive fathers with children who do. Much more needs to be learned about what works for children in this area and about the long-term consequences for children of our current custody and visitation order decision-making processes.

Focus on the Child

Hearing the child's voice "We have a responsibility to meet children's needs from a developmental, cultural, and language perspective."

"We need to recognize that children who witness domestic violence are also victims of domestic violence."

"Children need competent advocacy throughout all systems."

"We need more resources for child victims/witnesses."

"Custody and visitation orders continue to be issued to reward or punish the parent rather than to satisfy the best interests of the child."

One of the issues that came to the fore is the failure of many key players to focus on the child when decisions about custody and visitation are being made. In developing a vision about the lack of focus on the child, this group clustered its ideas around two central themes: the need to hear the child's voice and the child's right to safety.

The group identified the following issues:

Who should speak for the child and how do we hold them accountable?

Should the process for determining custody be adversarial when there is domestic violence?

Should the child's advocate be adversarial to both parents?

Who pays for the child's advocate and what impact does that have on the outcome of the case?

How can we minimize the potential for retaliation or negative impact on a

child when she states her wishes in the case?

How do we better understand a child's behaviors in their cultural context? [i.e. lying to cover up the abuse]

What do we do with our own mental models of best interests of the child when it causes us not to listen to children because they aren't saying what we want to hear?

To resolve some of these issues, domestic violence training should be required for all people who are raising the child's voice. Children's advocates and others need to learn via new research how children from different cultural backgrounds communicate-how they process violence in the family-so that their wishes can be expressed accurately in court. Research, solutions, and interventions for child witnesses to domestic violence should be conducted in a culturally sensitive manner to ensure good outcomes for these children. Standards, accountability, and certification for child advocates both in courts and in social services contexts also are required. These rules and standards of practice should be developed to ensure that advocates accurately state the child's preferences, while protecting the child's confidentiality if the statement may provoke or result in retaliation against the child. As one of these standards of practice, children's representatives should be required to make a full disclosure of the "role" they are taking, and whether they are expressing the child's views or their own views about what they believe to be in the best interests of the child.

Child's Rights to Safety

In the context of domestic violence and child custody and visitation, safety for children is a very complex issue. Because the concept of safety for children should be broad, it must encompass not only safety from physical violence, but also a child's need for nurturing, emotional well-being, and stability. These latter needs must be considered before a child is removed from the custody of his mother. Children should not be viewed in a vacuum-often a child's best hope for safety is linked to his mother's safety, and coordinated efforts to enhance a battered mother's safety also can enhance the child's.

To keep battered mothers and their children safe, there should be a presumption that it is not in a child's best interests for a batterer to be given joint or sole custody. In many states, domestic violence is merely a factor to be taken into consideration when custody decisions are being made, which may mean that the presence of domestic violence is not given sufficient weight.

Children who visit with abusive fathers should have access to appropriate and safe supervised visitation centers or services. Children also should have access to supportive services to develop their own safety plans, especially when they are required to have unsupervised visits. As part of their right to nurturing and emotional well-being, children should have a right to responsible parenting, and batterers who have court-ordered visitation rights should face consequences if they fail to show up for visits. There also is an urgent need for parenting education programs and batterer intervention

programs to incorporate into their curricula the impact of domestic violence on children, and a need for research to determine whether these preventive efforts are successful.

Fathers' Rights

"Who are the responsible groups? Who are not? Do we understand and appreciate their different agendas? How can we work together with those we identify as responsible?"

"Fathers' rights groups often focus on the rights of fathers instead of their responsibilities."

"Fathers' rights are often at odds with the safety needs of the rest of the family."

"Fathers' rights groups have a system of 'experts' who do 'evaluations' on 'syndromes' which have become formalized in many court systems."

In recent years there has been a shift away from the safety concerns of battered women and their children to a focus on re-establishing patriarchal values. With this shift has come an assumption that whatever is good for fathers is good for children, with a corollary message that divorce is always harmful to children. This backlash has been particularly harmful to battered women and their children who are seeking to separate from abusive men.

One successful strategy of fathers' rights groups has been to couch their message against a backdrop of real fear that social structures will disintegrate if fathers are not present in their children's homes, or at least an active presence in their lives. They also argue that maintaining the patriarchal status quo will alleviate the taxpayer burden of supporting single women and their children when men choose not to pay child support because they have been "deprived" of child custody.

These fathers' rights groups have considerable resources-money, time, and institutional power-to accomplish their goals, and their agenda now is spilling over from the custody and visitation context into child protection proceedings.

Positioning Responsible Fatherhood Groups

To counter these harmful messages, the voices of "responsible" fatherhood groups must be heard on the subject of domestic violence and child custody-and there must be an increase in resources to these groups so their voices can be heard.

Organizing the Battered Women's Movement

The battered women's movement also must take the initiative to develop an organized political strategy to get its message across about the harmful effects of domestic violence on children, and the need for custody and visitation orders that take domestic violence into account. In this regard, identifying available resources, such as the Minnesota Center Against Violence and Abuse, the American Bar Association Commission on Domestic Violence, the Albany synthesis project, and others, is crucial.

Other Strategies

Additional strategies include:

- develop focused research that demonstrates, for example, the percentage of violent fathers who are being awarded custody;

- participate in State Bar family law sections, which traditionally have not been helpful on the issue of domestic violence in the context of child custody and visitation;
- organize legal services to respond to domestic violence and custody as a gender issue;
- create a backlash instructional manual;
- develop web pages supported by good databases, including testimony given in legislative public policy arenas;
- compile a list of "surprising" allies-to be shared;
- perform academic research and develop a way to disseminate it by building alliances with women's groups or others who want to help, for example, Junior League, American Association of University Women, and Women's Auxiliaries; and organize adult children of batterers to speak and give testimonials about their experiences.

Resources

"There is a lack of good lawyers to represent battered women and children."

"We need supervised visitation centers and services, good batterer intervention programs, and holistic services for battered women (drug counseling, financial counseling, housing, and job training)."

"The direction of resources to states on this issue often excludes tribes."

"There is a lack of shelters that accept women and children from special populations."

Many communities throughout the country still lack basic resources for battered women and their children, and engage in an ongoing struggle to balance the competing needs for direct versus preventive services. Once a community determines that a critical mass of safety services has been reached, however, three main areas of need still exist.

Need for Attorney Representation

Battered women and their children need attorneys to represent them in a variety of custody and visitation cases, not just divorces. Courts should have funds and the authority to appoint attorneys for battered women and children, and legal services should have funds to hire more staff attorneys. To improve the quality of representation in custody and visitation matters, attorneys representing battered women and their children should have access to state-of-the-art training in the evolving standards of practice in domestic violence cases. There also is an urgent need for judges to have training about crossover domestic violence and custody issues. Finally, there is a need for courts to pay for competent interpreters; battered women who do not speak English should not have to rely on their children or other family members to speak for them in court.

Need for Holistic Services

Battered women and children should have access to drug/alcohol treatment, financial counseling, health and mental health services, housing, jobs and job training, transportation, parenting education, childcare, and safety planning. These holistic services should be created through new federal funding streams to tribes and states and also through new corporate partners in the private sector.

Need for Advocates within Various Systems

Battered women and their children need vertical advocacy through various systems, including courts, CPS, housing, and health/mental health systems. This concept of vertical advocacy encompasses the notion of one advocate, one woman provided through a lead agency that also coordinates services. In this context, the use of advocates to navigate through these various systems should be explored further.

Training

As professionals, what can we learn about the issues of domestic violence and child custody and visitation? What do we need to learn?

As a final small group activity, all focus group participants were asked to meet with members of their own profession to consider these two questions and make suggestions about what they need to learn.

Battered Women's Advocates

Battered women's advocates identified the need to go back to the basics and learn how to re-politicize the movement. Among the questions advocates should be asking themselves right now are:

What are the laws concerning domestic violence and child custody and how can we use them to protect battered women and their children?

How does the CPS system work and how can we learn to work with it?

How can we make sure our voices are heard with authority on this issue when others are being listened to?

How can we utilize local stories and voices to shape the development of law and policy in the overlapping issues of domestic violence and child custody?

How can we support advocates actively protecting children?

How can we influence the information about domestic violence and child custody given to students in social work/ law schools?

How can we learn to counter the sound bites of fathers' rights groups?

How can we be involved in research design and implementation?

Judges

Judges expressed a pressing need to learn more about:

- what are the developmental needs of children who have witnessed violence or have been abused directly, the needs of battered women, and the needs of batterers;
- how to deal with litigants who have substance abuse issues;
- how to deal with pro se litigants;
- how to coordinate with other courts dealing with the same family;
- how to take judicial leadership to develop and support the efforts of supervised visitation centers in their communities; and
- what are the judicial ethics issues related to domestic violence.

As an aside, because they cannot take time away from the bench easily and because they have access to limited training funds, judges need low-cost training at convenient times and in convenient venues. Mixed panels of trainers who are highly credible within their fields are most persuasive to judges. One way to reach judges who are not well informed in this area might be through mandatory judicial training. Another way is to publish materials in journals that judges read.

Attorneys

Attorneys identified two critical junctures in their careers during which they need training about the overlapping issues of domestic violence and child custody and visitation-during law school and after passing the bar.

The group identified the following three ways to ensure that law students receive adequate training about these issues:

- include domestic violence and child custody and visitation on the Bar Exam;
- have students participate in domestic violence clinics; and
- develop separate courses on this subject, as well as infuse this content into pre-existing courses such as family law, juvenile law, criminal law, etc.

After passing the bar, attorneys need to know about:

- what is domestic violence and its impact on the attorney-client relationship; how to screen for domestic violence;
- what are the effects of domestic violence on children;
- what are the best ways to support and protect children; and
- how to litigate these cases using the child's statement and expert information on children.

Depending on their areas of practice, some attorneys may have a need for even more specialized information. This information should be made available at state, local, and specialty bar functions and continuing education programs and is particularly crucial for family law attorneys, guardian ad litem attorneys, defense attorneys (both criminal and juvenile), legal service attorneys, general practitioners, and policy makers.

Children's Advocates

Children's advocates identified the following questions about which they need more information:

- How should they interact with the domestic violence community?
- What can they do to intervene on behalf of children's mental health needs?
- What is happening to children after custody is decided?
- What are the options for children when termination of parental rights and child custody orders are made?
- How can they get better facts/documentation?

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