

New Jersey Law Journal

VOL. CLXIX – NO. 6 – INDEX 471

AUGUST 5, 2002

ESTABLISHED 1878

Family Law

Understanding the Impact Of Violence on Children

Integrating the public policy to protect children with the custody statute is not a simple affair

By Toby G. Kleinman

Courts should employ a child-centered, protective strategy in child-custody cases involving allegations of child maltreatment and domestic violence, and such a strategy must be grounded in a complete understanding of the impact of violence on children.

Issues of child physical, sexual or emotional abuse and domestic violence frequently arise and remain during the pendency of custody and visitation litigation. Courts are confronted with having to make temporary awards of custody and orders regarding visitation, often on little evidence, long before either party puts on its complete case.

Parents' constitutionally protected rights to due process and to parent one's children may compete with the welfare of the children and the need to balance the potential harms of erroneous decisions.

The author is a partner at Adler & Kleinman of New Brunswick. She wishes to thank Patricia W. Cone, Ph.D., J.D., who works for the firm full time, for assisting in the research and writing of this article.

Public Policy Considerations

Numerous statutes make clear it is New Jersey's intention to safeguard the emotional and physical welfare of its youngest citizens. The express purpose of N.J.S.A. 9:6-8 (a) "is to provide for the protection of children ... who have had serious [non-accidental] injury inflicted upon them" ensuring the ...[t]he safety of the children served shall be of paramount concern ... and to assure that the lives of innocent children are immediately safeguarded from further injury and possible death and that the legal rights of such children are fully protected."

Under N.J.S.A. 9:6-8.34 "a parent or other person interested in a child ... or [a]ny person having knowledge or information of a nature which convinces him that a child is abused or neglected" may file a complaint for protection of a child.

The trial court should provide protection in the form of limited, supervised contact, or no contact on a temporary basis, even prior to a preliminary hearing in those child custody/visitation cases as is required upon a similar allegation under Title 9. See N.J.S.A. 9:6-8.28 to 9:6-8.38. Thus, public policy considerations for preservation of the emotional and physical health of the child may foreclose a parent from co-parenting or having any contact with the potentially offending parent or guardian. See N.J.S.A. 9:6-8.28 to 9:6-8.38.

N.J.S.A. 2C:7-1 recognizes the dan-

gers posed to children by the potential for recidivism by sex offenders and other offenders who commit predatory acts against children and therefore creates the sex offender registry system. N.J.S.A. 2C:24-4(j)(2) recognizes the significant devastating effects on children when perpetrators of sexual violence are parents of the child, as it makes it a crime of the first degree if a parent "causes or permits a child to engage in a prohibited sexual act or" other sexually prohibited and offensive acts, where a stranger committing identical acts is subject to a crime of the second degree.

N.J.S.A. 2C:25-18, commonly referred to as the Prevention of Domestic Violence Act, declares in pertinent part that "domestic violence is a serious crime against society ... that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence."

In stark contrast to the aforementioned legislative policies is the public policy enunciated by the Legislature in N.J.S.A. 9:2-4, the statute governing judicial decision-making in child custody cases. The considerations therein require a court to ensure "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage" and declares "that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."

Although the safety of the child or parent from the physical abuse of the other parent, history of domestic violence, if any, and parental fitness are among the factors that must be considered by the trial

court in making a custody determination, the paramount concern for safety of the child is conspicuously absent and may even appear to be overwritten in the requirements as it regards custody and visitation decisions.

The fundamental legal principle that laws be construed so as to not conflict with each other requires a trial court to apply the protective public policies to child custody and visitation cases thereby ensuring that the public policy of the state is carried out. Thus, when a parent's right to access to his or her child is in conflict with the child's need for safety from that parent, the child's need for safety trumps. See *V.C. v. M.J.B.*, 163 N.J. 200 (2000) and *In the Matter of the Adoption of a Child by P.S. and J.S.*, 315 N.J.Super. 91 (App. Div. 1998).

Trial Court Process

Parents who allege victimization of themselves or their children before or during custody or visitation litigation frequently run into a wall of disbelief from the child protection system, legal system, and even their own attorneys. Many victims of domestic violence will not disclose their experiences or their fears for their children out of concerns for retaliation by the batterer, shame, or a belief that they will not be believed and might even lose their children.

Pursuant to N.J.S.A. 9:2-4, the trial court must determine the custody/visitation plan that serves the best interests of the child by considering a number of factors. Consideration of these factors is mandatory.

The trial court may also consider any other facts or conditions determined to be relevant to the unique facts of the individual case. Upon the initial raising of child abuse or maltreatment allegations to the trial court in a custody/visitation matter, the processes required by N.J.S.A. 9:6-8.8 to 9:6-8.70 are not mandated. Numerous protections afforded victims and children of parents who are victims of domestic violence are not reiterated in the custody considerations of 9:2-4. Nevertheless, the statutes are compatible when construed with each other.

There are no specific procedures in N.J.S.A. 9:2-4 set forth for the court to follow when allegations of child maltreat-

ment are alleged in a divorce action. But, the procedures set forth in N.J.S.A. 9:6-8.8 to 9:6-8.70 can be followed. The court has the authority to make findings as to the occurrence of child maltreatment by a parent and can make such findings at preliminary stages of a custody proceeding in order to ensure the paramount safety of the child.

There is no reason for a court to treat allegations of child maltreatment or domestic violence raised in a custody case differently from those brought before it by the Division of Youth and Family Services. The risks of harm to a child whose abusive parent continues to have access are identical to the risks of harm to a child whose circumstances are before the court under the auspices of N.J.S.A. 9:6-8.8 and parts thereof.

If the same or similar sworn-to allegation made by a parent or guardian would warrant the court's removal of a child from a parent pursuant to N.J.S.A. 9:6-8.28, the identical remedy can be imposed by the trial court in the context of a custody/visitation action. The child's safety should be no less guaranteed. By construing the custody statute in light of the principles and procedures outlined in N.J.S.A. 9:6-8.8 to 9:6-8.70 and the domestic violence statute, N.J.S.A. 2C:25-18, children will be assured more protection and their best interest more certain.

N.J.S.A. 9:6-8.23 requires the appointment of a Law Guardian who is specially trained, and paid for by the state under the auspices of the Public Defender system. Unfortunately, at this time, a Law Guardian cannot otherwise be appointed.

Under the custody provisions of the statute, proof of the occurrence of child maltreatment or domestic violence is a subsidiary fact that contributes to the court's conclusions about factors such as parental fitness. These factors themselves are subsidiary findings that form the basis for the trial court's determination of the ultimate issue — the best interests of the child.

These subsidiary facts and the ultimate issue of best interests of the child must be established by the preponderance of the evidence, except when a parent moves for termination of visitation between the child and the other parent. See *Cosme v. Figueroa*, 258 N.J.Super.

333 (Ch. Div. 1992).

Domestic Violence

Concerns of child abuse and domestic violence are not less likely to be unfounded when first raised in the context of custody/visitation. See Peter G. Jaffe & Robert Geffner, "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals," in *Children Exposed To Marital Violence: Theory, Research, and Applied Issues* (George W. Holden, et al. eds., 1998).

Protections against domestic violence do not end because someone is in a custody or visitation dispute. In fact, domestic violence restraining orders once granted cannot be removed by motion of an abuser without going before the court and demonstrating good cause for dissolving the order.

Even if a victim seeks to withdraw a restraining order, she must prove to the court that her request is voluntary and not under duress. See *I.J. v. I.S.*, 328 N.J.Super. 166 (Ch. Div. 1999).

To ensure the domestic violence aspects of our public policy are carried out, it is irrelevant whether domestic violence is raised before, during or after a divorce. Whenever domestic violence is found, a court can never lose sight of the fact that each time the parties are before it, there is a perpetrator and a victim.

The right to due process does not alter the basic fact that a victim and perpetrator are before the court, even long after a restraining order has been granted. There is no distinction made in our law between the effects of harassment and the effects of physical battering on adult or child victims. It is the public policy for the court to give maximum protection to all victims of domestic violence. N.J.S.A. 2C:25-17.

The court is required to consider a parent's ability to communicate and cooperate in matters relating to the child. N.J.S.A. 9:2-4. These requirements are incompatible where there has been domestic violence and child maltreatment. See Jaffe & Geffner.

This is true *pendente lite* until all of the facts can be heard and ruled on by the court. Because the custody statute makes no specific reference as to how to inte-

grate domestic violence with the public policy of protection of children and victims of domestic violence, it is possible for the court to disregard the domestic violence policy considerations and their implications for the litigants. To protect these victims, no direct communication between a victim and her abuser is appropriate and should not be required.

Construing these statutes as compatible also requires integrating domestic-violence-sensitive knowledge and language by the court, not just at a domestic violence hearing, but even years later as these matters may continue to be before the courts. So, for example, it may be ordinary for a judge in a custody/visitation dispute to attribute wrongdoing equally for engaging in divorce litigation, it is an error to do so where there has been a finding of domestic violence.

When equal blame is attributed in the face of domestic violence, the motivation of perpetrators to use child custody litigation as yet another way to control and intimidate their victims is reinforced and unwittingly sanctioned by the court. See Jaffe & Geffner.

No victim of stranger violence would be required to schedule visitation or expected to speak with that individual to work out anything at any time. Yet, picture a scenario where an abuser has threatened to kill a domestic violence victim, or her children, and later is seen as recalcitrant if she resists working out visitation issues during a divorce. This is a daily occurrence in family courts as judges wonder why a victim is still saying she is frightened when there has been no incident of violence in a long time.

The language often used by judges flows naturally from the requirements of our custody statute regarding equal access and other provisions. It may also result from a bias that because violence has occurred in a family setting that its impact is less severe or less traumatic. When a court does this it is actually placing the setting of the family ahead of the presenting issue, which is contrary to our stated policy.

When a victim of domestic violence or a protective parent hears admonishments by the court regarding failure to communicate with her abuser about a child or her unwillingness to cooperate with visitation plans she believes are dan-

gerous to herself and to the child, the victims hears the message that her victimization and that of her child is not believed, or not worthy of the court's concern.

Under these circumstances, a victim may be inhibited and intimidated and fail to present her actual concerns to the court. The perpetrator hears the same admonishments to the victim, and may feel empowered. The sum effect is to neutralize and disregard the victims' very real experiences of violence and the effect of such violence on their functioning, leaving victims at risk for further harm. See Jaffe & Geffner.

Instead, the court should be reminded of the fact that perpetrators frequently use custody/visitation as a continuing means of control. Lenore E. Walker, *The Battered Woman's Syndrome*. (Springer Publishing; New York, 2000.)

We sometimes hear divorcing parties in litigation over custody referred to as warring parties. No criminal court would think of a victim and her assailant as warring parties when in court, regardless of how many years before the assault had occurred. A teller who robbed a bank would never be told not to rob again and be allowed to go back to work as a teller. Yet every day judges permit batterers back at work as parents, requiring child victims to visit with a parent who perpetrated domestic violence on their mothers.

A victim of harassment or assault by a stranger would never be expected to have an ongoing relationship with her perpetrator. The suggestion would be seen as absurd in the context of stranger violence. It is just as unthinkable to require parents to agree and cooperate, or to ensure frequent and continuing contact with both parents, when there has been domestic violence — but N.J.S.A. 9:2-4 makes no distinction.

A victim of violence in family court may be sanctioned if she fails to send a child who witnessed this assault to visit with the perpetrator. This is true even if the child does not want to go. This happens, in part because the court has not integrated the language of conflicting public policies.

More than sensitive language is required. The Prevention of Domestic Violence Act, N.J.S.A. 2C:25-29, gives courts the authority to order a risk assessment when there are concerns about visi-

tation between a perpetrator and his children. The statute does not place a limitation as to when a risk assessment of a perpetrator can be granted when there has been domestic violence.

By integrating the provisions of N.J.S.A. 2C:25-29 with the broad discretion afforded to the court in fashioning procedures in a custody hearing, the court can order a risk assessment when allegations of domestic violence and potential harm to the child from visitation with the alleged perpetrator are raised. Such risk assessments should be routinely ordered when there is a prior history of domestic violence.

A similar approach should be used when the allegations concern child maltreatment of any type since ongoing visitation between the perpetrator of child abuse and the child victim can result in ongoing victimization and intensified trauma.

The use of risk assessments during custody/visitation litigation when concerns about maltreatment of children and the impact of visitation on children are raised, even long after the violent act, would be another way for the court to convey to parties its recognition of the long term impact of domestic violence and child maltreatment.

Standard of Proof Issues

Proof of parental unfitness requires not only establishing that the parent engages in violent or threatening behaviors or cannot parent because of a mental illness or substance abuse problems, but also that "the parent's conduct has a substantial adverse effect on the child."

The courts are required to integrate the knowledge of the impact of such abuse on a child with the public policy of a child's safety as the court's primary concern.

Accordingly, if the standard of proof is met, then the proof itself should be sufficient to assume adverse effect. To do otherwise makes a mockery of the clear and stated public policies.

Psychology and Perspective

Of the approximately 1 million reports substantiated or founded by state child protection agencies each year, about 19 percent is for physical abuse, 10 per-

cent for sexual abuse, and 8 percent for psychological maltreatment. See <http://www.calib.com/nccanch/pubs/factsheets/canstats.cfm>. The remaining cases involved neglect.

More than 80 percent of children were victimized by a parent or parents. Experts in the field agree that much child maltreatment goes unreported and undetected. See Stuart N. Hart, et al., "Psychological Maltreatment," in *The Apsac Handbook on Child Maltreatment* (John Briere et al. eds., 1996).

Experts also agree that all forms of child maltreatment — physical abuse, sexual abuse, neglect and psychological maltreatment — harm children in the here and now and potentially across their lifespan. See David Kolko, "Treatment and Intervention for Child Victims of Violence," in *Violence Against Children in The Family and the Community* (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998).

A growing body of research is demonstrating that the experience of maltreatment not only harms the formation of psychological constructs such as self-esteem, parent-child attachments, interpersonal relationships, and so on, but fundamentally alters the developing brain in ways that have far-reaching implications. See Bruce D. Perry & Ronnie Pollard, "Homeostasis, Stress, Trauma and Adaptation: A Neurodevelopmental View of Childhood Trauma," 7 *Child & Adolescent Clinics of North America* 33 (1998).

Regardless of the form it takes, maltreated children receive the message from their parents that they are unloved, unlovable, worthless and exist only to meet their parents' needs. See Stuart N. Hart.

For these reasons, it is critical that courts take actions to minimize the risk of harm to children who come before them caught in custody disputes. The first step is to give the benefit of the doubt to the alleged victims and take actions to protect vulnerable children. See Lenore E. Walker, *The Battered Woman's Syndrome* (2000).

Although visitation between a child and parent is considered to be a fundamental right, this right can be and should be abrogated when the evidence establishes clearly and convincingly that such contact poses a real danger to the emotional or physical health and safety of the child.

See *Cosme*.

There is no known psychological profile of a parent who causes physical injury to a child, and abusive parents are in every culture and social strata of our society. Regardless of the background of the particular perpetrator, procedures in place by the child protective and domestic violence statutes should be required to be followed in custody/visitation matters whenever these issues are raised by a parent.

Sometimes child abuse is part of a pattern of family violence in a home. The presence of compensatory factors, such as family and social supports, may reduce the risk of physical abuse to a child. See Dante Cicchetti & Sheree L. Toth, "A Developmental Psychopathology Perspective on Child Abuse and Neglect," 34 *J. Am. Acad. Child & Adolescent Psychiatry* 541, 544-546 (1995). But victims must initially be believed and supported by the court with adequate protections imposed.

If the measures imposed by N.J.S.A. 9:6-8.8 to 9:6-8.70 were required to be used, then the appointment of Law Guardians with special training on the representation of these children would be required, any financial disequilibrium of the family would be less relevant and the others issues in the family circumstance could be acknowledged without putting the children at further risk.

While sexual abuse accounts for only about 10 percent of substantiated or founded reports to child protection agencies nationwide, these cases frequently garner a disproportionate share of attention and resources. See <http://www.calib.com/nccanch/pubs/factsheets/canstats.cfm>.

While much has been made in recent years of the supposed high frequency of allegations of sexual abuse in child-custody cases, survey research has demonstrated that such allegations are raised in a very small percentage of contested custody cases; false allegations occur at only a slightly higher rate in these custody cases than in cases of sexual abuse in general. See Kathleen C. Faller, "The Parental Alienation Syndrome: What is It and What Data Support It?" 3 *Child Maltreatment* 100 (1998).

In New Jersey, for the purpose of Family Court cases, sexual abuse of a child renders the child an "abused child" when

the abuse is committed by or allowed to be committed by a parent, guardian or other person having custody and control of the child. N.J.S.A. 9:6-8.9(c).

Unlike other forms of child maltreatment, the perpetrator of sexual abuse may already have or foster a relationship of trust and acquiescence with the victim.

Because there is no way to predict which children will suffer to what degree, and because the use by an adult of his or her inherently more powerful position to exploit a child is wrong and a crime, prompt and complete protection must be afforded to these victims. Protective parents should not have to fear that a court will be skeptical because issues of sexual abuse arise during litigation. The court in a custody/visitation matter should integrate all of the protective policies available whether or not a parent avails itself of filing a N.J.S.A. 9:6-8.34 complaint.

Visitation between a child and parent is considered to be a fundamental right that can be abrogated only when such contact poses a real danger to the emotional or physical health and safety of the child. See *Cosme*. Given the broad discretion of the court hearing a child-custody matter, a wide array of potential actions are available, including court-ordered risk assessments, supervised visitation, no-contact orders, appointment of counsel for the child, and so on.

All of these actions are consonant with the clear public policy of New Jersey: protection of child victims of violence and maltreatment must be the paramount concern of the courts. When courts further integrate this public policy stance with state of the information concerning the debilitating effects of exposure to violence and maltreatment, the rationale for limited, supervised contact or no contact between a perpetrator and his or her child victim becomes obvious.

Psychological research has shown the detrimental nature of contact where a child has been emotionally, physically or sexually injured by a parent, at least until the child is healed and feels fully protected and safe. It is only with the actual implementation of all of New Jersey's policies designed to protect children, together with the vast knowledge available to our courts, that children's best interests will be protected in the context of custody and visitation disputes. ■