



RATES AT WHICH ACCUSED AND ADJUDICATED BATTERERS RECEIVE SOLE OR JOINT CUSTODY

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RATES AT WHICH ACCUSED AND ADJUDICATED BATTERERS RECEIVE SOLE OR JOINT CUSTODY

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While no empirical study can definitively determine a universal statistical rate at which batterers receive custody, in part because courts' adjudications of battering are unreliable, the research nonetheless consistently shows that accused and adjudicated batterers receive joint or sole custody surprisingly often. This confirms the anecdotal experience of domestic violence attorneys and victims around the country.

I. A History of Domestic Violence is Common Among Contested Custody Cases

The remarkably consistent research on this issue is compiled in DV LEAP's Research Summary, *Research Indicating that the Majority of Cases that go to Court as 'High Conflict' Contested Custody Cases have a History of Domestic Violence* (updated August 2013).

One good example is a study cited by Janet Johnston, a leading researcher of parental alienation *who is not considered a domestic violence advocate*. Johnston cites the study as finding that, among custody litigants referred to mediation, "[p]hysical aggression had occurred between 75% and 70% of the parents . . . even though the couples had been separated. . . [for an average of 30-42 months]". Furthermore, [i]n 35% of the first sample and 48% of the second, [the violence] was denoted as *severe* and involved battering and threatening to use or using a weapon."¹

II. Domestic Violence Perpetrators are More Likely to Contest Custody than Non-Abusers

The American Psychological Association's Presidential Task Force on Violence in the Family, the leading review of the research as of 1996, found that men who abuse their partners contest custody at least twice as often as non-abusing fathers. They are even more likely to contest custody if the children are boys.²

III. Accused and Adjudicated Batterers Receive Joint or Sole Custody Surprisingly Often

The research on this has only emerged in recent years, and most studies have been small and local. Nonetheless, they document disturbing trends.

¹ Janet R. Johnston, *High-Conflict Divorce*, 4 THE FUTURE OF CHILDREN 165, 185-206 (1994), citing Depner et al., *Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services*, 30 FAM. & CONCILIATION CTS. REV. 185-206 (1992).

² AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY, VIOLENCE IN THE FAMILY 40 (1996).

A. Multiple studies have documented gender bias against women in custody litigation.

Contrary to the conventional wisdom that women are favored in custody litigation, both the experiences of battered women and the empirical research are showing that women who allege abuse are deeply *disfavored* in custody courts.

The Massachusetts Supreme Judicial Court Gender Bias Task Force was one of the first states to document the gender bias against women in family courts. This court-initiated study expressly found that *“our research contradicted [the] perception” that “there is a bias in favor of women in these decisions”* (italics added). Moreover, it found that “in determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.” The Court’s study further found that “the courts are demanding more of mothers than fathers in custody disputes” and that “many courts put the needs of noncustodial fathers above those of custodial mothers and children.”³

More recently, and since the evolution and widespread adoption of “parental alienation syndrome,” a multi-year, four-phase study using qualitative and quantitative social science research methodologies by the Wellesley Centers for Women found “a consistent pattern of human rights abuses” by family courts, including failure to protect battered women and children from abuse, discriminating against and inflicting degrading treatment on battered women, and denying battered women due process. Histories of abuse of mother and children were routinely ignored or discounted.⁴

A comparable study by the Arizona Coalition Against Domestic Violence found that most of the women surveyed felt the history of abuse was not taken seriously and that they were ignored, disrespected and discriminated against by court personnel.⁵

A study of the Domestic Relations Division of Philadelphia Family Court conducted by the Philadelphia Women’s Law Project in cooperation with the court, found that litigants are often denied due process, and that applicable legal standards are “not always observed, particularly in the consideration of abuse in custody proceedings, leaving families at risk.”⁶

Another study, based on interviews with 16 noncustodial mothers from northeastern Ohio, found that many women who have lost custody have experienced a triad of abuse that (i) begins in their intimate relationships, (ii) is exacerbated by the structure and process of custody litigation in family court, and (iii) continues after the custody decision. Of the 16 women interviewed, all experienced abuse prior to the custody proceeding and 13 of the 16 cited abuse as the primary reason for ending the relationship. The abuse included physical, sexual and

³ *Gender Bias Study of the Court System in Massachusetts*, 24 New Eng. L. Rev. 745, 747, 825, 846 (1990).

⁴ WELLESLEY CENTERS FOR WOMEN BATTERED MOTHERS’ TESTIMONY PROJECT, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 2 (2002).

⁵ ARIZONA COALITION AGAINST DOMESTIC VIOLENCE BATTERED MOTHERS’ TESTIMONY PROJECT, A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE 47, 49 (2003).

⁶ Carol Tracy et al., *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, 8 DOMESTIC VIOLENCE REPORT 81, 94 (2003).

emotional violence, with no correlation to race. 14 of the 16 reported experiencing institutional abuse during the court process (defined as bias and corruption) also without correlation to race, which all 14 attributed to gender bias. The majority described judges ignoring or refusing to hear clear evidence of the fathers' past violence, drug use or other criminal actions. 12 of the 16 experienced abuse after also *losing custody*; many either feared or had actual proof that their children were being abused in the father's care.⁷

At least one study has documented the gendered use of parental alienation. A case analysis of both published and unpublished Minnesota parental alienation cases found that "[t]he high proportion of cases where the courts found the mother was alienating and then transferred custody tends to suggest that courts are using PAS as a basis for custody decisions." The researcher concluded that MN parental alienation cases "exhibit anti-mother gender bias" and that the use of alienation has had an unfair impact on women.⁸ In this case analysis, approximately 78% (14/18) of the custody cases containing alienation allegations were made against mothers while approximately 22% (4/18) were made against fathers.⁹ In approximately 85% of the cases (11/13) in which the court found that a parent had engaged in alienating conduct, the findings were made against the mother and only approximately 15% (2/13) were made against the father. 90% of the cases (9/10) in which a court made an unfavorable ruling against the alienating parent were against the mother and only 10 percent (1/10) against the father.

B. Studies Show Accused and Adjudicated Batterers Receiving Sole or Joint Custody Surprisingly Often

One survey of the case law in 2001 identified 38 appellate state court decisions concerning custody and domestic violence. The survey found that 36 of the 38 trial courts had awarded joint or sole custody to alleged *and adjudicated* batterers. Two-thirds of these decisions were reversed on appeal.¹⁰

These cases included a case in which the perpetrator had been repeatedly convicted of domestic assault;¹¹ in which a father was given sole custody of a 16-month old despite his undisputed choking of the mother resulting in her hospitalization and his arrest;¹² in which the father had

⁷Michelle Bemiller, *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts*, 5 JOURNAL OF CHILD CUSTODY 228, 228-253 (2008).

⁸ Rita Berg, *Parental Alienation Analysis, Domestic Violence and Gender Bias in Minnesota Courts*, LAW & INEQ., Winter 2011, at 5, 25-26.

⁹ *Id.* at 19-21. In this case analysis, out of 18 custody cases containing alienation allegations, 14 of these allegations were made against the mother. In 11 of the 14 cases containing allegations against the mother, the court found that the mother had engaged in alienating conduct. 9 of these cases in which the court found that the mother had engaged in alienating conduct resulted in an unfavorable custody ruling against the mother. In contrast, of the 4 cases in which the alienation allegations were made against the father, there were only 2 cases in which courts found that the father had engaged in alienating conduct and only 1 case that resulted in an unfavorable custody ruling against the father.

¹⁰ Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 A.U. J. GENDER, SOC. POL. & THE LAW, 657, 662, n.19 & Appendix (2003).

¹¹ *In re Custody of Zia*, 736 N.E. 2d 449 (Mass. App. Ct. 2000).

¹² *Kent v. Green*, 701 So. 2d 4 (Ala. Civ. App. 1996).

broken the mother's collarbone;¹³ had committed "occasional incidents of violence";¹⁴ and had committed two admitted assaults.¹⁵ More such instances can be found in *Meier, supra*.

A survey of battered women by the Arizona Coalition Against Domestic Violence found that courts awarded joint or sole custody to the alleged batterers 56-74% of the time (depending on the county). Many of these cases involved documented child abuse or adult abuse.¹⁶

A study of 300 cases over a 10-year period in which the mother sought to protect the child from sexual abuse, found that 70% resulted in unsupervised visitation or shared custody with the alleged abuser; in 20% of the cases the mothers completely lost custody, and many of these mothers lost *all visitation rights*.¹⁷

The Wellesley Battered Mothers' Testimony Project found that 15 out of 40 cases resulted in sole or joint physical custody to the fathers, all of whom had abused *both* the mother and the children.¹⁸

The Massachusetts Supreme Judicial Court Gender Bias Task Force found that **94%** of fathers who actively sought custody received sole or joint custody, regardless of whether there was a history of abuse. *While fathers received primary physical custody 29% of the time, mothers received primary physical custody in only 7% of the contested cases.* The Gender Bias Task Force also cited other research which similarly found that fathers who sought custody received primary physical custody 2/3 of the time, with mothers receiving it less than 1/4 of the time; and another study which found that fathers seeking custody received joint or sole custody 79% of the time, with mothers receiving sole custody in only 15% of those cases (compared to fathers' sole custody in 41% of the cases).¹⁹ It is likely that a substantial proportion of the fathers in this study had committed domestic violence.²⁰

Commentators have noted that "[4 NIJ-funded studies have shown that] women do not gain anything tactically by raising domestic violence allegations," and that "[one of the studies has shown] that revealing information about domestic violence could potentially backfire against a victim."²¹ That study, which compared custody mediation in cases with and without domestic violence found that "in spite of the known danger of joint custody arrangements in cases involving DV, joint legal custody was recommended in the overwhelming majority of DV cases (91.4%)" and mediators "recommended primary physical custody to the mother in 35% of DV

¹³ *Couch v. Couch*, 978 S.W.2d 505 (Mo. App. 1998).

¹⁴ *Simmons v. Simmons*, 649 So. 2d 799, 802 (La. App. Ct. 1995).

¹⁵ *Hamilton v. Hamilton*, 886 S.W.2d 711, 715 (Mo. App. 1994).

¹⁶ ARIZONA COALITION AGAINST DOMESTIC VIOLENCE BATTERED MOTHERS' TESTIMONY PROJECT, A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE 33-34, 47-49 (2003).

¹⁷ A. Neustein & A. Goetting, *Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse*, 8 JOURNAL OF CHILD SEXUAL ABUSE, 103, 103-122 (1999).

¹⁸ BATTERED MOTHERS' TESTIMONY PROJECT, *supra* note 16, at Appendix A.

¹⁹ GENDER BIAS STUDY *supra* note 3, at 831-832 and citing Middlesex Divorce Research Group relitigation study and Phear et al., 1983.

²⁰ Meier, Statement, Research Indicating that the Majority of Cases that go to Court as 'High Conflict' Contested Custody Cases have a History of Domestic Violence (updated August 2013).

²¹ Joan Zorza et al., Guest Editors' Introduction, 11 VIOLENCE AGAINST WOMEN 1076, 1076-1107 (2005).

cases and 40.2% of non-DV cases.²² Another study found that, even in states with a presumption against custody to a batterer, 40% of *adjudicated* batterers received joint (legal or physical) custody. In states with competing “friendly parent” or joint custody presumptions, only 4% of courts gave sole physical custody to a mother.²³

Further Reading

VIOLENCE AGAINST WOMEN, Vol. 11, No. 8, Aug. 2005 (Symposium on NIJ-funded research studies on domestic violence and custody).

Sharon Araji et al., *Domestic Violence, Contested Child Custody and the Courts: Findings From Five Studies*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY 6-31 (M. Hannah and B. Goldstein eds., 2010) (discussing information from the VAW Journal’s published studies in Pennsylvania, Arizona, Massachusetts, California, and the authors’ independent research in Alaska).

Dallam, S., Are ‘Good Enough’ Parents Losing Custody to Abusive Ex-Partners?, updated 2008, available at www.leadershipcouncil.org/1/pas/dv.html.

²² Johnson et al., *Child Custody Mediation in Cases of Domestic Violence*, 11 VIOLENCE AGAINST WOMEN, 1035, 1035-1036, 1046 (2005).

²³ Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1076-1107 (2005).