

## **CUSTODY & VISITATION DECISION-MAKING WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE**

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### **Domestic violence law; emerging mandates for judicial deliberation in custody and visitation matters.**

By early 1995, 44 states and the District of Columbia had enacted custody statutes requiring courts to consider domestic violence when crafting custody and visitation awards. (Hofford et al, 1995; Lemon et al, 1995; Zorza, 1994) Most of the codes have been amended within the last 6 years; in some jurisdictions there may be a lag between statutory mandates and practice. (Hofford et al, 1995) Thirty-five states include domestic violence among the "best interest" factors to be evaluated by courts in determining custody and access awards. Twenty-eight states and the District of Columbia incorporate provisions directing courts to craft custody awards to protect the child (or the child and the abused parent) from future harm. (See *An Analysis of Provisions Concerning Domestic Violence In State Custody Statutes*. at p. [hereinafter *Chart.*]; Hart, 1992) Forty-two states have included custody provisions in civil protection or restraining orders. (See BAR GRAPH *Child Custody Provisions Related to Domestic Violence*, at p. ).

### **Purpose of statutory reform.**

Safety for abused adults and children is the overriding purpose for statutory reform related to custody and visitation issues. To the extent that the imposition of safeguards limit contact and delay relationship-building with the battering parent, the domestic violence-relevant codes direct that the "contact" and "relationship" objectives of custody and visitation awards be deferred until they can be undertaken safely for both parents and children. The safety and well-being of the child and abused parent are paramount. (See *Commentary of Model Code on Domestic and Family Violence* §§ 401& 402 [hereinafter "Model Code"]; LA Code, statement of legislative intent. LA REV. STAT. ANN. § 9:361; Lemon et al, 1995; Saunders, 1994)

### **Sole custody (v. joint/shared parenting) in the context of domestic violence.**

Erosion of the statutory preference for joint custody, based on the danger posed by batterers to children and battered women has occurred. (Model Code § 401; see also ABA Model Joint Custody Statute, 15 Fam. L. R. (BNA) 1494 at 1495, 1989; Hofford et al, 1995; Klein & Orloff, 1993) There is an emergence of a presumption against or a bar to an award of sole custody to battering parent. (Model Code §§ 401 & 403; See *Chart* at p. )

### **Best interest factors expanded to include domestic violence.**

The elements of the "best interest of the child" factor have been expanded in 35 jurisdictions to include a consideration of domestic violence as a factor that is contrary to the best interest of the child. (Model Code §§ 401 & 402 (b); See *Chart* at p. .)

### **Statutory presumptions.**

Various rebuttable presumptions related to domestic violence have been created in statutory and case law (Model Code §§ 401 & 402; accord, House Concurrent Resolution 172 (10/25/90) Rep. Constance Morella), but few offer guidance on the type and weight of evidence that may be required to successfully rebut the presumption (*Cf.* AZ, LA, ND, PA, WI)

### **Presumption requirements.**

Some codes delineate the standard of proof (ND, LA) or the type of evidence that must be adduced (DE, LA, ND & WI) to overcome the presumption or to obtain modification of an order entered pursuant to the presumption.

### **Weight of presumptions and best interest factors relating to domestic violence.**

However, guidance as to how the domestic violence best interest element and the various presumptions are to be weighed against the traditional "best interest" elements is rarely offered by statutes or case law. (Cf. Model Code § 402; FL, ID, LA, ND)

### **Mandates to consider domestic violence and prohibitions of awards.**

Many state codes compel state courts to hear evidence and make findings on domestic violence. (Lemon et al, 1995; Klein & Orloff, 1993) Several prohibit awards to perpetrators when there has been a determination of domestic violence. (Hofford et al, 1995; Lemon et al, 1995)

### **Relationship between protection order custody provisions and subsequent custodial awards; is the former binding or even/merely advisory in custody proceedings? And vice versa.**

Statutes are silent on the weight that custody judges must accord previously- issued custody awards in civil restraining/protection orders. Case law has only begun to emerge on this issue. Most reported decisions conclude that the protection order provisions are advisory, but not binding. (Cf. *Dye v. McCoy* - 423 Pa. Super. 334, 621 A. 2d 144 (1993).) However, some protection order statutes do give explicit direction to the protection order judge on the weight of previously-issued custody orders. (Model Code § 404; NJ, PA)

### **Protective provisions in custody orders tailored to safeguard abused parent and children from recurring violence; safety plans, protected access provisions, supervised visitation centers, court contracts with third-party supervisors and denial of custodial access to battering parents.**

Codes in more than half of the states specifically direct the courts to protect the child and/or the abused adult from further harm in crafting custody or visitation awards. (See *Chart* at p. ; Model Code §§405 and 406; Hofford et al, 1995) The ABA report *The Impact of Domestic Violence on Children* recommends, "Where there is proof of domestic violence, the court should issue very specific, highly structured custody and visitation orders. The court should leave no room for ambiguity or negotiation." (Davidson, 1994)

### **Custody mediation, evaluation and guardian ad litem procedures related to domestic violence.**

A limited number of custody mediation codes explicitly address domestic violence and provide safeguards for abused adults and children therein. (Model Code §§ 407 & 408; CA, NJ) However, mediation programs and associations throughout the country have initiated guidelines to assure safeguard abused adults and the authenticity of the mediation process in the context of domestic violence. (Academy of Family Mediators, 1995; Salem & Milne, 1995; Maine Court Mediation, 1992) Custody evaluators and guardians ad litem have begun to develop guidelines to better inform their practice in the context of domestic violence (FL & MN draft GAL guidelines; Garrity & Baris, 1995; Superior Ct., Santa Clara Cty, 1993; Hofford et al, 1995)

### **Requirements to notify courts of all other actions related to children in the context of domestic violence.**

Significant risks to children in the context of domestic violence arise when courts issue orders that impinge on the safety and well-being of children and their abused parents without the benefit of knowledge of current or pending matters related to the custody and protection of these victims. Therefore, court practice guides and policy statements (Davidson, 1994; NCJFCJ Model Code § 304) have emerged that place the burden on the parties to inform courts of any matter related to domestic violence or impinging on the minor children so that judicial decisions can be informed.

### **Statutory requirements for supervised visitation and visitation centers.**

In recent years, state legislatures, policy-makers and numerous local courts have provided for supervised visitation by responsible third parties and supervised visitation centers to protect abused parents and children of domestic violence from the risks posed by batterers during custodial access. (CA, DE, IL, LA,

MA, MI, MN, MO, NJ, PA; Model Code §§ 405.2.b & 406; Lemon et al, 1995; Davidson, 1994; Klein & Orloff, 1993; and guidelines for visitation centers in the context of domestic violence are now being drafted by the MA Governor's Commission on Domestic Violence.)

### **Change of circumstances, relocation by abused parent and other post-dispositional issues.**

The occurrence or recurrence of domestic violence should be deemed a material change of circumstance giving rise to modification of an existing custody order. (Lemon et al, 1995; Davidson, 1994, NCJFCJ Model Code § 404.) Case law and policy has begun to consider domestic violence as a factor that may be weighed in favor of the battered custodial parent seeking to relocate out of the issuing jurisdiction. (Gruber v. Gruber, 583 A. 2d 434 (PA, 1990); Desmond v. Desmond, 509 N.Y.S. 2d 979 (NY, 1986); Jacoby v. Carter, 563 N.Y.S. 2d 344 (NY, 1990); NCJFCJ Model Code §§ 402.3 & 403) A number of statutes provide for expedited review of custody and visitation awards when the child's or the abused parent's safety and well-being are jeopardized by the battering parent. (AZ, MN, NJ) By statute, case law and court practice in a few jurisdictions, judges have begun periodic review of custody orders to facilitate compliance with the protective provisions enumerated in orders. (OJG v. GWG, 770 S. W. 2d 372, (MO, 1989); NJ, PA; Lemon et al, 1995)

### **Parental abduction; UCCJA, PKPA, and change of custody**

The nexus between domestic violence and parental abduction has been empirically confirmed in recent years. (Johnston, 1994; Grief & Hegar, 1992) Both battered and battering parents abduct their minor children, albeit for different reasons, the former to deprive the other parent of the child and the latter to protect the child or abused parent from further abuse. Statutes and court practice to prevent abduction and to mitigate against the danger posed to children by the battering parent and the abduction, itself, should be universally adopted. (Lemon et al, 1995; Davidson, 1994) Among these, state UCCJA codes should designate that domestic violence provide a basis for emergency jurisdiction, should be a defense to "unclean hands charges" and should create an exception to the affidavit requirement which includes the disclosure of past and current addresses of the child to the abusing parent. (Davidson, 1994; also see CA, Family Code § 3409)

### **Pro se parties in the context of domestic violence**

Increasingly, parents are seeking resolution of custody disputes without the benefit of counsel. This is particularly problematic in the context of domestic violence since the level of conflict and the concomitant risk of violence is so high. In these circumstances, it has become necessary for judges to engage in fact-finding and case management activities, and some have begun to tailor court practices to more effectively and efficiently deliberate on orders designed to protect the party and children at risk of recurring abuse. (Hofford et al, 1995; Lemon et al, 1995, ME Court Mediation Service, 1992) Other communities have undertaken specialized domestic violence legal programs, pro bono projects or law school clinics to offer limited legal assistance and representation to abused adults seeking custody awards. (Hofford et al, 1995; Lemon et al, 1995; Davidson, 1994; Governor's Task Force, 1994)

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