

Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence

"The battered mother has to worry that if she leaves, the abuser will take her children and, if she doesn't, that the government will."

Jill Zuccardy, attorney in Nicholson v. Williams.



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EXECUTIVE SUMMARY

The Arizona Coalition Against Domestic Violence implemented the Battered Mothers' Testimony Project (BMTP) to explore the lived experiences of battered women in family court matters when child custody is an issue and domestic violence is present. Previous studies suggested that battered women do not face a level playing field in the family court. Discrimination abounds and myths pervade the judicial process. The rights of the children are not upheld and the victims of violence receive neither protection nor justice. We hope the report will lead to public discussion of the problems and issues, create impetus for change, and lay down a roadmap for positive resolution.

Drawing on a similar Massachusetts study, the BMTP surveyed a sample of women who had participated in a contested custody hearing in Arizona Superior Court where allegations of domestic violence or child abuse were present. Some participants were happy with the results of the court hearings and some were not. Even those who were pleased with the results were often displeased with the process. The study limited participants to women involved in cases since 1986, the first year that the courts were mandated by statute to consider domestic violence in custody disputes. The goal was not to do detailed case investigation but to ascertain trends and phenomena. The similarity of the 57 stories, a large number for a qualitative study, illustrates the presence of human rights violations.

The study considered diverse quantitative data in relation to the parties, including the number of years married, ages of adults and children, genders of children, comparative races and ethnicities of the parties, educational levels, child support amounts, and income levels. The study also considered the behavior of the perpetrator and victim to determine systems of control pre-divorce and post-separation. Finally, the study considered the impact of having an Order of Protection, having an attorney, using a custody evaluator, appointing a *guardian ad litem*, or involving Child Protective Service. The following points summarize the study's findings:

- In spite of evidence of violence against the women and/or their children (and with such violence documented in 63% of the cases) the courts consistently ordered sole or joint custody to perpetrators in 74% of the cases in Maricopa County and 56% of the cases in the other counties combined.¹
- Income level, which was highly skewed towards fathers, seemed to have the most impact on the ultimate custody decision.

¹ This finding fits with previous studies showing that fathers win custody in contested custody cases anywhere from 70-90% of the time (see, e.g., Pierson Sachs 2000, 217; Rosen & Etlin 1996; O'Sullivan 2000; Jaffe et al 2003, 20; Lombardi 2003). Lombardi, a New York sociologist, reviewed information from 1,000 child custody cases. The most frequent pattern she identified was "the penalization of mothers for bringing these allegations to the court's attention in the first place (Lombardi 2003, 1)." Other research studying 300 cases through the U.S. family court system for 10 years found that mothers won in only 10% of the contested cases.

- A mother represented by an attorney was more likely to win custody.
- Having a custody evaluator more likely resulted in the mother losing custody.
- By and large, the systems of control the perpetrator established pre-divorce, including physical and sexual violence and child abuse, were maintained post-separation with the added ability to use the court system to abuse the victims.
- Having an order of protection had no impact on the final custody decision; contrary to Arizona law, the courts simply ignored the documented existence of domestic violence.
- The courts ignored well-known research and federal standards as 100% of the victims were ordered to go to mediation or a face-to-face meeting with the abuser.
- A large number of perpetrators had weapons or used alcohol or drugs when with children.
- Child support orders were inconsistent.
- A large number of judges thought that since the parties were separated, domestic violence was not a concern.
- In a large number of cases, unsupervised visits were awarded or the supervisor was an untrained person such as a family member.

Once completed, the findings were analyzed in relation to state, constitutional and international human rights laws. For this group of battered mothers, state law was violated at virtually every turn. Constitutional issues such as due process, equal protection and the fundamental right of parenting were violated by arbitrary rules and actual practice. The fundamental precepts of international human rights law were violated. The children's rights to a violence-free life and due process in the courts according to the United Nations Convention on the Rights of the Child were also violated.

The report concludes with an extensive call for action to policy makers, the legal community, state government and, most importantly, the public. Though the issues of domestic violence and child abuse have been debated for decades, the victims continue to suffer because the system cannot or will not reform itself. Only with pressure from an educated public that puts meaning to the words "best interest of the child" will these victims of violence be protected.

INTRODUCTION

DEVELOPMENT, IMPLEMENTATION, AND DISTRIBUTION OF THE STUDY

The Arizona Coalition Against Domestic Violence initiated the Arizona Battered Mothers' Testimony Project (BMTP) after Director of Systems Advocacy, Dianne Post, read an article about a similar project in Wellesley, Massachusetts. The problem was not new. Post knew from her 20 years as an attorney representing abused women in divorce and dependency cases that the courts frequently put children at risk by placing them with abusers. The problem had grown increasingly dangerous as abused women were cautioned not to report domestic violence or child abuse for fear of losing custody all together. In one horrific example, Ms. Post assisted a mother who had fled Arizona to protect herself and her daughter from abuse. After the mother and daughter were captured in Florida and returned to Arizona, the father's attorney admitted that the father was raping the seven-year-old girl, arguing, "isn't that better than living on the run?"²

AzCADV's legal hotline received calls complaining about children placed in dangerous situations and many of AzCADV's volunteers, committee members, and workgroup members made similar complaints. Family law attorneys and domestic violence workers in Arizona were well aware of these dangerous placements. However, no study had been done to understand the nature and seriousness of the problem in the state.

When Post presented the Wellesley study to the AzCADV legal committee, the members enthusiastically embraced the idea of implementing a similar study. As noted below, while exploratory in nature, the committee believed that the study would offer greater insight into the problem of dangerous placements and allow examination of possible solutions. While the study would involve much work, drawing on the Wellesley study and survey would save some effort. The BMTP advisory board formed in May 2001.

As noted below, surveys and data analyses took place between January 2002 and March 2003. The report was finalized in May 2003 for distribution in June 2003. The report was distributed through three statewide press conferences in the three major cities. Copies were provided to the Governor's office, the courts, the legislature, other organizations, and the public. The report also will be sent to human rights organizations such as Amnesty International, Human Rights Watch, the CEDAW committee and the UN Special Rapporteur on Violence Against Women.

BRIEF DESCRIPTION OF SAMPLING AND METHODS

To participate in the study, a woman had to meet several criteria. First, she had to have been involved in a domestic relations case in Arizona Superior Court since 1986.

² The answer, of course, is emphatically "No!" When recently contacted, the mother advised that her daughter, now 20, already has suffered through several pregnancies and abortions. This outcome is no surprise to experts working in the field.

That year the first statute was passed requiring courts to consider domestic violence as a factor in custody determinations. Second, the divorce must have involved a contested custody battle with allegations of domestic violence or child abuse. Third, there must have been at least one hearing in front of a judge or commissioner.

Participants were recruited through personal contacts, from callers to the legal advocacy hotline, and from requests to the domestic violence shelters. An ad placed in the newspaper resulted in no new participants. The first few interviews were completed with women who had called AzCADV about dangerous placements. The study then employed snowball sampling, contacting subjects referred by those already interviewed to obtain the rest of the participants. This technique likely did not identify all potential subjects but allowed the study to explore the questions at hand.³ This technique especially is appropriate where, as here, one is studying a special population that may be difficult to locate.⁴

The study draws on a diverse sample of participants.⁵ A total of 57 women participated in the study, forty-two Caucasians, ten Hispanics, two Asian Americans, two African Americans, and one Native American. Table 1 indicates racial proportions of women in the sample and for the state.

Table 1. Racial Distribution of Women for Arizona and BMTP Participants

	Arizona	BMTP
Number of Women	2,569,575	57
Racial/Ethnic Distribution (One Race Alone)		
White (Not Hispanic)	64.68%	73.68%
African American	2.93%	3.51%
American Indian	5.09%	1.75%
Asian/Pacific Islander	1.91%	3.51%
Hispanic	24.36%	17.54%

Sources: *U.S. Census Summary File 1 (SF 1)* and *Table DP-1, Profile of General Demographic Characteristics for Arizona, 2000*.

As indicated, white women, African American women, and Asian women are over represented in the sample while Hispanic women and American Indian women are under represented. Note that we did not expect to have many American Indians in the study because most obtain their divorces in tribal court.

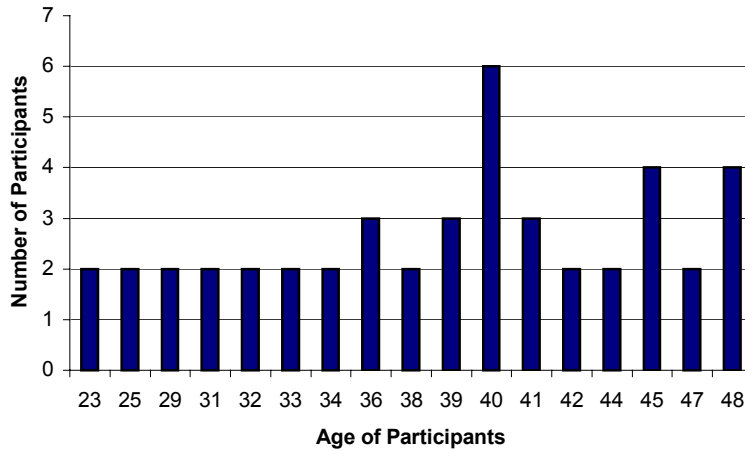
The sample also represents a broad range of ages. Figure 1 indicates the age distribution of the participants.

³ Babbie, Earl. *The Practice of Social Research, 9th Edition*. Belmont, CA: Wadworth-Thompson Learning, 1999.

⁴ Ibid.

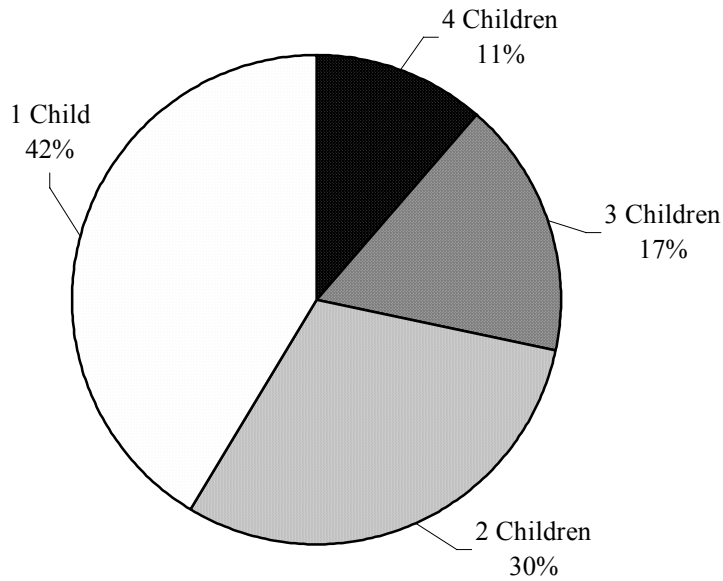
⁵ Demographic information was obtained for all participants. Demographic information for those who chose to have their identifying information destroyed was included in a summary chart but not in the database.

Figure 1. Age Distribution Of Participants



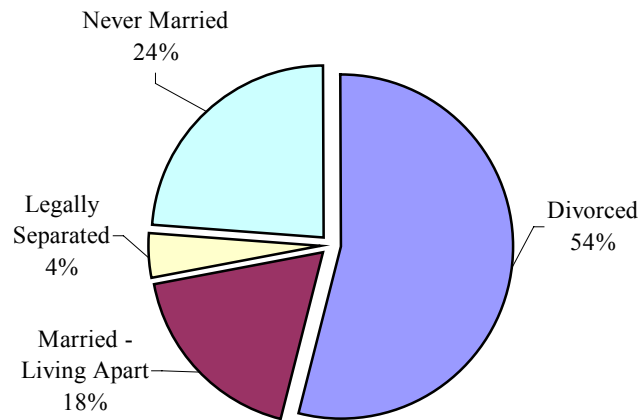
Each of the participants had between one and four children. Twenty-two women had one child, sixteen had two children, nine had three children, and six had four children. Figure 2 shows the percentage of women with one or more children.

Figure 2. Percentage of Participants with Children



As Figure 3 illustrates, the marital status of the participants varied. 54% were divorced, 18% were married but living apart, 4% were legally separated, and 24% were never married.

Figure 3. Marital Status Of Participants



Finally, the participants came from both rural and urban counties. Although each has vast rural areas, the majority of the state's urban population lives in either Maricopa or Pima Counties. Thus, we defined Maricopa and Pima Counties as urban and the remaining counties as rural. Maricopa County is over represented, as thirty-nine of the participants (68%) were from Maricopa County, which has approximately 60% of the female population in the state. In contrast, Pima County is under represented as seven participants were from Pima County (12%), which has approximately 17% of the state's female population. An additional five participants came from Coconino County (9%) and the remaining seven were from other rural counties (12%).⁶ Combined, however, the urban participants are slightly over represented and the rural counties slightly under represented in relation to the proportion of women in the urban and rural counties.

As indicated above, the Wellesley protocol was revised for use in Arizona. Interviewers were recruited in September 2001 and trained in December 2001. By January 2003, 57 interviews had been completed. All data was entered by February 2003 and statistical analyses from the queries were completed by March 2003. The questions for state actors were modified from those used in the Wellesley study. Those contacted were child custody evaluators, superior court family law judges and the President of the Board of Psychologists Examiners. Responses were completed by March 2003.

STUDY PROBLEMS AND LIMITATIONS

Given the vulnerable status of battered women, it was not surprising that issues of confidentiality and personal protection arose during the course of the study. Obtaining the interviews proved more difficult than expected, not because of a shortage of participants but because many women were afraid to tell their stories. Those in the rural areas feared

⁶ The numbers recited here total more than the 57 participants because two participants had court actions in two different counties. Additionally, one participant's location is unknown.

their stories would be recognized and their abusers or the court system would further punish them. In the metropolitan areas, some attorneys discouraged their clients from participating for fear that the woman's participation would be used against her. In fact, in at least one case a woman was questioned on the stand by the opposing counsel about her participation in the study.

Many women, both rural and urban, simply did not trust anyone or anything to do with the court system and consequently would not participate. Shelters turned out not to be good recruiting grounds because the residents were either not yet in a divorce proceeding or were too caught up in the immediate situation to participate in the research. Most participants had worked with AzCADV in the past and had a level of trust with the organization. Without that trust, many survivors were hesitant to talk about the intimate details of their lives.

Consistent with methodological standards related to subject confidentiality, the study made every effort to protect the information and identity of the participants. Participants were given two choices of confidentiality: (1) the destruction of all identifying information after entry in a demographic summary sheet, or (2) the assignment of a participant number and separation of their data sheet from the questionnaire. The questionnaires themselves were kept in a safe deposit box. Thirteen women chose to have all identifying information destroyed. In either case, all possible steps were taken to ensure that no person could be identified with any particular answers.

Time proved another obstacle. Most of the women simply had no time to do the interview, which took between 2-3 hours, because they were working and/or going to school and taking care of children. Participants received \$25.00 for their time. Transportation also was a problem for some though interviewers offered to go to the participants' homes. Often this was not convenient if there were children present in the home.

We were not successful in obtaining responses from the state actors survey. Surveys were sent to 11 custody evaluators and 15 superior court judges along with the President of the Board of Psychologists Examiners. Only one evaluator and one judge replied.

In conclusion, this exploratory study draws on available participants who were willing to share their information with us. Despite the diversity of the sample, it cannot and is not intended to represent all battered women who passed through the Arizona Superior Court system. We make no claims regarding statistical significance, ability to generalize to a larger population, or the overall extent of the reported problems in Arizona.

LITERATURE REVIEW

This section reviews the current literature on family violence and the court system, focusing on the frequency of family violence, children's allegations of sexual abuse, custody evaluators, Parental Alienation Syndrome, judicial education/effectiveness, and gender bias. The feminine gender is used to describe adult victims of family violence and the masculine gender to describe the abusers. We use these conventions because the overwhelming majority of adult victims of family violence are female and the overwhelming majority of their abusers are male.⁷

Frequency of Family Violence

Although this report uses the terms "family violence" and "domestic violence" interchangeably, the most accurate label is "violence against women and children" because 95% of victims of family violence are women and children.⁸ National surveys indicate that approximately two million women suffer abuse annually by an intimate partner.⁹ The FBI reports that about 1500 women are murdered by their husbands or boyfriends each year.¹⁰ Bureau of Justice Statistics confirms that "women sustained about 3.8 million assaults and 500 thousand rapes a year in 1992 and 1993. More than 75% of these violent acts were committed by someone known to the victim, husband, boyfriend, or ex-boyfriend."¹¹ The American Bar Association estimates that these figures are underreported.¹²

Contrary to common belief, violence against a woman and her child(ren) does not cease once she leaves her abuser. In fact, this is "[o]ne of the most important issues that goes unrecognized by many legal and mental health professionals."¹³ Rather, "[s]eparation tends to lead to an escalation of violence and a greater danger for the safety of [the children and] their mother."¹⁴ Sadly though, courts "rarely recognize that woman abuse continues after separation and are not cognizant of the complexities and subtleties of separation assault in the context of post divorce parenting."¹⁵ According to Jennifer Hardesty, in one study 40% of the participants had reported that their ex-partner used physical violence against them after the separation. Courts apparently either ignore this fact or choose not to believe it. They privilege the father-child relationship despite the

⁷ Jaffe, Peter, Ph.D. "Impact of Domestic Violence on Children and Families in Divorce." Expose: The Failure of Family Courts to Protect Children From Abuse in Custody Disputes – A Resource Book for Lawmakers, Judges, Attorneys, and Mental Health Professionals, Los Gatos: Our Children Our Future Charitable Foundation, 1999, 131.

⁸ Ibid.

⁹ American Bar Association Commission on Domestic Violence. The Impact of Domestic Violence on Your Practice: A Lawyer's Handbook, 1996, 1-1.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Jaffe, 135

¹⁴ Ibid.

¹⁵ Hardesty, Jennifer L. "Separation Assault in the Context of Postdivorce Parenting: An Integrative Review of the Literature," Violence Against Women, 8 May 2002, 605.

danger, concluding that father estrangement is more traumatic to children than paternal abuse and giving custody of the child(ren) to the abuser.¹⁶ Furthermore, women who do report must overcome significant emotional obstacles. Peter Jaffe, who has over 20 years of experience completing custody and visitation assessments, contends “the real problems lie in overlooking violence and most women under-reporting out of embarrassment, humiliation, and lack of trust for legal and mental health professionals.”¹⁷

Diverse reasons motivate the abuser to continue battering after separation. The Wellesley study, for example, suggests that batterers continue to abuse their partners after separation as a means of compelling reconciliation. Because an abuser batters his family as a means of gaining power and control over them, he likely will escalate his controlling behavior once he feels that his power and control are threatened.¹⁸ In fact, many studies have reached this same conclusion. For example, the 1999 Canadian General Social Survey on Victimization revealed that 39% of the 437,000 women surveyed who had a prior violent relationship reported enduring abuse after separation.¹⁹ “Women who were severely abused ... during marriage were three times as likely to report separation assault as women who were abused in less severe ways;” approximately 15% of the women “*indicated that they were first assaulted after separation, with more than half reporting that the abuse was severe*” (Emphasis added).²⁰

As Hardesty points out, “Murder-suicides, stalking-murders, and murders of women and their children are frequently perpetrated by men retaliating against women who left them.”²¹ In Florida in 1994, for example, “33 out of 47 cases of male-perpetrated multiple domestic killings ... included a female victim who was estranged or in the process of separating from the perpetrator.”²² This was true whether or not a victim of domestic violence secured an order of protection against her abuser. When a victim secured an order of protection, unfortunately, the abuser often increased his abuse.²³ Worst of all, when an abuser violated his order of protection, he often escaped punishment.

Studies suggest that once state actors recognize that (1) family violence is actually underreported and (2) family violence often increases upon separation from the abuser, they can take steps to prevent this abuse from continuing. As Jaffe notes, one way of preventing separation violence would be to require supervised visitation centers in cases that involve custody disputes.²⁴ When courts allow unsupervised visits, they are in fact giving an abuser another opportunity to continue abusing his ex-partner and child(ren).

¹⁶ Jaffe, 135.

¹⁷ Ibid.

¹⁸ Battered Mothers Testimony Project at the Wellesley Center for Women (“Wellesley BMTP”). Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts, 2002, 2.

¹⁹ Hardesty, 599.

²⁰ Hardesty, 600.

²¹ Hardesty, 601.

²² Hardesty, 601-02.

²³ Hardesty, 601.

²⁴ Jaffe, 135.

This is because after a separation batterers have limited access to their victims. Therefore, according to the Wellesley BMTP, they seek visitation to “attempt coerced reconciliation or to penalize the battered partner for refusal to reconcile.”²⁵

The Domestic Abuse Project of Duluth, Minnesota addressed post-separation visitation dangers by implementing a supervised visitation center offering supervised exchange, on-site visits and monitored visits, as well as education and counseling for fathers about the impact of domestic violence on children. “The program safeguards battered women and children from violence and child abduction, while providing fathers access to their children in an environment where they can begin to learn and practice appropriate parenting.”²⁶ Studies suggest that this may be a viable response to effectively decrease post-separation violence against women and their children.

Children’s Allegations of Sexual Abuse

National data show that about 75% of men who abuse their female partner also abuse their child(ren).²⁷ Female children are at an even greater risk of suffering sexual abuse at the hands of their fathers; girls are 6 ½ times more likely to be sexually abused than their counterparts from non-violent homes.²⁸ Overall, about 27% of girls and 16% of boys are victims of child sexual abuse.²⁹ Children are particularly susceptible to sexual abuse when the marriage is dissolving because, as noted above, an abusive man is highly committed to dominance and control over his female partner and their children.³⁰ His need to subjugate and control may intensify after separation. He may victimize his children as a way to continue his domination and control over the mother.³¹

The belief that mothers and/or their children make false allegations of child sexual abuse during the course of custody proceedings has been shown to simply be not true. Denike reports that in custody disputes allegations of child sexual abuse arise in only 2% of these cases; of those, only 8% were found to be false.³²

²⁵ BMTP, 2.

²⁶ BMTP, 2.

²⁷ Family Violence Department of the National Council of Juvenile and Family Court Judges Resource Center on Domestic Violence. Children of Domestic Violence (No date available.)

²⁸ Ibid.

²⁹ McDonald, Marilyn. “The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases.” Court Review Spring 1998, 12.

³⁰ Family Violence Department of the National Council of Juvenile and Family Court Judges Resource Center on Domestic Violence.

³¹ Ibid.

³² Denike, Margaret, et al. “Myths and Realities of Custody and Access.” The FREDa Centre for Research on Violence Against Women and Children. 1998. <<http://www.harbour.sfu.ca/freda/reports/myths.htm>> (4/24/03). One custody evaluator who answered our state actors survey believed 50% of all allegations of domestic violence and child abuse in custody cases were false. This preconceived expectation likely would hamper his evaluation, undermining the litigant’s rights to due process and equal protection under the law.

Furthermore, according to Denike, mothers were no more likely than fathers to make false accusations.³³ Although women make the overwhelming majority of sexual abuse reports, “it should be remembered that 95% of sexual abuse against girls and 80% of sexual abuse against boys is perpetrated by men.”³⁴ Questionable explanations such as Parental Alienation Syndrome discussed below have suggested that child sexual abuse allegations in custody disputes have increased dramatically in recent years.³⁵ However, the implementation of mandatory child abuse reporting laws may explain this seeming increase. This also may explain the increase in unsubstantiated sexual abuse claims.³⁶ In any event, there is little support for the claim that parents use abuse allegations merely to gain custody.³⁷

Because professionals are told to report even the mere suspicion of child abuse to Child Protective Services (CPS), more unsubstantiated claims may be inevitable. Those who report generally have neither a malicious intent nor any intent to deceive; rather, these reporters are simply obeying their instructions.³⁸ Furthermore, because CPS finds a claim “unsubstantiated” does not mean necessarily that no abuse occurred. As Sherman-Fahn notes, “unsubstantiated” simply means “evidence was insufficient to affirmatively conclude that the child was sexually abused by the alleged abuser. In some jurisdictions, even when it is clear that the child was abused, a case may be unsubstantiated if the identity of the abuser cannot be conclusively established.”³⁹ Time constraints on Child Protective Services and an inability to conduct a thorough investigation to assess the merits of the claim are additional reasons why a claim may be determined to be “unsubstantiated.”⁴⁰

Although reporting child abuse is the first step, a child may find it difficult to maintain his or her allegations over time. Retractions and inconsistencies are common and experts expect they will occur. As Wood argues, these children are overwhelmed by fear of breaching a duty of loyalty to the parent, of the consequences of telling their story, and the sense that they are the responsible party for whatever may result from the disclosure.⁴¹ Researchers have found that following disclosure, the child will most likely experience powerful feelings of “guilt and personal responsibility combined with feelings

³³ Ibid.

³⁴ Dallam, Stephanie J., R.N., M.S.N., F.N.P. “Dr. Richard Gardner: A Review of His Theories and Opinions on Atypical Sexuality, Pedophilia, and Treatment Issues.” Treating Abuse Today 8 January/February 1998, 67-68.

³⁵ The founder of the Parental Alienation Syndrome has called for an abolishment of mandatory reporting laws. Ibid., 69.

³⁶ McDonald, The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, 15.

³⁷ National Clearinghouse on Child Abuse and Neglect Information, Overview of the Domestic Relations Court Process, <<http://www.calib.com/nccanch/pubs/usermanuals/courts/domestic.cft#custody>> (April 5, 2003).

³⁸ McDonald, The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, 15.

³⁹ Sherman – Fahn, Meredith. “Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter.” Family Law Quarterly 25 Summer 1991, 197.

⁴⁰ Ibid., 198

⁴¹ Wood, Cheri L. “The Parental Alienation Syndrome: A Dangerous Aura of Reliability.” Loyola of Los Angeles Law Review, 27 June 1994, 1378.

of loss and grieving for the emotional warmth the abuser provided.”⁴² These feelings may lead the child to conclude that it might be in their best interest to retract the story.⁴³ When the abuser attempts to persuade the child to recant by instilling guilt, fear or ambivalence, he exacerbates these feelings.⁴⁴

Even if a child does not retract his/her story, the story likely will develop inconsistencies between the first telling and subsequent tellings. Wood outlines three main reasons. First, if a child has been abused for a period of months or years, the incidents tend to blur together. This explains why children cannot recall certain events, or may add to or subtract from their stories later.⁴⁵ This reflects the child’s confusion, not intent to deceive. Second, “the ambivalence experienced by many victims sometimes causes them to offer inconsistent accounts of abuse. Such inconsistency is found in children of all ages.”⁴⁶ Finally, and this is especially true for younger children, children’s minds are much too immature to comprehend these events well enough to retell them consistently every time.⁴⁷

In short, a victim of sexual abuse may recant his/her allegations for various reasons, not necessarily because the allegations were false. Adults expect these children to state that their parent has sexually abused them, give detailed descriptions of acts that they do not fully understand, and remain consistent every single time they retell their story. Because a child is unable to do this does not mean s/he has made false allegations. Rather, as noted above, often the inability to remain consistent and the tendency to recant his/her story is a result of “immaturity, psychological stress, societal pressures or similar factors or their interaction.”⁴⁸ It is not uncommon for the child who has accused his/her parent of sexual abuse to fear that either s/he will be in trouble or that s/he has caused the parent to be in trouble.⁴⁹ Furthermore, it is very possible that the abusive parent has either explicitly or implicitly threatened harm to the child if s/he discloses the abuse.⁵⁰ It is not uncommon for a child to disclose abuse to a trusted parent but not repeat the story to a third party because the child is not familiar with and does not trust that other person.⁵¹

Finally, a child’s affection for the allegedly abusive parent is not conclusive evidence that the parent has not abused the child. Most abusers do not abuse a child constantly, and the child may be eager to gain the approval of the abusing parent. The fact that a child shows no fear of the accused does not mean that there has been no

⁴² Ibid., 1378-79.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid., 1379

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ *State v. Lindsey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986).

⁴⁹ Goldstein, Seth L., Esq. “Sorting Out Allegations of Child Abuse in Custody and Visitation Cases: The Problem of ‘System Failure.’” *Expose*, 108.

⁵⁰ Ibid., 108

⁵¹ Ibid., 108.

abuse.⁵² A child's lack of fear of and seeming affection for the sexually abusive parent is a well-known and recognized reaction in the mental health profession.⁵³ Unfortunately, some custody evaluators in Arizona claim that they can tell if the children were abused by whether or not they exhibit fear toward the alleged abuser. Experts believe that children react this way toward their abuser despite the sexual victimization for several reasons: the child may feel a sense of loyalty to his/her parent; children are "required" to be obedient to and respectful of their parents; and most importantly, the child behaves in whatever way s/he thinks is required to survive the situation. Sadly, as Wood concludes, "the only healthy option left for the child is to learn to accept the situation and to survive. There is no way out, no place to run. The healthy, normal, emotionally resilient child will learn to accommodate to the reality of the continuing sexual abuse."⁵⁴

Custody Evaluators

Despite the myth that mothers always get custody of their children, several studies suggest that the courts in contested cases award custody to fathers approximately 70% of the time.⁵⁵ One national survey of non-abusive parents showed that 65% of the parents trying to protect their children were advised by attorneys, mediators, court personnel, advocates, police, psychologists, family court advisors, other protective parents and even one judge not to report the abuse.⁵⁶ Although 90% of the non-abusive mothers reported that they began with custody of their children, by the end of the court process 80% of the identified offender fathers had custody, 29% of the mothers were placed on supervised visitation, and 29% of the mothers had no contact at all with their children. In most cases, the fathers who plea for sole custody are the same fathers who abuse their wives and children.⁵⁷

In many custody disputes, the court will appoint a mental health professional to determine which custody placement will serve the "best interests of the child." Ostensibly, the courts seek to avoid placing the child with an abusive parent. Unfortunately, when the court appoints a custody evaluator, the evaluator's goal is not to relieve the child's suffering or to treat the child. Rather, it is to provide an objective and informed opinion to the court as to best custody situation for the child.⁵⁸ This is problematic especially in cases where domestic violence and/or sexual abuse are a factor because custody evaluators may lack knowledge about family violence issues. According to Zorza, for example, "40% of those working in mental health fields in the [United States] admit they have never received any training about intimate partner violence and

⁵² McDonald, The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, 17.

⁵³ Wood, The Parental Alienation Syndrome: A Dangerous Aura of Reliability, 1381.

⁵⁴ Ibid.

⁵⁵ Zorza, Joan. "Batterer Manipulation and Retaliation: Denial & Complicity in the Family Courts." 4 *Feminista*, (2001) <www.feminista.com/v4n7/zorza.html> (4/24/03).

⁵⁶ Geraldine Stahley, Oral presentation at the Western Psychological Association meeting in Canada, May 2003.

⁵⁷ Ibid.

⁵⁸ Herman, Stephen P., M.D. and William Bernet, M.D. "Summary of the Practice Parameters for Child Custody Evaluation." American Academy of Child and Adolescent Psychiatry. <<http://www.aacap.org/clinical/CUSTDY~1.HTM>> (4/24/03).

even fewer received training about child sexual abuse.”⁵⁹ Those who have received any kind of training on domestic violence typically have completed only about one hour of training. Without such training, custody evaluators are likely to work against the “best interests of the child” by placing the child in the batterer’s care.

Lacking training on domestic violence and child abuse, custody evaluators may fail to screen for domestic violence and, therefore, neglect their duty to determine placement in the best interest of the child.⁶⁰ Although the National Council of Juvenile and Family Court Judges clearly has stated that there should be a presumption against placing a child in either a sole or joint custodial situation when one of the parents is abusive (and Arizona law makes the same presumption),⁶¹ evaluators without knowledge and understanding of the dynamics of domestic abuse continue to endanger the lives of children by giving sole or joint custody to abusive parents.⁶²

Bancroft and Silverman’s study on the quality of custody evaluators showed chronic problems with custody evaluations.⁶³ Evaluators continually assumed that abusive men fit the “macho man” stereotype. However, abusers often appear to be charming, charismatic, and good-tempered. An untrained custody evaluator may take this pleasant behavior at face value, failing to recognize the father’s amicable behavior as a manipulative attempt to convince the evaluator that he is not an abuser. Alternatively, when the evaluator questions an abuser about past instances of abuse, the abuser usually appears regretful and justifies his abuse by blaming poor anger management, depression, substance abuse, or even his partner. Thus, the evaluator concludes that the abuser is no longer a danger and will not repeat the abuse. However, Zorza suggests that abuse rarely is a one-time occurrence and likely will be repeated.⁶⁴

The batterer’s manipulation of the evaluator can be detrimental to the child’s welfare. Evaluators are in danger of accepting the abuser’s position that he just “snapped” or that the victim not only caused but deserved her abuse.⁶⁵ According to Zorza, “Men have been so successful at projecting their negative feelings onto women that virtually all of the scrutiny is on women’s negative views of their partners, not the enormous belittling and devaluation by men.”⁶⁶ To the detriment of the children involved, most uninformed evaluators do not comprehend that the abuser does not seek custody out of love and concern for the child(ren); he seeks custody as a way of continuing his abuse. Thus not only does the abuser continue his harassment by continually dragging the victim

⁵⁹ Zorza, Batterer Manipulation and Retaliation.

⁶⁰ Zorza, Batterer Manipulation and Retaliation.

⁶¹ A.R.S. § 25-403

⁶² Saunders, Daniel G. “Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations”, 1998. Violence Against Women Online Resources. <<http://www.vaw.umn.edu/documents/vawnet/custody/custody.pdf>>(4/24/03).

⁶³ Bancroft, Lundy and Jay G. Silverman. The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics, Sage Publications, 2002, 119-20.

⁶⁴ Zorza, Batterer Manipulation and Retaliation.

⁶⁵ Crites, Laura and Donna Coker. “What Therapists May See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged.” The Judges Journal Spring 1988, 42.

⁶⁶ Zorza, Joan. “Domestic Violence Report: Most Therapists Need Training in Domestic Violence.” 1 Civic Research Institute, Inc. August/September 1996, 2

into court, by fighting for custody of children that he will most likely abuse he delivers the “ultimate blow to the victim – more serious than the years of psychological and physical abuse.”⁶⁷

Untrained custody evaluators make assumptions not only about the batterer but about the victim as well, often assuming that no victim would stay in an abusive situation. This further minimizes the batterer’s actions and places the blame on the victim.⁶⁸ When unknowledgeable evaluators meet with a victim who has trouble substantiating her abuse claims, they usually conclude that the alleged abuse did not occur. However, with training, these evaluators would know that a victim’s inability to substantiate her claims results from her intense fear of her abuser and her abuser’s potential retaliation against her. As Crites notes, these same factors may keep a victim of domestic violence from making formal complaints to the police about her abuser.⁶⁹

By failing to consider the victim’s legitimate fear of her abuser or by claiming that the victim’s behavior is a result of stresses associated with divorce, the evaluator effectively minimizes the abuser’s choice to abuse his partner and “fail[s] to take into consideration the energy she typically expends in trying to reduce tension and stop the violence in the home.”⁷⁰ Conversely, evaluators faced with an indignant victim may fail to consider that her anger is justified after all of the years of abuse that she has endured. If the victim is angry, the evaluator may conclude that she is upset because her intimate partner is leaving. Therefore the abuse could not have been that bad. If the woman is not angry, the evaluator may conclude that the abuse couldn’t have been that bad because, if it were, she would be angry. In short, an untrained evaluator likely will hold a victim’s emotional expressions against her.

According to Saunders, when evaluators do not understand the dynamics of domestic violence, they blame the victim for her inability to escape the situation.⁷¹ The evaluators fault the victim for not stopping the violence and for not leaving the violent home, incorrectly concluding that the victim is pathological or unstable and an unfit parent. Again, this effectively diverts attention from the abuser’s choice to use abusive behavior and places it on the victim, whom the evaluator may conclude is unable to act as the evaluator thinks she should. Although the evaluator’s duty is to help decide placement in the best interest of the child, the evaluator’s decision to give custody to the abusive parent virtually guarantees that the child will remain in the same abusive environment from which the non-abusive parent is fighting so hard to remove the child.

Not only do untrained evaluators continue to be ignorant of the causes and the effects of domestic violence on both the battered parent and the child, many custody evaluators do not consider domestic violence important enough to factor into a custody

⁶⁷Crites, Laura and Donna Coker. “What Therapists May See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged.” *The Judges Journal* Spring 1988, 42.

⁶⁸Zorza, “Most Therapists Need Training in Domestic Violence,” 2.

⁶⁹Crites, “What Therapists May see that Judges May Miss”, 9.

⁷⁰Ibid.

⁷¹Saunders, “Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations”.

determination. Bancroft and Silverman stated that when therapists of the American Association for Marriage and Family Therapy were presented with scenarios involving domestic violence, 91% of them failed to identify the abuse. Further, of those therapists who were aware of the domestic violence issues, 40% did not think it important enough to make further inquiries into the matter. Only 2.2% of all the therapists recognized that domestic violence might be lethal.⁷²

In practice, when untrained custody evaluators are presented with allegations of domestic violence, they sometimes completely dismiss them. Surprisingly, evaluators can completely dismiss such allegations without consulting the court record for the case in question. These evaluators base their decisions strictly on their psychological tests and their personal impressions of the parties. Because no psychological test can either confirm or deny that a person is either a batterer or has suffered abuse, persons who are trained in the field of domestic violence strongly discourage their use.⁷³ Further, because these tests do not consider the psyche of a domestic violence victim, they frequently misdiagnose a victim as paranoid, borderline, or schizophrenic. In reality, these victims may be terribly frightened not only of losing their children but of their abusers' retaliation against them for fighting their abuser for custody. Finally, these tests are incapable of giving the evaluator an accurate description of the victim's potential as a parent.

When evaluators make conclusions about the victim based on these test results, the mother will almost always lose custody of her child(ren) to her abuser. Evaluators relying on these tests often fail to seek a second opinion from a peer. Furthermore, because "syndromes" such as the Parental Alienation Syndrome and its progeny do not appear in the Diagnostic and Statistical Manual IV, knowledgeable psychologists strongly discourage evaluators' reliance on this syndrome as well.⁷⁴

Solutions exist to ensure that custody evaluators are competent enough to consider the severity of family violence allegations in child custody disputes. Once an evaluator receives adequate training on domestic violence issues, s/he should be informed enough to tell the judge whether or not the abuser has accepted responsibility for his abuse; understands that his use of abuse (physical, sexual, and emotional) is his way of attempting to control his victim; and has empathy for his victim. As Crites suggests, the State could require custody evaluators to consult with specialists who are educated on family violence issues before offering their conclusions to the court.⁷⁵

Bancroft and Silverman further suggest that evaluators should speak not only with both parents, but should speak with others who may have information about the abuse, including police, school personnel, friends, relatives, past partners (if available); read diaries and criminal records of the parties; and review the court record for the case in question.⁷⁶ However, evaluators also must recognize that the absence of documentation

⁷² Bancroft, 119.

⁷³ Crites, 40.

⁷⁴ Kaufman, Phyllis A., Ph.D. "The Role of Mental Health Professionals in Family Courts." Expose, 48.

⁷⁵ Crites, 12.

⁷⁶ Bancroft, 197.

does not necessarily mean that the victim fabricated the abuse allegations. As noted above, custody evaluators should be extremely wary of basing a “best interest” determination solely on his/her personal impressions of the parties involved.⁷⁷

Evaluators should be cautioned against finding or not finding a party credible simply because s/he does or does not present him/herself as the stereotypical abuser or victim. Of particular importance, evaluators should be careful not to put too much weight on an hour-long interaction between the child and the parent. This type of situation reveals nothing about how the abuser interacts with his child(ren) in his private home. Abusers rarely present themselves as abusers when they are under observation.⁷⁸ Finally, as noted earlier, evaluators need to be aware that in abusive situations, joint custody is harmful to the children. In these cases, Bancroft argues, “it is preferable to award sole custody to the non-battering parent and to create visitation schedules that do not involve frequent exchanges.”⁷⁹

Parental Alienation Syndrome

Often in custody battles, if a child alleges that the father sexually abused him/her, the father will claim that not only did the child fabricate the complaint but also that the mother coerced the child to make these allegations against the father and thus “trained” the child to fear him.⁸⁰ Such is the basis of the Parental Alienation Syndrome, a condition arguably identified by Dr. Richard Gardner.⁸¹ Instead of focusing on

⁷⁷ Bancroft, 198.

⁷⁸ Ibid., 199.

⁷⁹ Ibid., 200.

⁸⁰ NOW Legal Defense and Education Fund. “Parental Alienation Syndrome: A Guide For Mothers.”, 1999, 1.

⁸¹ As discussed below, Gardner’s approach to adult-child sexual interactions is deeply troubling. See, e.g., Gardner, Richard, M.D. True and False Accusations of Sex Abuse. (Creative Therapeutics, 1992). The following quotes suggest an attitude of normalization and acceptance:

Older children may be helped to appreciate that sexual encounters between an adult and a child are not universally considered to be a reprehensible act. The child might be told about other societies in which such behavior was and is considered normal. The child might be helped to appreciate the wisdom of Shakespeare’s Hamlet, who said, ‘Nothing’s either good or bad, but thinking makes it so.’ In such discussions the child has to be helped to appreciate that we have in our society an exaggeratedly punitive and moralistic attitude about adult-child sexual encounters (549).

If the mother has reacted to the [sexual] abuse in a hysterical fashion, or used it as an excuse for a campaign of denigration of the father, then the therapist does well to try and ‘sober her up’ ... Her hysterics ... will contribute to the child’s feeling that a heinous crime has been committed and will thereby lessen the likelihood of any kind of rapprochement with the father. One has to do everything possible to help her put the ‘crime’ in proper perspective. She has to be helped to appreciate that in most societies in the history of the world, such behavior was ubiquitous, and this is still the case (584-585).

If he [the molesting father] doesn’t know this already, he has to be helped to appreciate that pedophilia has been considered the norm by the vast majority of individuals in the history of the world. He has to be helped to appreciate that, even today, it is a widespread and accepted practice among literally billions of people. He has to appreciate that in our Western society especially, we

determining whether the accused parent is the untruthful party, PAS assumes that the mother and child are the guilty parties.⁸² The crux of it is that the mother is so vengeful against the husband that she will do anything to “get back at” him in court. Thus, she “coerces” her child(ren) to invent sexual abuse allegations against their “innocent” father. According to Wood, experts who support PAS argue that any time a child acts ambivalently toward the father, the mothers’ manipulation, and consequently PAS, are present.⁸³

In effect, when the accused employs an expert who will testify as to whether PAS has occurred (which usually happens), the expert is testifying as to whether the child has truthfully alleged that the father has sexually abused him/her. Such testimony goes to the credibility of a witness. The Arizona Supreme Court expressly has forbidden such testimony. This is an area that is solely the jury’s concern. In *State v. Lindsey*,⁸⁴ the defendant was convicted of sexual exploitation of a minor. The issue on appeal was the admissibility of the State’s expert witness.⁸⁵ The Court held that “trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness.”⁸⁶ It reasoned that expert testimony is only permissible when the facts of the case are such that comprehension of them is out of the realm of the ordinary juror’s common knowledge.⁸⁷

Conversely, the purpose of an expert witness is not to “tell the jury” who is correct or incorrect, who is lying and who is truthful. Such testimony is tantamount to expert evidence on the question of guilt or innocence. We do not permit such testimony.”⁸⁸ The Court further explained:

[T]he expert’s function is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror. Certainly, the behavioral patterns of young victims of incest or child molestation fall into that category. It is not the expert’s function, however, to substitute himself or herself for the jury and advise them with regard to the ultimate disposition of the case. Under our Constitution, not even the judge may do that. Opinion evidence on who is telling the truth in cases such as this is nothing more than the expert’s opinion on how the case should be decided. We believe that such testimony is inadmissible,

take a very punitive and moralistic attitude toward such inclinations... He has had a certain amount of back [sic] luck with regard to the place and time he was born with regard to social attitudes toward pedophilia. However, these are not reasons to condemn himself (593).

The North American Man/Boy Love Association, a group that advocates sexual intercourse between men and boys and presses for its normalization and acceptance, echoes these very sentiments. Dallam, 22.

⁸² Bruch, Carol S. “Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody.” 35 *Family Law Quarterly*, 2001, 528-29.

⁸³ Wood, 1367

⁸⁴ 149 Ariz. 472, 473; 720 P.2d 73, 74 (1986).

⁸⁵ Ibid.

⁸⁶ Ibid. at 475, 76.

⁸⁷ Ibid. at 473, 74.

⁸⁸ Ibid. at 475, 76 (emphasis in original.)

both because it usurps the jury's traditional functions and roles and because when given insight into the behavioral sciences, the jury needs nothing further from the expert.⁸⁹

Therefore, the Court will only permit an expert witness to testify to matters that will assist the jury in understanding what is outside the common knowledge of the juror.⁹⁰

PAS is not based on scientific research. It is based on Gardner's personal observations.⁹¹ Furthermore, PAS has remained stagnant for the last fifteen years.⁹² This means that there have been no new developments in this "syndrome" since its inception. This is perhaps attributable to the fact that Gardner has never actually tested his own theory.⁹³ Others in his own community have tested his theory and they have found it to be erroneous.⁹⁴ Further, mental health professionals nationwide have criticized PAS as "being biased, and ... failing to take into account alternate explanations for children's and parents' behavior in custody cases."⁹⁵ Moreover, many critics have faulted PAS for using circular reasoning. To wit, Gardner claims that the "vast majority" of sexual abuse claims occur during child custody disputes. However, one of the main criteria by which Gardner evaluates the veracity of a sexual abuse claim is whether the claim occurred during a child custody proceeding.⁹⁶ By Gardner's logic, virtually every allegation of sexual abuse is false. Another one of the criticisms of PAS is that it forces the potential victim to confront his/her alleged abuser.⁹⁷ This is uncommon among the mental health profession because it "significantly decreases the likelihood that the child will report anything the child feels is negative, like abuse."⁹⁸

Furthermore, Gardner has published the vast majority of his books on this syndrome through his own publishing company, Creative Therapeutics. This means that almost none of his work has been peer reviewed by scientific journals. In fact, aside from Creative Therapeutics, mostly legal journals have published his work.⁹⁹ Legal journals, however, only examine legal issues and do not have the knowledge to evaluate scientific theories. This means that PAS has not been subjected to the rigorous scrutiny that all

⁸⁹ Ibid.

⁹⁰ See also Floray v. State, 720 A.2d 1132 (Del. 1998) (holding that the use of an expert witness in child sexual abuse cases is limited to providing information to the jury that will assist it in areas that are not part of the ordinary juror's common knowledge (i.e., the psychological dynamics and resulting behavior patterns of a person who has been victimized); the expert may not testify as to the credibility or the veracity of others who have testified); People v. Loomis, 172 Misc.2d 265, 658 N.Y.S.2d 787 (N.Y. County Court 1997) (holding that only the jury, not an expert witness, may determine whether sexual abuse has occurred).

⁹¹ Dallam, Stephanie, R.N. M.S.N, F.N.P. "The Parental Alienation Syndrome: Is it Scientific?" Expose, 70.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ "Parental Alienation Syndrome: A Guide For Mothers," 3.

⁹⁸ Ibid.

⁹⁹ Ibid., 2-3.

valid scientific propositions must undergo in order to gain acceptance in their respective communities. PAS is neither listed in the American Psychiatric Association's Diagnostic and Statistical Manual IV, which is the mental health professional's guidebook, nor is it listed in the World Health Organization's International Classification of Diseases.¹⁰⁰

Since courts use a gender-neutral standard - "the best interest of the child" - when determining which parent should get custody, men are purportedly on equal footing with women in custody disputes.¹⁰¹ Gardner contends that one of the reasons women "alienate" their child(ren) from the father is to counterbalance the man's economic superiority.¹⁰² Allegedly, because men usually have more money than women have and are therefore better able to litigate a custody dispute, women attempt to offset this by "alienating" their children from their children's father by "convincing" their children that their father has abused them. Gardner believes that as many as 90% of abuse allegations that arise in the course of a custody battle are false.¹⁰³ Furthermore, Gardner believes that whenever a child alleges sexual abuse, it is more likely than not a lie.¹⁰⁴ This myth has been disputed (see footnotes 41, 82 and 91). Gardner believes that a woman who "convinces" her child that the child's father has molested him/her is perhaps "projecting her own sexual inclinations" onto her husband.¹⁰⁵

Although evidence shows that very few sexual abuse allegations are actually fabricated, Gardner recommends that when a mother accuses a child's father of sexual abuse, the mother and the child be completely separated and the mother have no contact with the child.¹⁰⁶ Unfortunately, PAS does not take into consideration that when the mother acts in an uncooperative manner, it may be because the father has made threats of violence against the mother and that the mothers' resistance to joint custody stems from her unwillingness to subject her child(ren) to further abuse.¹⁰⁷

Despite its lack of validity in the mental health community, some courts across the nation have accepted PAS, including some courts in Arizona. Thus, courts may use PAS to grant the father custody or the very children who have accused him of physical or sexual abuse. It is also important to note that not all courts necessarily refer to PAS by that name. As long as the father's expert uses the following words in describing the mothers' behavior, the expert is using the idea of PAS: alienate, manipulate, brainwash, program, train, coach, and retaliation.¹⁰⁸

Because Gardner places so much emphasis on the sexual abuse allegations that arise during the course of a custody dispute, it bears examining why such allegations arise then. First, when parents separate, this may be the first time the child does not have

¹⁰⁰ Ibid., 3.

¹⁰¹ Goldsmith, Susan. "The Scarlet Letter." Expose, 58.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Dallam, "The Parental Alienation Syndrome: Is it Scientific?" 67-68.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., 68.

¹⁰⁷ Butts-Stahley, Geraldine, Ph.D. "Domestic Violence and Custodial Challenges." Expose, 125.

¹⁰⁸ "Parental Alienation Syndrome: A Guide For Mothers," 2.

very much contact with the abusive parent. Therefore, the child may feel more secure and less threatened about revealing his/her secrets. Conversely, the child may actually have more time alone with the abusive parent after a separation. This might make the child feel more vulnerable, which is likely to lead to a disclosure of the abuse. Third, the general stress and anxiety that surrounds a divorce may increase the closeness between the child and another family member. The closeness of the relationship may make the child feel that s/he can confide in this family member. Similarly, such a separation may make the child feel as though the non-offending parent will believe them now if they tell.¹⁰⁹ Finally, it is not uncommon for parents that may not have been sexually abusive before the separation to become so after the separation.¹¹⁰ Related to that, it is possible that during the course of the marriage the mother found evidence (i.e. photographs) that the father had sexually abused the child. Refusing to believe that her husband could commit such acts against their children, usually the mother will immediately destroy the evidence. It is not until later when they accept the truth of the situation that they proceed to make a report. Unfortunately, because the mother lacks any direct evidence that the abuse in fact occurred, she is accused of making up the allegations.¹¹¹

A study by Sally Palmer and Ralph Brown found that childhood disclosure of abuse usually did not bring on an end to the abuse and that little action was taken to control the perpetrator, even after disclosure took place.¹¹² Of those who disclosed, the abuse stopped completely in only 5% of the cases, temporarily or completely in 25% of the cases when the mothers knew, and in 16% of the cases when someone else knew. Thus while most abuse was not stopped, mothers still were most effective at stopping the abuse. Still, since the abuse is stopped so rarely, children have very little incentive to report.

In the Palmer and Brown study of 116 cases where child sexual abuse was confirmed by a perpetrator's subsequent guilty plea or conviction, or by highly consistent medical evidence, 72% of the victims denied the abuse when they were first questioned about it. Thus victims are much more likely to underreport rather than over report abuse. Victims don't disclose because of fear of the consequences, self-blame, lack of awareness and difficulty in talking about the abuse. The most likely incentive to report was school programs and anger (tied at 24%) and timeliness (everything fell into place, 22%). A safe environment promotes disclosure of sex abuse for girls who may only disclose at adolescence or upon divorce. Yet that is precisely when they more likely not to be believed.

The survivors themselves reported to Palmer and Brown that they were most likely to be believed when they told friends or neighbors and least likely to be believed when they told professionals. Therefore the very people in charge of making the determination of abuse don't believe the victim.

¹⁰⁹ McDonald, 16-17.

¹¹⁰ Dallam, "The Parental Alienation Syndrome: Is It Scientific?", 72.

¹¹¹ Goldstein, 108.

¹¹² Palmer, Brown, "Responding to Disclosures of Familial Abuse: What Survivors Tell Us", Child Welfare Journal of Policy, Practice and Program, Mar/Apr 1999.

In the same study, after disclosure, most mothers responded with some support to the child but less than 50% took action. Mothers most likely to be supportive were those no longer living with the perpetrator, and the action most mothers took was divorce. However, that is precisely when the system, CPS, evaluators, and the court, do not believe the allegations. Those children who were believed were much less disturbed emotionally and behaviorally than those who weren't believed. So for the best interest of the child, the mother should believe them. Yet when they do, the mothers are accused of alienation.

Lack of Judicial Education/Judicial Ineffectiveness

While custody evaluators who make decisions without proper training or investigation into abuse are to blame for their decisions, the judges for whom they work are equally responsible. According to Patricia Bellasalma, “[t]he judicial system reality is that outcomes are determined by the personal philosophy of the jurist.”¹¹³ She argues that the ambiguity of the term “best interest of the child” coupled with the fact that the judge is at liberty to choose an evaluator of his/her liking guarantees that a judge will choose an evaluator that supports his/her personal parenting philosophies. Because judges are not necessarily educated on issues of domestic violence and because patriarchal notions of gender roles in the family abound in the courts, “this system has only served to reinforce a profoundly patriarchal philosophy.”¹¹⁴

Unfortunately, in almost all family court cases, judges’ ineffectiveness stems from their lack of education about violence against women and children. This is particularly true with respect to child sexual abuse allegations.¹¹⁵ Even when judges have some background information on family violence, it is usually so inadequate as to be of no assistance to either the judge or the victims involved.¹¹⁶ Experts speculate that this is because the evaluators who teach family violence seminars “are selected by powerful jurists, and they tend to promote the patriarchal view of these jurists,” and because “training vehicles do not address the absence of accountability within the family law system.”¹¹⁷

To compound this problem, most states do not specify clearly what does and does not constitute sexual abuse.¹¹⁸ The devastating result is that when judges hear allegations of abuse, especially allegations of child sexual abuse, the judge believes that because such allegations are all too common, they must be false.¹¹⁹ Realizing the severity of the lack of education, the National Council of Juvenile and Family Court Judges began to

¹¹³ Bellasalma, Patricia, J.D. “Suspension of Reality: Belief Systems Versus Judicial System Reality.” Expose, 156.

¹¹⁴ Ibid.

¹¹⁵ Burton, Randy, J.D. “Children’s Rights, Child Abuse, and the Legal System.” Expose, 201.

¹¹⁶ Jaffe, 138.

¹¹⁷ Bellasalma, 157.

¹¹⁸ Sherman-Fahn, 209-210.

¹¹⁹ Burton, 201.

consider solutions to this problem as early as 1987.¹²⁰ One of its first recommendations was that, “all judges must be trained in the dynamics of family violence on an ongoing basis and [have the ability to] address it fairly and properly.”¹²¹

The National Council of Juvenile and Family Court Judges also addressed the issue of joint custody. This Council declared that judges should not presume that joint custody is always in the best interests of the children.¹²² It recognized that joint custody orders will force a victim to continue the relationship with her abuser and places both the victim and the child(ren) in further danger.¹²³ When victims and their children are forced to continue a relationship with their abuser, the abuser will continue to use his power and control techniques to intimidate and subjugate the victims.¹²⁴ This has far more adverse consequences on the children than any other custody option and judges should avoid it.¹²⁵

Sherman-Fahn suggests that the State should require judges to undergo training sessions that address all facets of family violence, including spousal abuse, child abuse, and child sexual abuse. Additionally, judges should be exposed to not only the legal aspect of family violence but also the psychological aspect. With such thorough training, judges who preside over family court matters will be better equipped to elicit and evaluate evidence presented in such cases, evaluate custody evaluators, evaluate testimony, and render a decision that will be the best for all parties involved.¹²⁶ Most importantly, an educated judge will be better able to evaluate the arguments and emotional appeals of the alleged abuser.¹²⁷

The belief that judges are objective and disinterested parties in the cases over which they preside must be abandoned.¹²⁸ To begin with, these judges are not required to state their premises for reaching their conclusions.¹²⁹ This is because many family law statutes do not require judges to provide a “written accounting of the determining factors and the respective weight given each factor in making child custody awards.”¹³⁰ In Arizona, judges are required to make findings of fact.¹³¹ However, few make extensive findings that would make clear the basis of the decision. Additionally, due to the “best interest of the child” standard, judges tend to ignore the relationship between a mother and her child. Although the mother may have done the bulk of the nurturing and caretaking, and is the parent the child is most connected with, judges do not necessarily

¹²⁰ Daley-Pagelow, Mildred. “Commentary: Justice For Victims of Spouse Abuse in Divorce and Child Custody Cases.” 8 Violence and Victims, 1993, 73.

¹²¹ Ibid.

¹²² Ibid., 75.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Sherman-Fahn, 210-11.

¹²⁷ Sherman-Fahn, 211.

¹²⁸ Bellasalma, 157.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ A.R.S. § 25-403(J).

need to give these factors any weight at all.¹³² Relying on the “best interest of the child” standard instead, judges create an artificial neutrality that ignores the “very real differences between mothers and fathers at the time of the divorce.”¹³³

To combat this problem, Bellasalma argues that the laws must be followed so that (1) judges are required to explain the factors involved and the weight given to each that made the judge decide the way s/he did and (2) the statutory list of the factors must be considered. The legislature should state what factors are prohibited in a custody case such as PAS or punishing parents for lawful reports of child abuse.¹³⁴ According to the First National Summit of the National Council of Juvenile and Family Court Judges, new programs are available to help educate judges as to the causes and effects of family violence. Although these programs are widely underused, they (1) provide family violence training to judges, (2) “offer coordinated, cross-agency responses to cases involving both domestic violence and child maltreatment,” (3) “utilize specialized domestic violence courts,” or (4) “have a one-family, one-judge approach in which one judge hears all civil cases involving a particular family.”¹³⁵ The implementation and use of such programs would assure victims of family violence that the judge involved in their case would be more likely to protect the victims of violence.

Gender Bias

Although popular opinion holds that mothers have an advantage in custody disputes, gender bias studies of thirty-two state courts, psychologists, and attorneys who work with battered women have found that this is not the case. In fact, historical gender biases continue to work against battered women.¹³⁶ James Ptacek’s study of battered women in the courtroom found that “judicial harassment of battered women” was a public problem.¹³⁷ He also found that judicial attitudes and demeanor toward women and men were different and had profound consequences in the litigants’ later behavior. Most of the women feared going into court. They feared retaliation, the legal process, and that they would not be believed. Judicial demeanor did much to increase or alleviate those fears. Similarly, Bancroft and Silverman observed that in family violence cases, courts apply different evaluation criteria in evaluating fathers and mothers; assume that a mothers’ concern for her child(ren)’s safety is exaggerated; blame the mother for “failing to protect” her child from the batterer yet criticize her for “alienating” the batterer when she does try to protect them; and make greater allowances for a father’s anger than a mothers’ anger.¹³⁸

¹³² Winner, Karen. Divorced From Justice: The Abuse of Women and Children by Divorce Lawyers and Judges, HarperCollins Publishers, Inc., 1996, 48-49.

¹³³ Ibid.

¹³⁴ Bellasalma, 157.

¹³⁵ Schechter, Susan and Jeffrey L. Edleson, Ph.D. Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy & Practice, 1999, 10. National Council of Juvenile and Family Court Judges. <<http://www.ncjfcj.org/dept/fvd/Publications/>>(4/24/03).

¹³⁶ Butts-Stahley, 131.

¹³⁷ Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses, Northwestern University Press, Boston, 1999, 67.

¹³⁸ Bancroft, 190.

The Wellesley BMTP report supported these findings and additionally found that “gender bias affects substantive decision making in court cases and the treatment of individuals coming to court.”¹³⁹ For example, when women report incidents of violence, courts usually view these women as exaggerating the problem in an attempt to manipulate courts. The Wellesley BMTP found that often courts considered violence against women irrelevant and proceeded to grant the abuser joint custody rights.¹⁴⁰ Moreover, that study found that when a woman reported partner abuse or made child abuse allegations to state actors, these people often “failed to investigate or consider their claims.”¹⁴¹ Even worse, the state actors who did conduct an investigation into these women’s claims did so in a manner that “sided actively with the father, refused to look at evidence that supported the mothers’ claims of abuse, conducted interviews in a way that favored fathers, and/or distorted facts to benefit the fathers.”¹⁴² Additionally, the study found that “regardless of the presence or absence of partner abuse, fathers who actively seek custody obtain either primary or joint physical custody 70-90 percent of the time, and that when fathers contest custody, mothers are held to a different and higher standard than fathers.”¹⁴³

On the other side of the country, the 2002 California Family Court Report found that in almost every case that involved an abuse allegation, “the ‘experts’ labeled the mother as ‘overprotective’ or ‘alienating’ and on such basis recommend changing custody to the father, regardless of evidence proving sexual or physical abuse, criminal history, domestic violence, or substance abuse against the father.”¹⁴⁴ Additionally, this study reported identical results to the Massachusetts study regarding state actors. Specifically, “[c]ounsel who are appointed to represent the children in violation of the mothers’ parenting rights ... at best, d[id] not represent the children adequately and, at worst, side[d] with the fathers by supporting sexist theories described in mediation and evaluation reports.”¹⁴⁵ In fact, once a false syndrome (i.e. PAS) was alleged against the mother, this report found that “the child’s counsel almost never argue[d] against the use of the syndrome and instead advocate[d] that the father must be the better parent, despite evidence to the contrary.”¹⁴⁶

Furthermore, when courts are presented with a father who fights for custody of his child(ren), they often presume that the father is a devout and loving father and that any violent incidents on his part were acceptable emotional reactions to stressful situations.¹⁴⁷ These courts do not consider how often or why batterers seek custody of their victims.¹⁴⁸

¹³⁹ BMTP, 3.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 20.

¹⁴² Ibid., 35.

¹⁴³ Ibid., 3.

¹⁴⁴ Heim, Sheila et al. California National Organization for Women 2002 Family Court Report, 7.

¹⁴⁵ Ibid., 5.

¹⁴⁶ Ibid.

¹⁴⁷ Jaffe, 135.

¹⁴⁸ Bancroft, 121.

Similarly, when judges are presented with two parents who want custody of their children, they hold the father to a different standard than the mother. Mothers are evaluated on “the basis of their actual history and performance as parents[,]” whereas fathers are evaluated on “the basis for their expressions of emotion and their stated intention for the future.”¹⁴⁹ Additionally, the Wellesley Battered Mother Testimony Project reported that in custody disputes, state actors generally “[took] more time to listen or pay attention to the ex-partner’s claims, witnesses, and evidence than to those of the woman.”¹⁵⁰ In other cases, “women reported that state actors imposed demands on them or scrutinized them in ways not applied to ex-partners.”¹⁵¹

Paradoxically, mental health professionals (including CPS), judges, and attorneys “may be harshly critical of a mother whom they perceive as guilty of ‘failing to protect’ her children from exposure to a batterer.” However, once the mother and father are separated, these actors reverse their viewpoint. At this point, “professionals often become suspicious of a mothers’ motives for attempting to protect her children and may attribute children’s symptoms to the mothers’ alleged anxiety, over-protectiveness, or vindictiveness against the alleged abuser.”¹⁵² The 2002 California Family Court Report found that “traditional gender roles [were] manipulated to accommodate the father, as for example, when a stay at home mother loses credibility for not having worked, while a working mother is found at fault for not having stayed at home.”¹⁵³

On the other hand, there is no evidence to suggest that “men are losing custody of children because they work outside the home.”¹⁵⁴ In fact, “[i]n many places, the man gains an advantage in court if he works longer hours and makes more money than his [partner] because the economic security of the parent is one criterion some judges now use to decide custody cases.”¹⁵⁵

Courts’ reliance on the “friendly parent provision”¹⁵⁶ also evidences gender bias. This provision directs the court to give custody to the parent who appears to be the most amicable and appears to encourage a continuing relationship between the child and both parents. However, as previously discussed, often abusers have mastered the ability to manipulate third parties into believing that they are calm, collected, rational, and “friendly,” whereas abused women are often so terrified of their abusers’ retaliation that they appear to be unfriendly or irrational. By relying on the “friendly parent provision,” “women are placed in a situation where they are advised to promote a relationship and set aside their past conflicts with someone who may be a danger to themselves and their children.”¹⁵⁷ Further, it puts the children directly in harms way. This provision is

¹⁴⁹ Ibid.

¹⁵⁰ BMTP, 36.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Heim, 5.

¹⁵⁴ Winner, 47.

¹⁵⁵ Ibid.

¹⁵⁶ A.R.S. §25-403 (A)(6).

¹⁵⁷ Jaffe, 135.

unacceptable because it punishes the victim of violence for her “seeming lack of cooperation.”¹⁵⁸

Jack Straton states that “friendly parent provisions” guarantee a batterer frequent and continuing access to his victim.¹⁵⁹ He argues that joint custody harms children in other ways by giving batterers a tool to bargain with, to interfere with needed and timely medical decisions, and by creating unconscionable costs in pain and privation for children and mothers. He recommends the standard be “primary caretaker” which is a gender-neutral standard and lies entirely within the power of the parents themselves, not delegated to the state. The American Bar Association’s Center on Children and the Law has recognized this and stated “‘friendly parent provisions’ are inappropriate in domestic violence cases.”¹⁶⁰ The ABA has proposed that state legislatures amend their laws to eliminate “friendly parent provisions.”¹⁶¹

FINDINGS¹⁶²

Our findings are organized in large part according to the four different types of custody used in Arizona. Three of these types are defined by statute¹⁶³ while the fourth is a matter of practice and understanding. Note that any of these may be awarded temporarily before permanent custody is finalized. They are:

- Joint legal custody: Both parents share legal custody and neither parent’s rights are superior, except with respect to specified decisions as set forth by the court or the parents in the final judgment or order.
- Joint physical custody: Physical residence of the child is shared by the parents in a manner that assures that the child has substantially equal time and contact with both parents.
- Sole custody: One person has legal custody.
- Sole legal custody (no statutory definition): Frequently used to mean that the parent with sole legal custody has the superior right to make decisions about the child’s welfare.

¹⁵⁸ Hofford, Merry, M.A. et al. “Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice.” 29 Family Law Quarterly, 1995, 201-02.

¹⁵⁹ Jack Straton, Ph.D., “Don’t Create Laws that Facilitate Abuse”, Portland, Or. (date unavailable).

¹⁶⁰ *Ibid.*, 202.

¹⁶¹ Hofford, Merry, M.A. et al. “Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice.”

¹⁶² We do not have comprehensive summary data for each participant. Not all participants answered all questions so the number of participants varies from question to question. Furthermore, some of the participants chose destruction of their identifying data as soon as it was entered into the summary demographic sheet. Thus some of their answers cannot be summarized because we cannot tie it to other specific data that might be too revealing, such as county, number of children, race etc. The percentages are of those who answered a particular question, not the total data set of 57 interviews.

¹⁶³ A.R.S. §25-402

DISTRIBUTION OF CUSTODY AWARDS

Demographic Distribution of Custody Awards

Where the information was available, we analyzed the distribution of custody awards based on the race of the woman, race of the man, and gender of the children. Table 2 outlines the total distribution of custody awards and the breakdown by gender of the children. Based on the available data, it appears that fathers were more likely to be awarded custody of their daughters.

Table 2. Distribution of Custody Awards by Children's Gender

Type of Custody (Total Occurrences)	Gender of Children In Custody Dispute			
	Female	Male	Both	Unknown
Sole custody to mother (13)	2	3	4	4
Sole custody to father (18)	7	2	6	3
Temporary custody to mother (2)		1	1	
Joint physical (4)	1	1	1	1 *
Joint legal (11)	2	3	2	2 **
Joint physical and joint legal (3)	2		1	
Undecided (1)				

N = 52 Not all cases had a custody decision at the time of interview

* With sole legal to father

** with one sole physical to mother, one primary residential to father

With regard to the race of the couples, where both parties were Hispanic (five cases), the mother was awarded custody in three cases, the father was awarded custody in one case, and joint custody was awarded in one case. In six out of seven mixed race cases, the mother received custody of the child. In the only American Indian case, the child went to the father.

As Table 2 indicates, thirty-one cases awarded sole custody. Of the thirteen women who received sole custody, five were Caucasian and four were Hispanic. In four, ethnicity was unknown. Of the eighteen men who received sole custody, twelve were members of same race Caucasian couples, one was a member of a same race American Indian couple, one was a member of a same race Hispanic couple, and one was a member of a mixed race couple (Hispanic father and African American mother). The race/ethnicity of three fathers were unknown.

In both of the sole legal custody decisions, fathers received sole legal custody. In the eleven joint legal custody cases, eight Caucasian women, one Asian woman, plus two of unknown race/ethnicity received custody. Of the seven joint physical custody decisions (three with joint legal custody as well), six Caucasian women and one Hispanic woman received custody.

Custody Award Differences Between Counties

As Table 3 indicates, counties differed in their custody awards in the cases under study. Statewide there were twenty-two sole custody decisions, 54.5 % to mothers and 45.5 % to fathers. In Maricopa County, there were fourteen sole custody decisions, of which 57% went to fathers. Statewide, there were 16 cases of sole legal custody, 11 in Maricopa County. Four went to mothers (36%) and seven to fathers (64%). In the rest of the state, all sole legal custody decisions awards custody to mothers. Courts awarded joint legal custody in seventeen cases, nine of them in Maricopa County. Statewide there were six joint physical decisions, five of them in Maricopa County.

Table 3. Distribution of Custody Cases By Parent and County

County	Sole Custody		Sole Legal Custody		Joint Legal Custody	Joint Physical Custody
	Mother	Father	Mother	Father	Both Parents	Both Parents
Maricopa	6	8	4	7	9	5
Coconino	2	1	1*	0	2	0
Pima**	3	0	3*	0	3	0
Mohave	0	1	0	0	0	1
Navajo	0	0	0	0	1	0
Cochise	1	0	1*	0	1***	0
Gila	0	0	0	0	1	0
Total	12	10	9	7	17	6

* This case also is included in the sole custody count.

** One Pima County case had no custody determination

*** Also counted in Pima as both counties were involved.

By county, Maricopa County was in a league of its own in terms of giving custody to fathers in contested custody cases. Of the thirty-nine cases evaluated in Maricopa County, sole custody, either physical or legal, was awarded twenty-five times. Mothers received sole physical or sole legal custody in ten cases, or 40% of the time. Fathers received sole physical or sole legal custody in 15 cases, or 60% of the time. Furthermore, of the thirty-nine cases, joint legal or joint physical custody or both was awarded in fourteen cases, 35.8 % of the time. In summary, then, alleged perpetrators of domestic violence received sole or joint custody in twenty-nine out of thirty-nine decisions, or 74% of the time. This finding is in line with similar studies that found fathers win custody 70-90% of the time.

Of the eighteen cases in all other counties combined, mothers received sole physical or sole legal in seven cases, or 39%. Fathers received sole physical or sole legal custody twice, or 11%. Joint physical or joint legal was awarded eight times, or 44%. In one case, custody was given as “other”. Thus, in other counties combined, alleged perpetrators received sole or joint custody in ten of eighteen cases, or 56% of the time. Although much better than Maricopa County’s award percentages, these custody awards still place more than half of all battered mothers and their children at risk.

Looking at various factors that might impact the decisions, fathers who received sole custody were on average five years older than the mothers who received sole custody. In all of the joint custody cases, the fathers were 2-7 years older on average than the mothers. The number of children did not seem to have an impact on the type of custody. The average number of years living together also seemed to have no impact. In all types of custody, the average duration of cohabitation was ten years, except for sole legal custody. In that instance, the average number of years living together was eight years when mothers obtained custody and twelve years when fathers obtained custody.

SYSTEMS OF CONTROL WHILE THE PARENTS WERE TOGETHER

Abusers used various systems of social control while the parents were together including, but not limited to, physical force or violence against the mother and/or the children, emotional or psychological intimidation against the mother and/or the children, sexual abuse of the mother and/or the children, and control of family finances. Abusers used physical force or violence against 93% of the participants. All participants (100%) said the abusers had threatened them physically or made them afraid. Abusers harmed victims emotionally or psychologically by intimidation (100%), control and blaming (99%), humiliation and cruelty (96%), and name-calling and psychological mind games (93%). Eighty-nine percent of participants reported that the abuser had used money to hurt and control them. The primary way means of control was by monitoring the participant's spending, but 51% said the abuser spent the family money on gambling or alcohol.

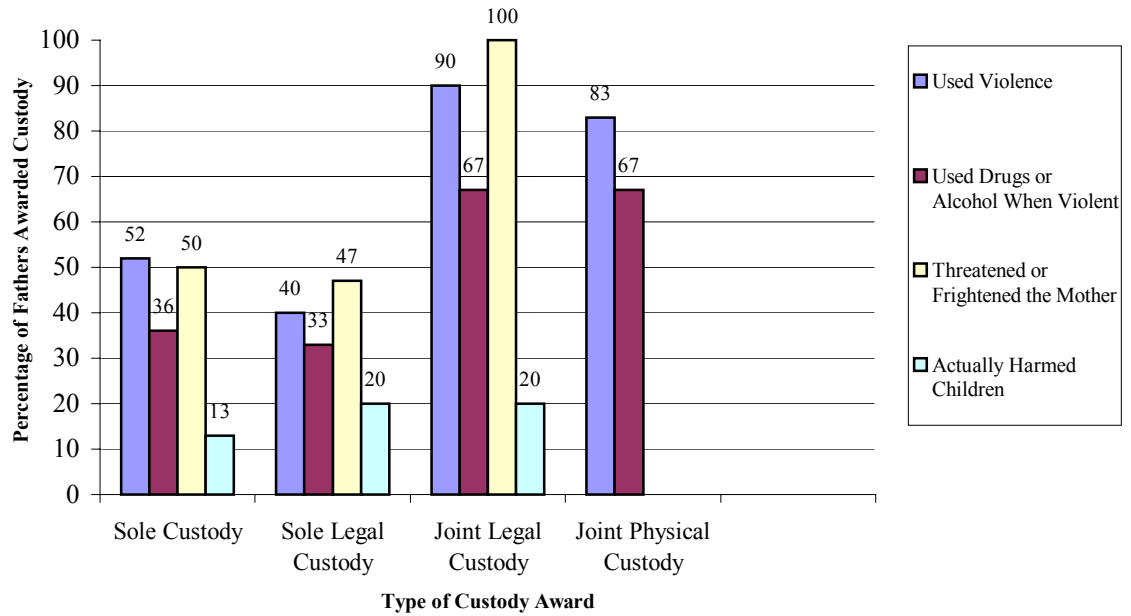
The risk of danger was increased by the presence of firearms in the home and the abusers use of drugs or alcohol when violent. According to participants, 70% of abusers had possession of firearms and 67% used drugs or alcohol when violent.

Children were present during the violence in 79% of the cases. Fifty-six percent of the children responded in some way during the incident. However, only 32% of the mothers felt the children were in danger of physical abuse during the incident.

Despite their abusive physical, emotional, and financial control abusers received various types of sole and joint custody awards. Figure 4 illustrates the percentage of abusers who received sole and joint custody awards in despite of the abuses identified.

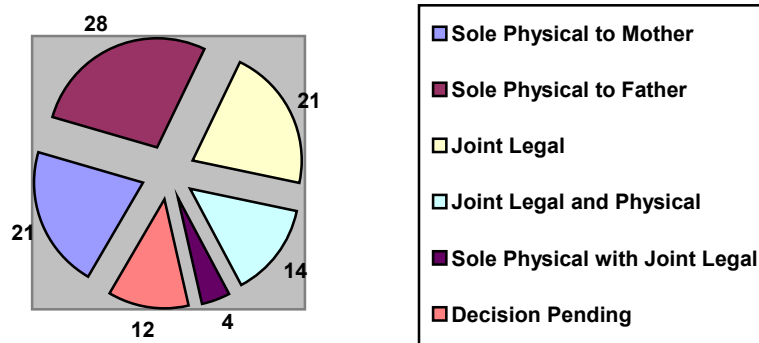
Participants also reported sexual abuse by their ex-partners. Thirty-three percent of the men threatened the victim to force her to participate in sexual intercourse. Forty-seven percent of the men used physical force while 72% insisted on participation in sexual acts against her will. Seventy-four percent retaliated if she refused. After hurting her, 58% insisted on having sex. Thirty-five percent forced her to watch pornography, 14% forced her to have sex with others, and 12% concealed sexually transmitted diseases from her, including AIDS.

Figure 4. Percentage of Fathers Awarded Custody Despite Selected Abusive Behaviors While Parents Were Together



Participants often were forced to use violence in self-defense to protect themselves or their children. Over half (58%) said they used force against their ex-partners but 77% of those said it was in self-defense. Of those mothers who used violence in any way, sole physical custody went to the mother in 21% of the cases and to the father in 28% of the cases. Joint legal custody was ordered in 21% and joint legal and physical was ordered in 14%. In 4%, sole physical custody with joint legal went to mother. In 12%, custody type was other or not yet determined.

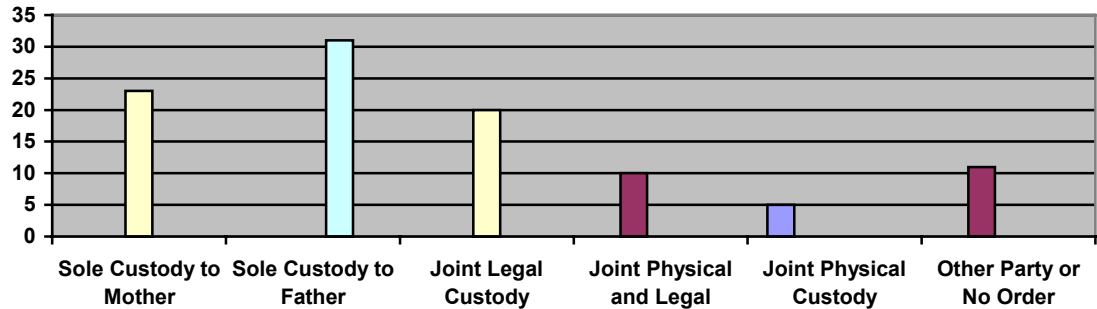
Figure 5. Types of Custody Orders Compared to Use of Violence by Mother



The abuser threatened and harmed not only the participant but the children as well. Seventy-nine percent of the mothers felt the ex-partners had done things to harm their relationship with the children or to limit her ability to parent the children. Eighty-

one percent said he undermined her authority. Seventy-five percent said he tried to turn the children against her. Of these cases, the mother received sole custody 23% of the time and the father received sole custody 31% of the time. The courts ordered joint legal custody in 20% of the cases, joint physical and legal custody in 10% of the cases and joint physical custody in 5% of the cases. In 11%, the court ordered custody to others or there was no order.

Figure 6. Percentage of Abusers Who had Attempted to Harm the Mother’s Relationship With the Child and Type of Custody.



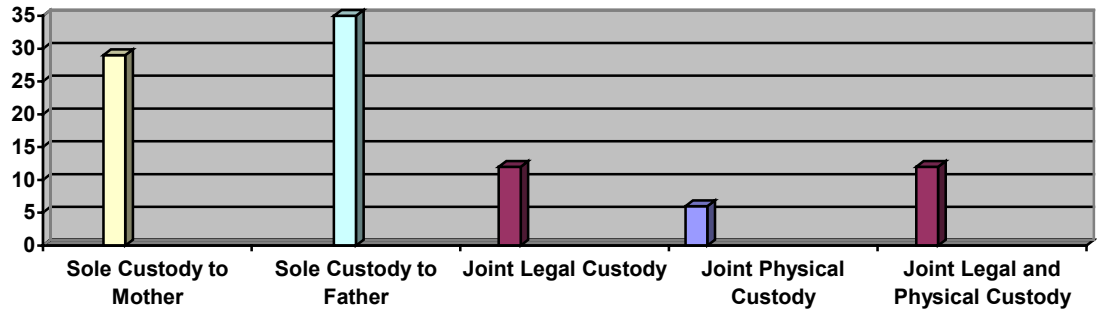
Finally, abusers not only attempted to interfere with parenting but also, as noted above, threatened or harmed the children. Eighty-one percent of the participants reported that the ex-partner had threatened or frightened the children. In those cases, sole custody went to the mother 23% of the time, with one mother getting sole physical custody and joint legal custody. Sole custody went to father 31% of the time. The courts ordered joint legal custody 18% of the time, joint physical custody 5% of the time, and joint physical and legal custody 10% of the time. In 13%, the decision was other or not yet made.

Figure 7. Percentage of Abusers Who Threatened or Frightened the Children and Type of Custody.



Thirty-seven percent of the participants said the father had physically harmed the children. Of those, sole custody went to mother 29% of the time and to father 35% of the time. The courts awarded joint legal custody 12% of the time, joint physical custody 6%, of the time, and joint legal and physical custody 12% of the time. In 6%, the decision was other or not yet made.

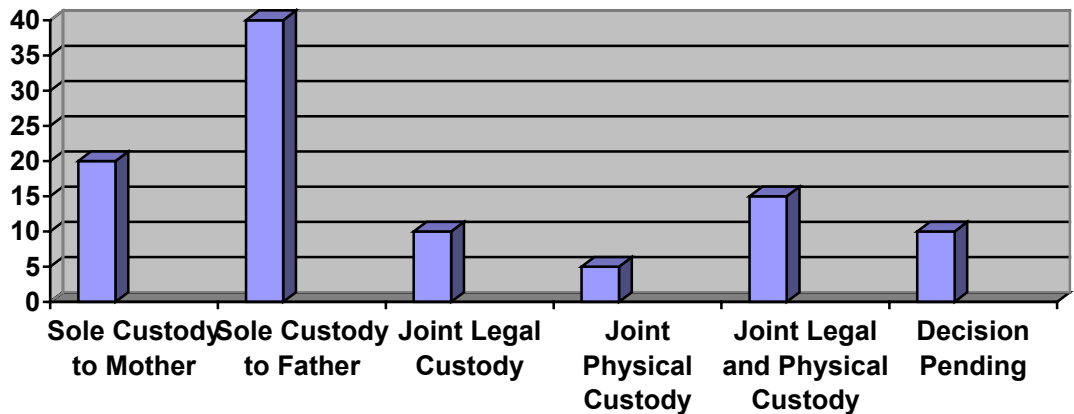
Figure 8. Type of Custody by Percentage of Abuser Who had Physically Harmed the Child



In addition to physical harm, participants reported sexual harm and sexually inappropriate behavior. Eight participants reported that the abuser had sexually harmed the children. Of those, sole custody was awarded to fathers 38% of the time and to the mother 12% of the time. Joint physical custody was ordered 12% of the time. Other or unknown totaled 38%.

Forty-four percent of the participants reported that the father had acted sexually inappropriately. The two main problems were making comments about the children's bodies and being nude inappropriately. Ten percent of the participants reported that the abusers had children watch sex acts and 14% had exposed them to pornography. In those cases where the father had acted sexually inappropriately, sole custody went to the mother 20% of the time and to father 40% of the time. The courts ordered joint legal in 10% of the cases, joint physical custody in 5% of the cases, and joint legal and physical in 15% of the cases. In 10%, the decision was other or not yet rendered.

Figure 9. Type of Custody by Percentage When Abuser Acted Sexually Inappropriately



SYSTEMS OF CONTROL AFTER SEPARATION

Bancroft and Silverman (2002) found that a majority of male batterers who maintained contact with the children after separation exhibited continued and/or worsened inappropriate parenting behavior. Male batterers also tended to use their time with the children to interrogate them about their mothers for purposes of stalking.¹⁶⁴ Thus the violence does not end at divorce. Our study confirms these findings.

The onset of legal conflict gave the abuser yet another means of exercising control over the victims. Eighty-four percent of the participants reported that their ex-partners continued to use money to control them, primarily through the creation of high legal expenses (72%). Additionally, as the participant's statements in Box 1 reflect, the abuser used the legal system itself as a means of harassment and continued abuse.

Physical violence, sexual abuse, and emotional abuse also continued post-separation. Eighty-four percent of the participants reported that the abuser continued to threaten her after separation, making her feel unsafe. Only 12% of the abusers stopped threatening the woman post separation. With regard to physical violence, the abuser is likely to use physical violence regardless of the type of custody. Participants reported that 40% of the men used violence against them; 16 % of the time it was during exchanges of the children.

Box 1. Victims Reveal How Their Abusers Use Court Process To Continue Abuse

He continually takes me back to court for custody and visitation after he specifically stated in court that he wanted a paternity test.

He's upset I've rejected being back with him and since is saying he now is going for full custody to take [the child] away.

He's threatened several times that he'll take my son and I'll never see him again.

His continual litigation to punish me. He was determined to take [the child] away to cause me severe pain emotionally. He pushes the courts and they actually help him hurt me and my daughter!

The most horrible sufferings have been not only physical, they have been emotional, psychological, and financial! He never stops harassing me – the courts are his legal playgrounds! He uses the courts to inflict suffering. He constantly and I do mean constantly has me in court. His lawyer helps him to wear us out. He wants to inflict as much suffering as he can on me and the court itself enables him to. The end is never coming – it never ends!

We have lost precious time together doing normal family things. We have lost our sense of peace and security. We have lost years of our lives to litigation, which caused severe stress and suffering!

Serious emotional, physical sufferings. Severe anxiety and physical reactions to stress. Our lives have been constantly upset – we have had CONSTANT court dates for 11 years!

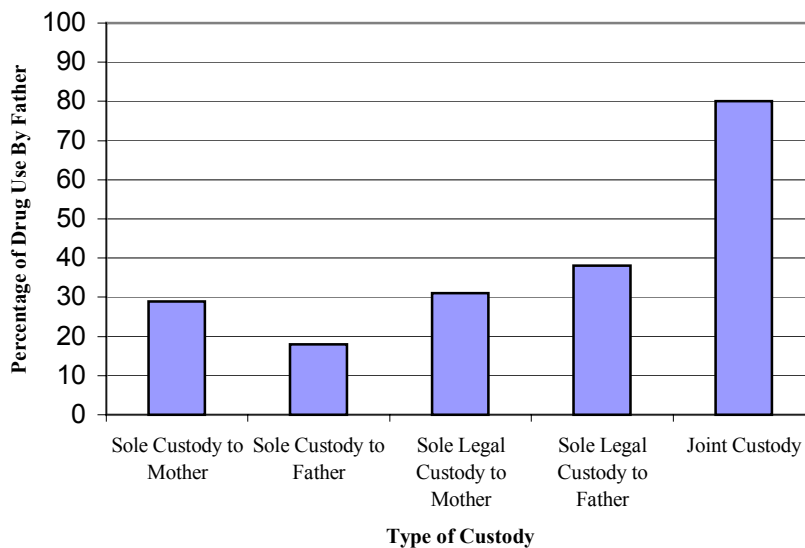
To shut me off from my daughter and her life, knowing she was the most important focus of my life. He successfully turned my own immediate family against me and our neighbors. He kept our dog – anything I could love or loved me. He kept or destroyed my keepsakes and belongings.

Whether or not the mother or the father received sole custody, the father continued to use violence in 23% of the cases. Whether or not the father or the mother received sole legal custody, the fathers continued to use violence in 28% of the cases. In other words, whether or not they had sole custody, fathers continued to use violence against the mother *after separation* approximately 25% of the time. Finally, 38% of the participants in our study reported that *there was no violence during the marriage but abuse began at separation*.

Joint custody not only had little effect on stopping post separation violence but actually increased the risk of post separation violence. In joint legal custody cases, 44% of the participants reported post separation violence, while in joint physical custody decisions, 40% of the women reported experiencing post separation violence.

Abusers continued to present additional dangers through firearm possession and drug and alcohol abuse post separation as well. Fifty-eight percent of the participants said their partners possessed firearms both before and after separation. Sixty-five percent of the ex-partners have been high on drugs or alcohol post separation, 47% of the time this was during exchanges of the children. As Figure 5 suggests, the continued use of drugs by the father remains problematic especially when joint custody is awarded.

Figure 10. Fathers' Drug Usage By Type of Custody Award



Post separation, 79% of the participants said their ex-partner acted to emotionally harm or manipulate the children, which included making the children feel sorry for him. Sixty-three percent said their ex-partner had physically harmed the children. Fifty-six percent said the ex-partner continued to frighten or threaten to harm the children post separation. Unexpectedly, 38% of participants reported that there was no child abuse during the marriage but that abuse began post separation. Only 8% of fathers who had harmed the children during the marriage stopped the harm after the divorce. Thus post divorce, a significant percentage of children remain at risk of physical harm. As Figure 6

suggests, the only way to decrease continued harm to the children is to award sole custody to mother. Joint custody is especially abusive to children.

Finally, child sexual abuse continued post separation as well. Twelve percent of the participants reported sexual harm to their children post separation. Only 2% of the participants reported that sexual harm existed during the marriage but did not exist afterwards. Similarly, 2% reported that sexual abuse did not exist during the marriage but existed post separation. This is consistent with other findings that child sexual abuse actually increases after divorce. This is especially troubling given that fathers are more likely to obtain sole custody of female children. As Figure 7 illustrates, sole custody to the father seemed to double the risk of post separation sexual harm to the child.

Figure 11. Percentage of Fathers' Continuing Child Abuse/Harm Post Separation By Custody Award

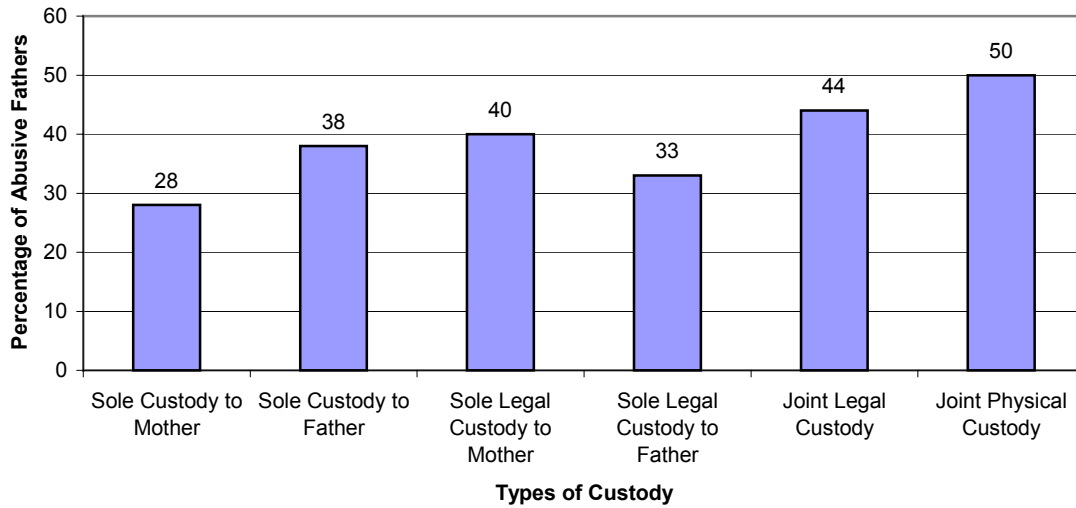
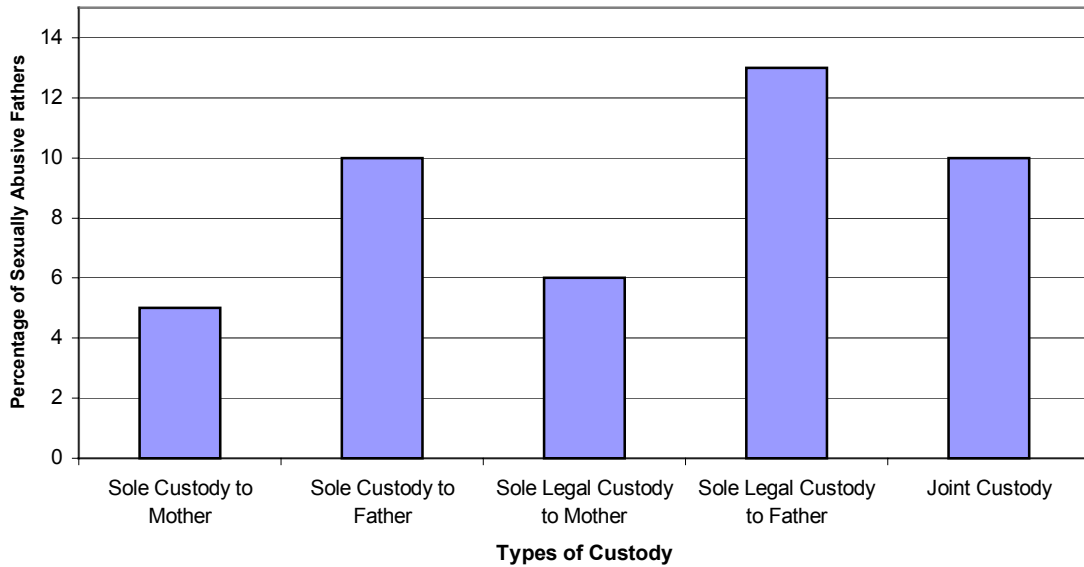


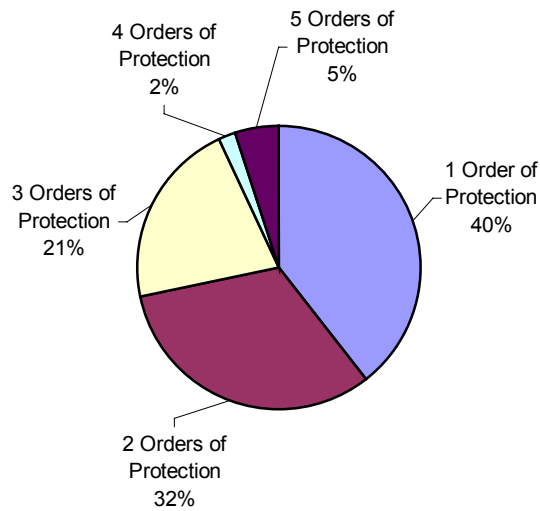
Figure 12. Percentage of Sexually Abusive Fathers Post Separation By Type of Custody



USE OF ORDERS OF PROTECTION

Sixty-eight percent of the participants said they obtained an order of protection during or post separation. This is a much higher percentage than Arizona in general, where only 18% of all domestic violence calls to the police result in orders of protection. As Figure 8 illustrates, participants obtained between one and five orders of protection post separation.

Figure 13. Percentage of Participants Obtaining Orders of Protection



Despite Arizona law prohibiting a joint custody award where domestic violence is present¹⁶⁵, 67% of the mothers with joint custody have an order of protection. Where mothers were awarded sole custody, 32% have an order. Where fathers have sole custody, 27% of the mothers have orders of protection. Finally, for all sole legal custody decisions, 87% of mothers have obtained an order of protection.

Finally, of those who obtained orders of protection, 77% said the ex-partner had violated the order. Thirty-six percent said the violations occurred during exchanges of the children. Seventy-five percent of the participants who had secured at least one order of protection against their abuser revealed that their abusers were never punished for violating the order; only 25% said the abuser was punished for the violation. Lastly, 12% of the time, the abuser obtained an order of protection against the victim.

ECONOMIC ISSUES

We compared the income and education levels of the participants and their ex-partners. Educational achievement ranged from less than high school to a J.D., M.D. and a Ph.D. Thirteen couples had the same education level and in another seven situations the educational levels were close. Where the education levels were different, the women were more educated than their partners in seventeen cases and the men were more educated in seven cases.

Educational differences, however, were not reflected in income levels. Women's income ranged from \$3,000-\$90,000, with a median of \$13,000 and an average of \$18,961. Men's incomes ranged from \$8,000-\$600,000, with a median of \$47,000 and the average \$89,129. Thus in spite of the women's equal or advanced education levels, men had significantly higher incomes.

Furthermore, based on national census data, the female study participants earned significantly less in Arizona than the national median, while the fathers earned significantly more. The most recent census shows the median income for all married couples with children at \$60,168 (\$45,315 when only the father works outside the home, \$72,773 when both parents work outside the home). For women who are raising children on their own, the median income nationally is \$19,934. For divorced mothers, the national median income is \$24,363 but for never-married mothers it is a poverty-level \$13,048. For solo fathers, the median income nationally is \$32,427.

These income differences impacted the children post separation. When asked if their children's lives had been affected economically since the divorce, 54% to 74% answered yes for food and recreation activities respectively. As noted earlier, 82% of the respondents felt that their ex-partner used the legal process deliberately to harm her financially. This was particularly evident in joint custody cases where 80%-100% felt the father used the legal process to harm them financially. This result is consistent with other

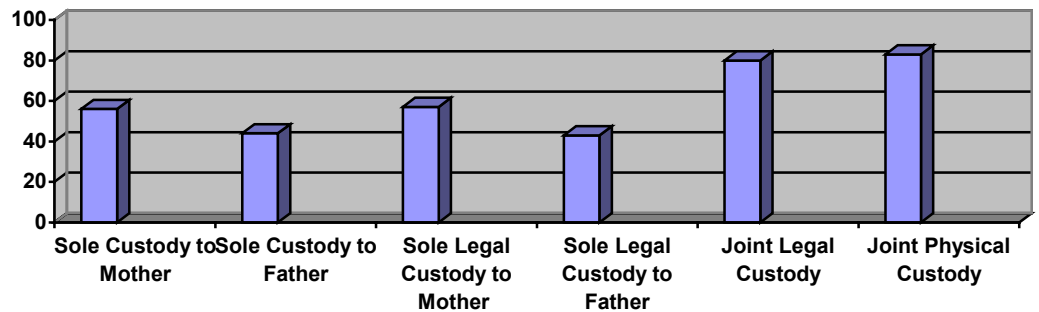
¹⁶⁵ A.R.S. §25-403 (E).

studies that found abusive men intentionally continue litigation while openly admitting that they are trying to drive their victims into homelessness.¹⁶⁶

LEGAL ASSISTANCE

Seventy-eight percent of participants had an attorney at some point during the litigation. Of those, fifty-six percent of the mothers who were awarded sole custody had attorneys at some time during the litigation while 44% of the fathers did. Fifty-seven percent of the mother's who were awarded sole legal custody had attorneys at some point compared to 43% of the fathers. For those who received joint legal custody decisions, 80% had an attorney at some point during the process if they received joint legal custody or 83% of the time if they received joint physical custody.

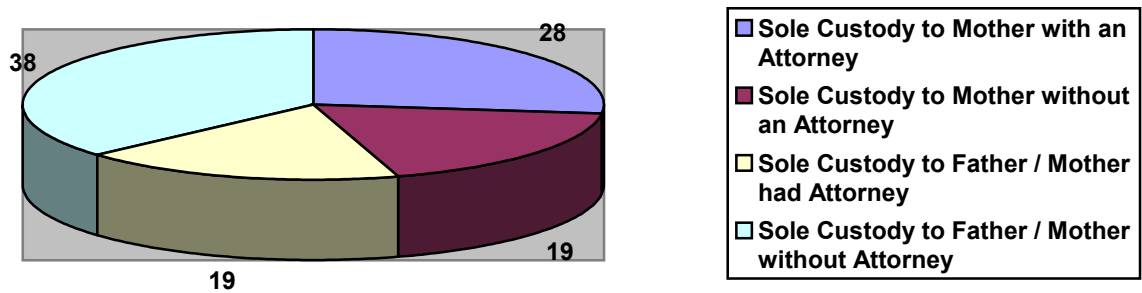
Figure 14. Impact of Having an Attorney at Some Point During the Litigation



Only 37% of the participants had an attorney throughout the entire process. If the mother had an attorney throughout the entire process, 28% received sole custody compared to 19% if they did not have an attorney throughout the litigation. When the father received sole custody, the mother had an attorney the entire time 19% of the time but had no lawyer 38% of the time. So mothers are much more likely to receive sole custody if they have an attorney the entire time than if they do not.

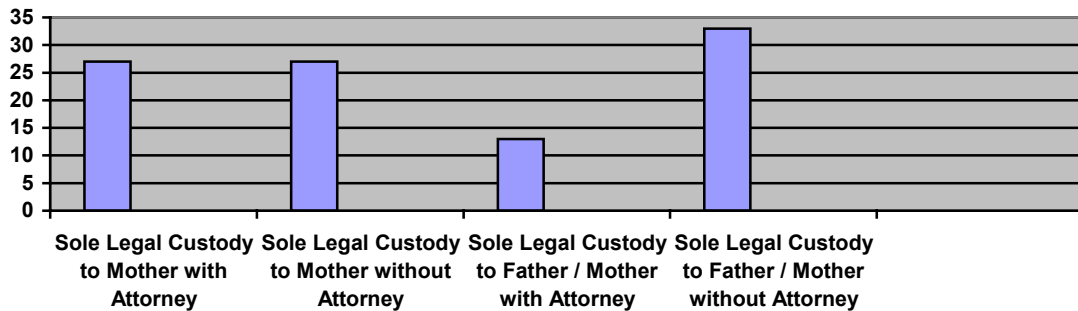
¹⁶⁶ Bancroft & Silverman, 2002; Hofford et al, 1995; Zorza, 2001; BMTP.

Figure 15. Impact of Having an Attorney Throughout the Litigation.



If the decision was sole legal custody, mother had an attorney 27% of the time and did not have an attorney 27% of the time. But if sole legal custody went to the father, mother had an attorney throughout the litigation 13% of the time but had no attorney 33% of the time. Thus the mother was just as likely to win sole legal custody with or without an attorney but father was more likely to win sole legal if the mother did not have an attorney.

Figure 16. Impact of Having an Attorney on Sole Legal Custody Award.



When joint legal custody was ordered, mother had a lawyer throughout the case 60% of the time. Sixty-seven percent of the participants obtaining joint physical had a lawyer throughout the case. Thus it appears mothers with legal representation leads to more joint custody awards. This may be good as an alternative to losing custody altogether. Or the findings may reflect a more negative influence if lawyers are advocating joint legal custody when it is inappropriate, which is more likely the case.

Looking at cases when the father had an attorney throughout the case, the father won sole custody and sole legal custody in half of the cases. Fathers had legal representation in all cases where they won joint custody. Thus it appears that with an attorney, a father has a 50% chance of getting sole custody and a 100% chance of getting joint custody.

Thus it seems that the mothers' lack of legal representation contributes to fathers winning custody. Given the fathers' significant economic advantage, it is not surprising that fathers could afford an attorney throughout. Of women who had attorneys, lawyers were paid an average of \$34,109 and the median cost was \$19,400. Other legal costs, primarily but not exclusively related to custody evaluation, averaged \$3,612, with a median cost of \$2,500.

Only four women had representation from legal services for the poor. Although judges can order temporary and final attorney fees to allow the poorer party to have funds to litigate the case, they do not. This prohibits mothers from having a fair chance to litigate custody issues. In only one case the judge ordered the husband to pay attorney fees and then only \$2,000. In practice, legal services are not providing representation for women without resources. As a result, it appears more likely that fathers will win custody. Lack of funding is a primary reason why legal services cannot meet the need.

Court costs also are burdensome for the women in these cases. When asked if they thought the judge had fairly divided up costs, 63% of the participants said no. Fifty percent of those who received sole custody and 77-83% of those receiving joint custody thought that the court costs were not fairly divided. Thus whether or not the mother won custody most thought they paid an unfair share of court costs.

Finally, participants were forced to make economic compromises to resolve the legal matter. While 44% of the participants overall said they made economic compromises, 67-70% of those who received joint custody felt they had made economic compromises. Finally, 54% of recipients said they did not agree to reduced child support in order to get custody while 28% confirmed that they did compromise their child support claims to get custody.

CHILD SUPPORT

Child support awards were not a guaranteed outcome. Only 77% of participants said that child support had been ordered in their case. The support ranged from \$15-\$2,317 per month, with a median order of \$400 and an average order of \$507. The child support ordered was on average approximately 10% of the payor's income but percentages ranged from .03% for the payor earning \$225,000 to 41% for the payor earning \$23,000. When both parents were in the same income bracket, the payor was ordered to pay a higher percentage than when the income between the two parties differed by a great deal. When women were the payors, two paid 13% and one paid 21% of their income, i.e. more than the average. Though almost all respondents said the judge used child support guidelines, the vast differences in percentages ordered show that awards are inconsistent.

Only 30% of the subjects said the ex-partner had in fact paid the child support obligation. Not surprisingly, 77% said there were things they wanted to do in the custody litigation that they could not do due to lack of money e.g. hire a lawyer (63%), take a deposition (38%), hire an expert witness (51%), and go to trial (42%).

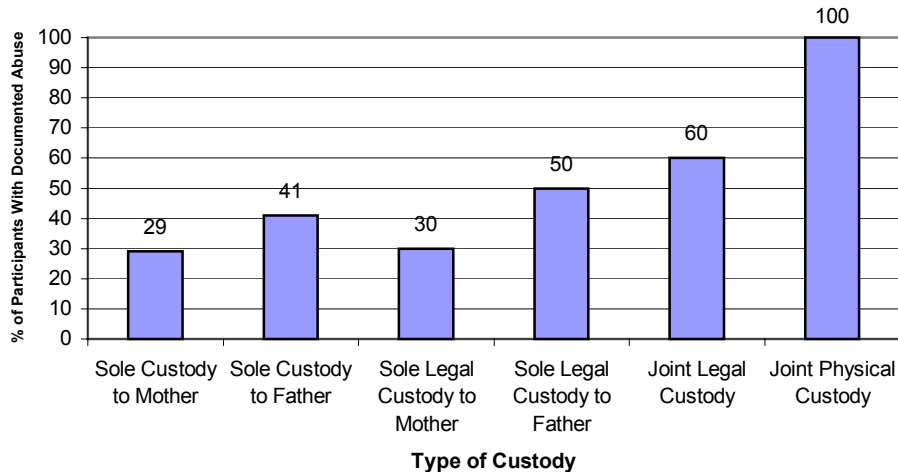
IMPACT ON EMPLOYMENT

Attending court dates interrupted the participants' work obligations. 79% of those working outside the home said they had to miss work due to family court dates. Some missed only a day or two, some missed up to a month, but most missed approximately 14 days. Most were honest with employers and told them they had to go to court. Five (11%) were fired because of the missed days. Six suffered other punishments like demotion, warnings, reprimand or criticism.

EXPERIENCES WITH STATE ACTORS

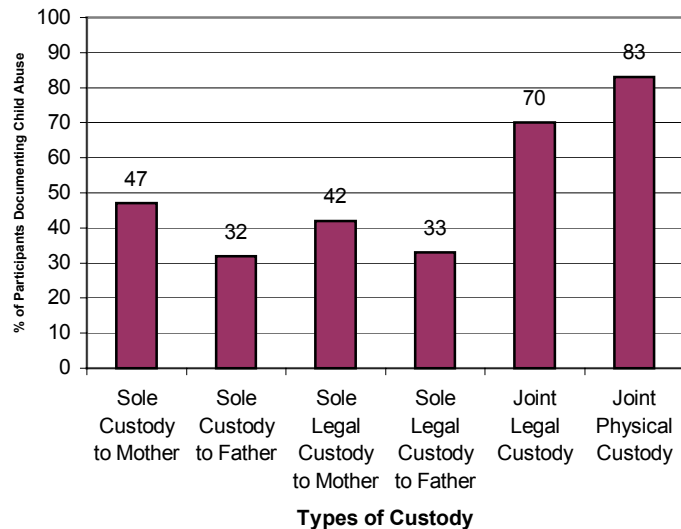
This study reveals a troubling lack of concern from state actors (commissioners or judges) about domestic violence in these cases. When questioned, 68% of the participants said the court did not take their history of partner abuse seriously. Sixty-five percent said they had given documentation of the abuse to the court. As Figure 17 illustrates, even when the mother provides documentation of the violence, the courts award custody to the abuser. It is stunning that in 100% of the cases of joint physical custody, when mothers are forced to have constant contact with fathers, proof of violence was provided but ignored. Arizona is number two in the nation for women murdered by men. One factor is because the perpetrator has easy access to the victim. Obviously when the victims are forced into joint physical custody with abusers, abusers can more easily continue their victimization.

Figure 17. Percentage of Participants Submitting Documented Abuse To Court By Type of Custody Award



Similarly, seventy-seven percent of mothers said courts failed to take concerns about the children seriously. Again 63% had given documentation about child abuse to the court. Figure 18 outlines the custody outcomes in these cases. It appears that even when documentation is given of child abuse, the safety of the child is ignored, the statutes violated, and custody given to abusers.

Figure 18. Percentage of Participants Submitting Documented Child Abuse By Custody Award



Though judicial canons require courts to be unbiased (Canon 3), and parenting is a fundamental right protected by the constitution and requiring due process, 72% of the mothers said they were not given an adequate chance to tell their side of the story. Sixty-one percent were ordered into mediation even though the court knew about the domestic violence. Mediation in cases of domestic violence is not recommended¹⁶⁷. In 100% of joint physical custody decisions, mothers were ordered to mediation in spite of the fact that the court knew about the abuse and in spite of A.R.S. §25-403(R) which says parties cannot be ordered to joint counseling.

When asked if the court made rulings that were not in the best interest of the child, 81% of the study participants said yes and only 9% said no. The same percentage felt child support orders were unfair. Sixty percent said the court made rulings putting the child in unsupervised visitation with the ex-partner or with someone who was not a professional. Thirty-seven percent said that the court told them the domestic violence was no longer a concern. Given the findings that abuse continues unabated post-separation and in some cases increases, for courts to think violence is no longer a concern indicates an immediate need for serious education on the dynamics of violence.

The mothers were held to different parenting standards according to 58% of the participants and were held equally responsible for the abuse in 46% of the cases, especially in joint physical decisions (67%). The participant felt the court treated the mother with disrespect, scorn or condescendingly in 65% of the cases, again with a very high rate in joint physical custody (83%). Sixty-three percent of participants were afraid to raise issues because they were afraid it would be used against them. The issues women

¹⁶⁷ Family Violence: A Model State Code, National Council of Juvenile and Family Court Judges, Reno, NV, 1994; House Concurrent Resolution 172, October 15, 1990.

feared to raise were domestic violence (8), effects on children (3), medication for depression (2), sexual abuse (4), supervised visitation, abusers income, and drug abuse.

In spite of the fact that Parental Alienation Syndrome (PAS) does not meet evidence standards under either existing law, 49% of the participants said that PAS was used against them in their case (see Literature Review for information on PAS). In one Maricopa County case in 2003, two Court Watch volunteers in the courtroom observed the judge specifically asked for an evaluator who had expertise in PAS. As recently as 1999, a Judge and a Commissioner conducted a seminar with a child custody evaluator and an attorney about “High Conflict and Alienation in Arizona Divorce Proceedings”. The evaluator presented on “The Spectrum of Parental Alienation Syndrome (Part I and Part II). Of the 54 custody evaluators on the Maricopa County list, 67% state that they do therapy for “alienation.” While claiming not to follow Gardner’s PAS model, they use the same methodology. As recently as May 9th, 2003, the evaluator with the most child custody evaluation referrals was distributing information on Gardner and PAS at training for the legal community.

Respondents also believed that the courts did not rule on the facts, blamed the mother for not working full time, let the husband continue to abuse his wife, made disparaging remarks, made anti-Semitic remarks, did not protect the mother from the ex-partner’s violence in the courtroom, delegated decision making to custody evaluators (2), and failed to treat the mother as an equal.

Participants also expressed concern about the limited time available for them to present their case to the court. The courts in several of these cases permitted only three hours to hear a case. Limiting the litigants to three hours when such an important issue and fundamental right as child custody is presented violates due process. Even worse is the practice of limiting temporary order hearings to 20 minutes, 10 minutes per side. Most of the time the final order is the same as the temporary order so, in reality, parents are given 10 minutes to present a case on the most important issue in that parent’s and that child’s life.

Many participants felt battered and abused by the system (9), felt that judges don’t follow the law (2), experienced total frustration (2), thought the system was very unfair (7), expressed the lack of legal assistance (3), felt no consideration was given for children (3), felt the court did not follow the best interest of the child (3), felt the court delegated its authority to custody evaluators, felt there was corruption (3), and objected to face-to-face mediation because of the violence.

Finally, in addition to feeling ignored and disrespected in court, 86% of the participants reported feelings of discrimination. Such discrimination violates Judicial Canon 3. Of those who felt discrimination, six believed it was based on gender, three on socioeconomic status, two on religion, and one on language and race. In spite of the feelings of discrimination, only 22% filed a formal complaint with a regulatory board against a judge or psychologist.

Box 2 and Box 3 below reveal participant attitudes towards the courts.

Very few cases (9) had a *Guardian-ad-litem* (GAL). Of those participants who interacted with a GAL, 66% said the GAL failed to take abuse seriously; 56% said the GAL wrote a biased or inaccurate report; 44% said the GAL showed bias in favor of the ex-partner; 78% said the GAL made recommendations not in the best interest of the child; 44% said the GAL recommended unsupervised visitation or visitation without a professional supervisor; 44% said the GAL held the mother equally responsible for the abuse; 44% said the GAL behaved dishonestly or unethically; and 67% said the GAL treated them disrespectfully, scornfully or condescendingly. These findings are consistent with a 1998 Massachusetts study finding that GALs did not consider domestic violence to be serious, did not comprehend the risks in mediation, did not appreciate the ability of abuser to be deceitful, and viewed victims as pathological.¹⁶⁸ Finally, 44% of the participants told the interviewers that they had issues or concerns that they felt unable to raise with their GAL because they were afraid that the GAL would use the information against them.

¹⁶⁸ Dalton, 1999, 286-287.

Box 2. Participants Talk About Problems With Judges and the Courts

[The judge had] his own agenda (let's see if we can re-unite the children with their father); didn't listen to the lawyers.

[The judge] didn't consider the statute [he] just considered the evaluator and completely abrogated [his] duty to [my] child.

[The judge] was not paying attention. [He was] talking to his assistant while my witnesses were testifying.

Realistically, 'justice' does not exist no matter how much effort you put forth to get help. Truly, the courts are NOT putting the child's interest first.

Abuse is going on through children and courts do not take it seriously. The courts have allowed someone to take our lives away while they should be protecting us. The courts allowed him to destroy a family.

Corruption/cronyism in the legal system is disgusting. Justice goes to the highest bidder.

Don't expect fairness by the court system, all the people and court itself. It's like a game. Not pro family at all! Expect your voice not to be heard.

I don't feel the judges were ruling on the actual facts or followed the pattern of his behavior. Do they read the cases?

My ex-husband became violent in the courtroom and the judge should have taken more control of her courtroom. She made a remark, 'It would be nice if both parents could get along!' She allowed him to go to court repeatedly after he stated he wanted a paternity test and he wanted to relinquish his rights.

The judge wrote the moderator/evaluator's [comments] verbatim, even asking her what to write next on his order.

Laws are not inadequate; they are not followed. Some judges think they are above the rules.

The courts need to stop making survivors feel that they are responsible for the abuse, stop intimidating survivors. Things need to be made easier and not so prolonged. Therefore, training for judges/clerks to understand when a perpetrator is continuing to abuse the victim through prolonging the case-filing false motions/continuations.

I would strongly recommend a program to educate judges, attorney, and court psychologists in regards to abuse. The abusers "appear" more "normal" than the victim, in fact my abuser appeared exemplary in court. He appears to be a man of high caliber, which I feel swayed the court players against me.

When someone has been found guilty of domestic violence and there is evidence the court needs to take the child into consideration and recognize that domestic violence doesn't stop with spousal abuse.

Box 3. Participants Talk About Problems With Judges and the Courts, Continued

Stop blaming the victim! We didn't choose this. Learn about domestic violence and understand all power and control addiction implications.

[Courts should] consider history of domestic violence. Listen to people when they talk about domestic violence. The courts are killing women because they don't/can't get away. Judge ***** has refused to hear a lot of petitions I file and doesn't do or rule on anything in a timely manner.

[Family court judges] all were on the father's side and did not treat us as equal.

Abuse is going on through the children and the courts do not take it seriously. The court system allows father to harass mother.

The system rakes you over the coals in the Arizona court system. It's expensive. Judges make rulings that are final without knowing all the facts. Abusers are not accountable.

Attorneys and judges need to be understanding about abuse and the effects of violence on women and children.

Judge ***** would give more time to my husband during hearing. He would not place limits on issues my husband would raise, but would limit me.

Judge ***** was unwilling to look at my ex-partner's documented history Concerning: (1) his domestic violence records; (2) his diagnosed manic depression illness; (3) his failure to comply with court ordered attendance at anger management classes; (4) his repeated violations of orders of protection; (5) the lack of documentation on his allegations in the August, 2001 hearing; (6) lack of the credibility of his witnesses in that hearing.

The judge did fault me for not working full time – saw it as a lack of trying – when in reality it was the domestic violence and court stresses that interfered.

[The] current divorce process is hard on children. [The] adversarial process is not effective or appropriate when children are involved. Lawyers are rewarded financially to keep the fight going, to the detriment of children.

The participants also experienced problems within mediation. In cases of sole custody where there was a mediator, 54% of the time custody went to the mother. In sole legal custody, however, mothers obtained custody only 21% of the time. Two joint legal custody cases and one joint physical custody case were mediated. While legal representation appears to be the main factor in joint custody, mediators appear to be particularly fond of sole legal custody to the father.

When there was a mediator, 46% of the participants felt the mediator failed to ask about a history of partner abuse or if there was an order of protection in effect. Participants said that 69% of the time they were asked to go to mediation when the

mediator knew there was abuse, which is contrary to statute¹⁶⁹. Eighty-five percent said the mediator failed to take the abuse history seriously, even when 48% of the participants gave the mediator documentation of the abuse history. In fact, when documentation of the abuse was given to mediators, fathers were more apt to get sole custody (27% to fathers and 9% to mothers in sole custody; 28% to fathers and no mothers for sole legal). Even with proof of abuse, mediators' recommended joint physical custody two out of three times.

Even when the mediator was given documentation of child abuse or the negative effects of the father's behavior on the children, fathers still won sole custody twice as often as mothers. Fathers won sole legal custody in one case and mother none. In 25% of joint legal custody cases and 100% of joint physical custody cases documentation of child abuse was provided but apparently had no impact on the mediator.

Participants felt that thirty-three percent of the mediators showed bias by making inaccurate reports to the court. A large number, 68%, felt the mediator made unfair or unsafe recommendations to the court. Thirty percent felt they were held equally responsible for the abuse and 56% felt the mediator behaved dishonestly or unethically.

Other problems mentioned were failing to hold the abuser accountable for his violation of court orders, meetings only during the day thus requiring loss of work time, bias toward the abuser (3), complete disruption of established schedules for children, and failure to provide safety for the victim. In one case, the mother arrived to mediation with a black eye and the mediator never noticed or, if so, never commented.

Child Protective Services was involved in 25 of the cases. CPS threats to remove the children from the mother if she did not leave the abusive partner were uncommon, occurring with only 8% of the participants. Similarly, only 14% of the participants reported CPS threatening them with "failure to protect" their children. But 70% said that the CPS worker failed to take a history of abuse seriously, even though 58% had provided the CPS worker with documentation. Eighty percent said CPS failed to take concerns about the children seriously, though 54% had given them documentary proof. Of those who had reports from CPS (11), 73% said the reports were biased or inaccurate while 46% held the victim equally responsible for the abuse. Fifty-four percent said the CPS worker treated them disrespectfully, scornfully or condescendingly. Almost half (48%) made a complaint to a supervisor about their treatment, including complaints that the worker failed to talk to the mother and only talked to the father and kids. The workers were biased in favor of the husband and ignored sexual abuse even when they saw it themselves. They ignored emotional and even physical abuse of the children by the father. Fifty-four percent of participants said the CPS actions were used against them in family court.

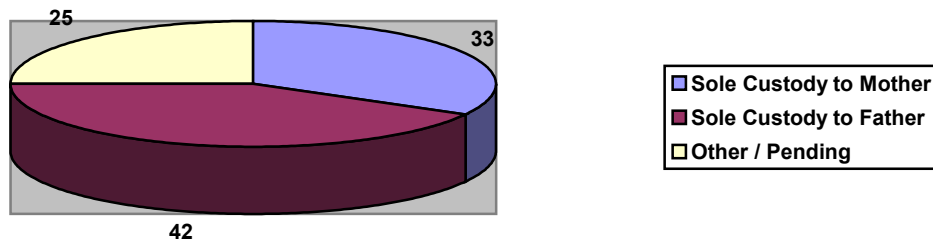
Participants also suffered from their interactions with the custody evaluators. In Arizona, custody evaluators claim that they are chosen by "consent of the parties" in most cases. However, in Maricopa County there are 54 evaluators on the mental health

¹⁶⁹ A.R.S. §25-403(R).

provider list but four providers account for 38% of the cases and the top eight providers account for another 38% of the cases. Thus 22% of the providers have 76% of the work.

Twenty-eight cases had a court-appointed custody evaluator. Eighty-four percent of the participants felt the evaluator failed to take into account the effects of abuse on either her or the children even when given documentation. In sole custody and sole legal cases when documentation was given to custody evaluators, mothers received custody 33% of the time and fathers 42% of the time. In 25% of the cases, the decision was “other” or not yet made. In joint custody cases, documentation was given about the abuse in 75% of the cases.

Figure 19. Recommendation of Type of Custody by Evaluators When Documentation of Abuse Was Given.



Psychological testing was used to discredit reports of abuse (e.g. stating that the ex-partner did not fit the type) in 64% of the cases. As previously discussed, no psychological test can identify an abuser nor is there a “type” of person who can be identified as an abuser. Yet one of the custody evaluators who responded to our state actors survey stated he would identify the abuser through psychological testing. In a survey in May 2003 of the Maricopa County Superior Court Mental Health list, 15 responses were received. Of the 10 still on the list, four had significant education or experience in domestic violence and/or child abuse. However, those four had, in the last three years, received only 24 referrals between them. Of the other six who indicated no education or training in domestic violence or who refused to respond to the question, they had 469+ cases between them in the last three years. Thus, it appears that those with the education and experience are not getting the court appointments. This is consistent with the literature review that judges appoint people whose beliefs are consistent with their own.

The victim was held equally responsible or blamed for the abuse in 70% of the cases handled by the custody evaluator. Respondents felt the report was biased or inaccurate in 92% of the cases, not in the best interest of the child in 80% of the cases, showed bias in favor of the ex-partner in 86% of the cases, and that the evaluator behaved dishonestly or unethically in 75% of the evaluations. The cost of the evaluation ranged from \$60-\$12,000 with a median of \$2,000 and average of \$2,892. The national average for a custody evaluation is \$2,646. Thus, the cost in Arizona is slightly higher even though our income levels are lower.

Other problems with custody evaluators included a bias toward joint custody. One evaluator claimed that if men aren't given joint custody they won't pay child support and the government will have to pay welfare. Victims complained that the evaluations included no questions about domestic violence or child abuse (3). Participants felt there was a bias toward the father (2) and that the evaluator had no knowledge of child abuse issues or child development.

In short, the role of the custody evaluator is problematic if not destructive for victims seeking custody of their children. As Carol Bruch, professor at the University of California Davis's School of Law, notes: "You have a therapist for mom, a therapist for dad, and a therapist for the child. In addition, they recommend that there be a special master who is entitled to make a great number of judicial decisions with no attorneys present. It's a highly intrusive, highly coercive, and very costly scheme."¹⁷⁰

When participants were asked what is needed to improve the system, they stated: training, especially regarding domestic violence and child abuse (7); elimination of custody evaluators; use only professional witnesses; establish guidelines; recognize domestic violence; follow the law (5); provide lawyers; eliminate the "high conflict resolution" class; state in the law that failure to pay child support is abuse; stop the use of the legal system to harass victims; hold evaluators to some standard; give sufficient time to hear case (2); listen to the victim (2); don't make victim and perpetrator be together; establish a specific domestic violence court; and pay attention to domestic violence (3).

Box 4. Participants Talk About Problems With Non-Judicial State Actors

When the evaluation was done, [the evaluator] spent four hours with the father. [The evaluators] did not contact mother of his parents, did not interview anyone else – parents, ex-partner, ex-girlfriend. Did not take his previous history into account. Blamed his depression and behavior on "custody battle" which actually didn't occur.

She didn't take me seriously or put enough weight on the domestic violence.

I don't remember his name, he was court ordered and I saw him once. I did make a point to say to him that the evaluation sheet I was given made no acknowledgement of abuse, no attention to abused women's issues.

[The GAL] seemed supportive at first, got important information from me, thoroughly reviewed abuse evidence on the father. In November 2001, she promised me that she would see to it that the father would not get custody if I would agree or at least sign to a dependency against me. But she would not put this in writing, so I declined. At that point she did a 180-degree immediate turn, supported dad, harassed and threatened me and my supporters and used everything I had told her against me. [She] failed to investigate my home and environment, never observed my interaction with my girls or spoke to my older children.

[CPS] aligned themselves with my abusive ex-partner after he manipulated them and never followed up to confirm.

¹⁷⁰ Heim et al, 2002, 56-57.

Box 5. Participants Talk About How To Change The Current Family Court System To Better Serve Victims of Family Violence

Higher standards for mental health professionals connected to the courts. You get blown off in the end. They lead you on then drop you off.

Should have training about domestic violence and continuous abuse through the children.

Be more receptive, I did not really know how much psycho-abuse I was undergoing until now, no one asked me how much. Because I was not physically beaten, no one seems able to see the abuse.

RESPONSES FROM STATE ACTORS

Only one of eleven evaluators who were contacted responded to our survey. He stated, “unsubstantiated allegations are all too common and much would depend on the nature of the abuse.” With proof however, he says he would be more likely to recommend supervised visitation but building towards unsupervised over time. When asked if evaluators had to abide by the statute A.R.S. §25-403 (N) and (P), he said it would depend on the case. “If the abused parent is mentally ill or a substance abuser, the other parent, even though that person engaged in abuse, may be the safer parent to have custody.”

Evidence that he would look for includes eyewitness reports from children, PTSD, and avoidance of or fear reaction to the abusing parent. To assess false allegations, he would use psychological tests, nature of allegations, lack of witnesses, forensic evidence, physiological evidence, polygraphs and possible gain from false allegations. He believes allegations of both partner abuse and child abuse are false 50% of the time.

To determine if a person is a batterer, he would consider personality characteristics, previous relationships and marital history, history of fighting, substance abuse, lack of ability to express feelings, and attitudes toward women. When asked what a mother should do who believes the father has physically or sexually abused the children, she was advised to “be supportive of the children, provide them with ongoing psychotherapy and hopefully, not poison the children against the father should he not be guilty of the suspected behavior. Thus, she should remain in psychotherapy as well.”

While this one answer is certainly not representative, it does represent an amazing array of misinformation, bias against abused women and children, and failure to hold the perpetrator accountable. Studies of domestic violence and child abuse reports have consistently shown that false reports number between 3-5%, less than other types of

criminal complaints. Research has been done regarding claims made in divorce cases as well and does not show more false claims than any other kind of case.¹⁷¹ In fact one study found that 21% of father's accusations are false as opposed to 1.3% of mother's accusations.¹⁷² Thus to claim that 50% of allegations are false puts the victim and child at extreme danger.

Often victims of violence are misdiagnosed as having mental health problems when in fact they are reacting logically to a crazy situation. Battered women often may use substances to dull the pain of the repeated violence. Yet these factors would cause custody to be given to an abuser contrary to much evidence about the ability of a batterer to parent.¹⁷³ The repeated suggestion that batterers could have unsupervised visitation after some period of supervised is not borne out by the research.¹⁷⁴

The method of assessing violence is also flawed. As demonstrated in the Palmer and Brown study,¹⁷⁵ many children will not tell the custody evaluator about violence. They have a very short relationship with the evaluator and no trust has been built. Many children will not show fear or avoidance of an abuser because he is not abusive all the time or they know that to do so would incur more violence.

The method of assessing who is a perpetrator is equally flawed. There is no personality characteristic that identifies a batterer. While previous relationships are certainly important, why isn't the current one important too? For example, is there an order of protection, police reports, medical records, etc. A history of fighting will not disclose a perpetrator but it will lead to biased judgments. Young men and blue-collar men might fight more, but that doesn't mean that the older man or businessman isn't just as likely to be violent at home. Domestic violence is not about "fighting;" it is about power and control. Substance abuse may or may not indicate abuse and is certainly not a cause of it.

The evidence from the data shows that one of the most serious problems is with the "custody evaluator" – their ignorance of domestic violence and child abuse, their preconceived notions about battered women and perpetrators, and their refusal to follow the clearly delineated state law. This response certainly supports our findings.

The Chair of the Board of Psychologists Examiners responded that psychologists are required to conduct an evaluation "in accordance with all relevant statutes and rules." That would include A.R.S. §25-403 that outlines the factors for determining best interest of the child. In the years from 1989-2001, the Board received 115 complaints growing out of custody matters. Of these, 7 or 6.09% were found guilty of unprofessional conduct and disciplined. Additionally, 11 or 10% were given non-disciplinary Letters of

¹⁷¹ Thoennes & Tjaden, 1990; Brown, Fredericko, Hewitt & Sheehan, Australia, 2000.

¹⁷² Bala & Schuman, Canada, 1999.

¹⁷³ Bancroft and Silverman, The Batterer as Parent: The Impact of Domestic Violence on Family Dynamics, Sage Publishers, 2002.

¹⁷⁴ Ibid.

¹⁷⁵ Palmer & Brown, "Responding to Disclosures of Familial Abuse: What Survivors Tell Us".

Concern. This compares with 63 or 14% of non-custody based complaints leading to discipline and 42 or 9% resulting in non-disciplinary Letters of Concern. Since the rate for complaints in which the psychologist is found guilty of unprofessional conduct is more than twice in non-custody complaints than in custody complaints, either the custody evaluators are doing a very good job, the complaints are not well presented, or the Board is not taking appropriate action. There is no mandate from the Board that child custody evaluators be trained in domestic violence or child abuse.

Only one superior court judge answered the survey. This judge believed that violence could be an overwhelming issue in the case or one of many depending on the level of violence. Without police or medical reports, the court might disregard the allegations. If both parents were improper, CPS would be called in. The presence of children in the home makes violence significant. The judge gives significant weight to the custody evaluator reports and seldom disagrees with them. This too supports the participant's statements. Safety precautions for victims are limited in his rural court. He does not see discrimination against women in his court as has been found in gender bias studies. This judge did not have preconceived notions about how often allegations were false but would follow legal procedures to ascertain the truth or falsity of the allegations.

IMPLICATIONS FOR STATE LAW

In 1990, Congress recognized the bias against battered women in courts. It passed House Concurrent Resolution 173 that stated:

- Whereas State courts have often failed to recognize the detrimental effects of having as a custodial parent an individual who physically abuses his or her spouse, in so far as the courts do not hear or weigh evidence of domestic violence in child custody litigation;
- Whereas there is an alarming bias against battered spouses in contemporary child custody trends such as joint custody and mandatory mediation;
- Whereas joint custody guarantees the batterer continued access and control over the battered spouse's life through their children;
- Whereas joint custody forced upon hostile parents can create a dangerous psychological environment for a child;
- Whereas a batterer's violence toward an estranged spouse often escalates during or after divorce, putting the abused spouse and children at risk through shared custody arrangements and unsupervised visitation;
- Whereas physical abuse of a spouse is relevant to child abuse in child custody disputes...

Resolved by the House of Representatives (the Senate Concurring)

Section 1. It is the sense of this Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse.

The Model Code on Domestic and Family Violence, released by the National Council of Juvenile and Family Court Judges in 1994, also states that:

In every proceeding which there is at issue a dispute as to the custody of the child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.

In 1996, the American Bar Association recommended adoption of such statutes and in 1996, the American Psychological Association concurred stating:

In matters of custody, preference should be given to the nonviolent parent whenever possible, and unsupervised visitation should not be granted to the perpetrator until an offender-specific treatment program is successfully completed, or the offender proves that he is no longer a threat to the physical and emotional safety of the child and the other parent.

Likewise, the Uniform Adoption Act supports terminating a father's rights if:

The respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor ...

The state legislature of Arizona has also made a very strong public policy statement regarding the importance of considering domestic violence in child custody cases. In A.R.S. Chapter 25, the issue of domestic violence and its impact on custody is mentioned ten times. But for the participants in this study, the law may be strong; but the implementation is weak.

A.R.S. §25-403(E) says that joint custody shall not be awarded if there is significant domestic violence. Yet among Maricopa County participants, 74% of the time the alleged abusers received sole or joint custody. In the rest of the state, 56% of the time the alleged abuser received sole or joint custody. Mothers said they provided documentation of the abuse in 60% of the cases where joint legal custody was awarded to the father, and in 100% of the cases where joint physical custody was awarded to the father.

To determine whether domestic violence has occurred, the court shall consider various factors including findings of guilt from other courts (A.R.S. §25-403(S)). That includes an order of protection. Fully 68% of the participants had obtained an order of protection during the marriage or post separation. In cases of sole custody to the father, 27% of the mothers have an order of protection. Of those with sole legal custody to the

father, 87% of the mothers have an order of protection. Of those with joint custody, 67% of the mothers have an order of protection. Therefore, the court has found in at least 67% of the cases that there is significant domestic violence according to A.R.S. §13-3602. Yet joint custody is awarded contrary to the statute.

In one case, in which the husband, among other acts, ran his car into the day care supervisor, the court found significant domestic violence and ordered joint custody anyhow with no explanation. In another case, the 13-year-old stepchild of the father shot and killed the father's 11-year-old son in front of the father's other son who was eight at the time. In spite of that, the custody evaluator recommended joint custody continue with the 8-year-old forced to spend half his time in the father's home with the shooter. Two years later, a different psychologist said being forced to remain in that household was damaging the child. He is still there.

A.R.S. §25-403(C) requires that joint custody can be ordered if both parents agree. If the mother has to get an order of protection to keep herself safe, there is no possibility of agreement.

A.R.S. §25-403 (D) says that the court may issue an order for joint custody over the parent's objection if the court makes specific written findings why it is in the child's best interest after considering a series of factors. No participant reported that the judge made specific written findings about why joint custody was being ordered over a parent's objection and the documents examined do not show such findings.

A.R.S. §25-403(M) says that the court shall consider evidence of domestic violence as being contrary to the best interest of the child. The court shall consider the safety and well being of the child and of the victim of the act of domestic violence to be of primary importance, and the court shall consider a perpetrator's history of violence. Mothers said they provided documentation of the abuse in 41% of the cases when sole custody was given to the father; in 50% of the cases when sole legal custody was awarded to the father; in 60% when joint legal custody was ordered and 100% when joint physical custody was ordered. Obviously the court is not considering violence as being contrary to the best interest of the child if they continue to order sole or joint custody to perpetrators in spite of documentation of their abuse.

When participants were asked about courts and judges, 68% said they did not take a history of partner abuse seriously even when given documentation which 65% did. The judge in one case¹⁷⁶ actually ruled that he would not hear evidence about the child sexual victimization in the custody case. When told that the child would be traumatized if she had to repeat the abuse allegations over again to a new therapist, the judge remarked that the mother traumatized him when she disobeyed his order. Minimizing a child's trauma from sexually abuse is totally inappropriate and the appeals court so stated. Fortunately that ruling was overturned, but most litigants cannot afford an appeal.

¹⁷⁶ *Hays v. Hon. Richard Gama/Donald Hays*, Arizona Supreme Court No. CV-02-0316-PR, April 25, 2003.

A.R.S. §25-403(N) says that if a person seeking custody has committed domestic violence, there is a reputable presumption that an award of custody to that person is contrary to the child's best interest. In one case, there were three domestic violence convictions, which should have been elevated the crime to a felony. Still the judge gave custody to the perpetrator. In another case, the perpetrator had prior arrests on aggravated assault, child molestation, and two substantiated child abuse reports yet the judge gave him custody.

A.R.S. §25-403(P) says that if a parent has committed domestic violence, that parent has the burden of proving that visitation will not endanger the child. Even if that burden is met, the court shall place conditions on visitation that protect the child and the other parent from further harm. Yet in another case, the two boys themselves called CPS and the school nurse verified the incident. The protecting mother filed a motion to change custody. Eight months later, though the evaluator never spoke to the boys, the court said they were no longer afraid of their father and custody remained with him.

Sixty percent of the participants reported that the court ordered unsupervised visitation or visitation supervised by a non-professional e.g. a family member. That does not meet the burden of proving that visitation will not endanger the child. The profound lack of understanding of domestic violence by courts is illustrated by the thirty-seven percent who told the participants that domestic violence was no longer a concern now that they were separated.

In one case, though the therapist felt strongly enough about the perpetrator's threat to kill the mother that he felt a duty to warn under A.R.S. §36-517.02, the court continued to order the mother to deliver the child to the father's parents where he lived. Though he was not supposed to be there, he frequently was, thereby putting the mother in grave danger.

A.R.S. §25-403(Q) says that to weigh a parent's relocation against that parent, the court should consider whether the relocation was caused by the domestic violence of the other parent.

A.R.S. §25-403(R) says that the court shall not order joint counseling between a victim and perpetrator of domestic violence. Yet 100% of those participants who had a ruling of joint physical custody were ordered to mediation in spite of the fact that the court knew about the abuse. Courts argue that "counseling" is not "mediation". The intent of the statute was to prevent forced face-to-face confrontation between a victim and an abuser. In no other kind of crime do we force the victim to continue to face the assailant over and over again.

For those who were ordered to mediation contrary to the statute, 46% felt the mediator failed to ask about a history of partner abuse or if there was an order of protection. Eighty-five percent failed to take the abuse history seriously even when given documentation by 48% of the victims. In fact, when documentation of the abuse was given, fathers were more apt to get sole custody (27% to fathers versus 9% to mothers in

sole custody and 28% to fathers versus 0 to mothers for sole legal). Even with documentation of abuse, mediators' recommended joint physical custody two out of three times.

Even when the mediator was given documentation of child abuse or the negative effects on the children, fathers won sole custody twice as much as mothers, and fathers won one sole legal decision while mothers won none. In joint legal decisions, 25% had documentation of child abuse and in joint physical custody 100% had documentation of child abuse. So even documentation of child abuse does not deter the mediators from recommending custody to perpetrators contrary to the law. This puts the child directly into harms way.

The Adoption and Safe Families Act¹⁷⁷ was amended in 1997 to state that "(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;... " The court's refusal to protect the children and propensity to blame the mother has a long history in Arizona. In *Sholty v. Sherrill*¹⁷⁸, the court ignored the pre-divorce abuse and even put it in quotations to illustrate its disbelief even though the children said that is why they feared going to Ohio to visit their father. They were also afraid that they would be kidnapped and not allowed to return. The counselor testified that being forced to go to the visit would endanger the children. Obviously the court did not understand that divorce does not end abuse. They even spoke with approval of a Pennsylvania case where a 13-year-old had been struck by her father and kicked him back. She was very disturbed at the prospect of having to visit him; yet the court forced her. This is in complete violation of the UN Convention on the Rights of the Child to be free from abuse. The rights of a parent who has been violent do not trump the rights of a child to be safe. In the Pennsylvania case with proof of violence, the court blamed the mother for alienating the child. Likewise in the *Sholty* case, the court focused on the mother's attitude rather than on the father's abuse. Yet the Arizona court has made it clear that the role of the court should not be to gratify the father or mother or to punish either of them, but only for the protection and good of the children.¹⁷⁹

However, fathers are rewarded when they violate the law and kidnap the children. In *Wise v. Wise*¹⁸⁰, the father violated the court order, kidnapped the child and kept the child from her mother for 5½ years. When the mother found the child, the father retained custody. According to studies commissioned by the Office of Juvenile Justice and Delinquency Prevention in 2001,¹⁸¹ mothers and fathers are equally likely to abduct children. Men were more likely than women to be arrested for abduction, but the women who were arrested for abduction were more likely than men to be convicted and incarcerated. If the woman is Caucasian, she is treated even more harshly. The *Wise*

¹⁷⁷ 42 U.S.C. §671 (a)(15).

¹⁷⁸ *Sholty v. Sherrill*, 129 Ariz. 458, 632 P 2d 268 (1981).

¹⁷⁹ *Galbraith v. Galbraith*, 88 Ariz 358, 356 P 2d 1023 (1960).

¹⁸⁰ *Wise v. Wise*, 14 Ariz App 125, 481 P 2d 296 (1971).

¹⁸¹ Janet R. Johnson, Inger Sagatun-Wedward, Martha-Elin Blomquist, and Linda K. Girdner, "Early Identification of Risk Factors for Parental Abduction", <http://www.ncjrs.org/html/ojdp/2001_3_1/contents.htm>

case also illustrates the fungible mother problem. Since there was a woman in the house that the child viewed as her mother, the real mother's claim was discounted.

Evaluators are given judicial immunity because they are carrying out judicial process, but they are not held to any standard in their evaluations.¹⁸² Since the custody evaluators are doing a judicial job, they should be required to follow the law and the canons of judicial ethics, as they would be required to if they were judges. Yet the Superior Court in its policies and Procedures Service Provider Rosters (January 29, 1999) states clearly, "The Court assumes no responsibility for the quality of the professional services of individual Service Providers on the Court rosters. ... Service providers are not agents of the Court, and all services and activities of the Service providers are conducted independently of the Court... The Court will not determine appropriateness of any fee for a service ...". Yet the policies also require that complaints about the evaluators be made with the court. Not only is this internally inconsistent, but it is contrary to the case law in *Lavit*¹⁸³ If the judge needs to appoint a psychologist because it does not have that expertise, then how can the court determine whether the evaluation was done according to professional standards? Many participants felt that the court was improperly delegating its authority to the evaluators,¹⁸⁴ and not making proper findings of fact regarding domestic violence.¹⁸⁵

While there is no quantitative data on how often the courts adopt the evaluator's recommendations, at least two judges agree that it is a high percentage of the time. Thus if the evaluator ignores the law or uses unscientific theories in the evaluation, and the judge adopts the findings, not only the statutory law but the evidence law is subverted as well. Part of the problem is the attorneys who agree to the evaluations and who do not vigorously cross-examine the experts. Even those attorneys who are specialized in family law are not required to have any training or education in domestic violence, child abuse or child sexual abuse. This is another problem that must be addressed both in law school and the bar. However, many of the litigants do not even have attorneys. Seventy-eight percent of the mothers had an attorney at some point during the litigation but only 37% had an attorney throughout the litigation. One of the ways that fathers win custody is to bankrupt the mother so she can no longer fight in court. Fully 82% of the participants felt the partner used the legal process to deliberately harm the mother financially. In joint custody awards, 80-100% felt the father used the legal process to financially harm them.

A motion for modification cannot be made within a year unless there is domestic violence or another reason.¹⁸⁶ Even in the Uniform Child Custody Jurisdiction Act,¹⁸⁷ the occurrence of domestic violence is a significant factor in determining jurisdiction. Domestic violence can be a factor for suspending visitation or custody.¹⁸⁸ In all, the statutes mention domestic violence ten times and give extensive protections to victims,

¹⁸² *Lavit v. Superior Court*, 173 Ariz 96, 839 P 2d 1141 (1992).

¹⁸³ *Ibid.*

¹⁸⁴ *DePasquale v. Superior Court*, 181 Ariz 333, 890 P 2d 628 (1995).

¹⁸⁵ *Diezsi v. Diezsi* 38 P 3d 1189 (2002).

¹⁸⁶ A.R.S. §25-403(T).

¹⁸⁷ A.R.S. §25-1037 and 1038.

¹⁸⁸ A.R.S. §25-408(M).

establish mandatory considerations for judges and create presumptions for perpetrators. A legislature could hardly make a stronger statement of the importance of considering domestic violence when determining custody. Yet the statutory law is being ignored, subverted and violated time and time again - putting the children directly in harms way. "While it is axiomatic that a trial judge has authority to interpret the law reasonably, it must be in conformity with the statutes of the State of Arizona and the decisions of the Arizona appellate courts. He may not alter the law or fashion it to his own liking. This is the function of the legislative branch of the government. The trial judge is accountable to no man for his courtroom decisions, but he is accountable to the law."¹⁸⁹ The findings of this study show that the court is not being accountable to the law.

IMPLICATIONS FOR CONSTITUTIONAL LAW

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution provide that no state shall "deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." The anecdotal and statistical evidence in this report reveals the consistent disregard and violations of the most basic and sacred rights protected by our Constitution.

FUNDAMENTAL RIGHTS PROTECTED UNDER THE FOURTEENTH AMENDMENT

The liberty interests protected from state interference under the Fourteenth Amendment include "both the mothers' and their children's liberty interest in familial integrity, and the mothers' rights to direct the upbringing of their children."¹⁹⁰ Both the right to raise one's children and the right to maintain established familial relationships are based in the "tradition and conscience of the country."¹⁹¹ Case law establishes that the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."¹⁹² The court of appeals for the Second Circuit stated that it is "beyond peradventure" that the "existence of the private realm of family life which the state cannot enter has its source not in state law, but in . . . intrinsic human rights."¹⁹³

A mothers' right to conceive and raise her children is one of the "basic civil rights of man".¹⁹⁴ A mothers' right to retain custody over and care for her children and to rear her child as she deems appropriate is one of the most fundamental rights in and to our society.¹⁹⁵ In addition, both a mother and a child have a constitutionally protected liberty

¹⁸⁹ *State of Arizona v. Jacobson*, 22 Ariz. App. 260, 526 P 2d 784 (1974).

¹⁹⁰ *Nicholson v. Williams*, 203 F.Supp.2d 153, 233 (E.D.N.Y. 2002).

¹⁹¹ *Baldwin v. Ledbetter*, 647 F.Supp. 623, 637 (N.D. Ga. 1986).

¹⁹² *Baldwin*, 647 F.Supp. at 637 (citing *Moore*, 431 U.S. 503-04, 97 S.Ct. at 1637-38)).

¹⁹³ *Ducshesne v. Sugarman*, 566 F.2d 817, 824 (2nd Cir. 1977) (internal citations and quotation marks omitted).

¹⁹⁴ *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S.Ct. 1208, 31 L.Ed2d 51 (1972).

¹⁹⁵ *Campbell v. Burt*, 949 F.Supp. 1461, 1466 (D.Hawaii 1996).

interest in the companionship and society of their relationship.¹⁹⁶ This interest in familial integrity has long been recognized by the United States Supreme Court, which stated in *Roberts v. United States Jaycees*¹⁹⁷, "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom we share not only a special community of thoughts, experiences, and beliefs but also distinctive "personal aspects of one's life." More recently, the Ninth Circuit Court of Appeals recognized that the right to familial integrity extends to both the parent and the child when it stated: "The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship."¹⁹⁸ Other federal circuits also recognize that the right to familial integrity is shared by both parents and children.¹⁹⁹ ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.").

These rights that recognize the integrity of the family unit find their protection in the Ninth Amendment which reserves some powers to the people and which is applied against the individual states through the Fourteenth Amendment.²⁰⁰ In addition, the right of the child when seized from his parents by the state may be analyzed under the Fourth Amendment, which prohibits "unreasonable searches and seizures" and requires probable cause before a warrant can be issued.²⁰¹ The Fourth Amendment is also applied to the individual states through the Fourteenth Amendment Due Process clause, but, unlike the Ninth Amendment, it requires examination under the particular Fourth Amendment standards.²⁰²

Finally, a child also has a Fourteenth Amendment liberty interest in the right to personal safety when the state interferes with that child's personal liberty or freedom to act.²⁰³ When a child is taken from his or her mother and placed in the custody of the state, the state has "an affirmative duty to protect" because of the special relationship between the child and the State.²⁰⁴ An example is when a child is placed in foster care and a prison-like setting is created.²⁰⁵ The Seventh Circuit has established that "a child in state custody has the substantive due process right to not be placed with a custodian that

¹⁹⁶ *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121 (9th Cir. 1989).

¹⁹⁷ *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984).

¹⁹⁸ *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987).

¹⁹⁹ *Duchesne v. Sugarman*, 566 F.2d 81, 825 (2d Cir. 1977).

²⁰⁰ *Nicholson*, 203 F.Supp.2d 153, 247 (E.D.N.Y. 2002).

²⁰¹ *Nicholson*, 203 F.Supp.2d at 246-47.

²⁰² *Nicholson*, 203 F.Supp.2d at 247; see also *Chi Chao Yuan v. Rivera*, 48 F.Supp.2d 335, 348 (S.D.N.Y. 1999).

²⁰³ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

²⁰⁴ *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002).

²⁰⁵ *Burton*, 276 F.3d at 979; *DeShaney*, 489 U.S. at 201 (fn. 9), 109 S.Ct. 998.

the state actor knows or suspects is likely to abuse or neglect the child."²⁰⁶ In *Camp v. Gregory*²⁰⁷, the court of appeals held that this duty applies to placement with a relative and not just placement in an institution or with a foster parent.

ANALYSIS UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

To determine whether the evidence indicates violations of the above stated constitutional liberty interests, two Fourteenth Amendment analyses must be followed: substantive due process and procedural due process. "Substantive due process comes into play where, regardless of the procedures followed, a governmental decision or action is so contrary to a fundamental right that it cannot be countenanced." *Nicholson*, 203 F.Supp.2d at 237. On the other hand, procedural due process requires the government to follow constitutionally adequate procedures before depriving a mother or her child of his or her liberty interests.²⁰⁸ Procedural due process raises questions about whether and when a mother and child receive a hearing before being deprived of a right, whether mother or child received access to an attorney and whether the attorney acted effectively, whether the mother or child had the ability to present evidence and witnesses at the hearing, and whether the proceeding was administered by a fair and impartial court.

Substantive Due Process

A state official violates Fourteenth Amendment substantive due process when that individual interferes with a liberty interest of a mother or child and the official's conduct is "shocking, arbitrary, and egregious."²⁰⁹ In addition, the official must have acted intentionally, or at least recklessly or with gross negligence.²¹⁰ A state policy or practice violates the Fourteenth Amendment substantive due process clause when it interferes with a mother or child's liberty interest, and it is not narrowly tailored to serve a compelling state interest.²¹¹ In other words, the state can interfere with familial rights for compelling state interests, such as to protect minor children, but the interference must be narrowly tailored for that purpose.²¹² For example, a district court in New York held that when, under the guise of protecting the children, a state children services agency makes it a practice to remove children from their mothers' custody solely on the grounds that they were victims of abuse, the mother and children's rights were violated because the compelling state interest is not at all advanced and in fact the children are often placed in danger in the foster care system.²¹³

²⁰⁶ *Hebein Ex Rel Berman v. Young*, 37 F.Supp.2d 1035 (N.D. Ill. 1998) (citing *K.H. v. Morgan*, 914 F.2d 846,852 (7th Cir. 1990).

²⁰⁷ 67 F.3d 1286 (7th Cir. 1995).

²⁰⁸ *Chi Chao Yuan v. Rivera*, 48 F.Supp.2d 335 (S.D.N.Y. 1999.)

²⁰⁹ *Nicholson*, 203 F.Supp.2d at 242.

²¹⁰ *Woodrum*, 866 F.2d at 1126.

²¹¹ *Nicholson*, 203 F.Supp. at 243.

²¹² *Woodrum*, 866 F.2d at 1125; *Nicholson*, 203 F.Supp.2d at 245.

²¹³ *Nicholson*, 203 F.Supp.2d 153 (E.D.N.Y. 2002).

Thus, in determining whether a state has interfered with liberty interests, "it is apparent that courts have a duty to review alleged infringements closely."²¹⁴ The Supreme Court characterized this duty as follows: "[W]hen the government intrudes on choices concerning family living arrangements, this [Supreme] Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation."²¹⁵

Procedural Due Process

Before a mother or child is deprived of a protected liberty interest, he or she "must be afforded an opportunity for some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justify[es] postponing the hearing until after the event."²¹⁶ At the very minimum, due process requires timely notice in advance of a hearing in which parents' rights to custody are at stake.²¹⁷

Thus, an extraordinary situation must exist before a child can be taken from a mother without a prior hearing. Such emergency situations "mean circumstances in which the child is immediately threatened with harm" and not "[t]he mere possibility of danger."²¹⁸ If the danger is not imminent, then "there is no reason to excuse the absence of the judiciary's participation in depriving the parents of the care, custody and management of their child." A corollary to this rule is that prior to the government removing a child without the judiciary's participation, it "must conduct sufficient investigation into the alleged neglect or abuse it relies upon to establish an objectively reasonable belief that the mother has neglected or abused her child."²¹⁹ The Supreme Court requires "that the states provide individual hearings to ascertain unfitness instead of relying on presumptions about categories of people."²²⁰

When a mother is not entitled to prior judicial review, "their parental due process rights are merely postponed, not nullified", and such mothers are "entitled to prompt post-deprivation judicial review."²²¹ The cases vary on what they say is prompt. The Fourth Circuit stated that a delay of 72 hours is on the outer limits.²²² The Campbell court held that a one-week delay violated procedural due process.²²³ The Supreme Court standard requires the Court to weigh "the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the

²¹⁴ *Nicholson*, 203 F.Supp.2d at 246.

²¹⁵ *Moore v. City of East Cleveland*, 431 U.S. at 499, 97 S.Ct. 1932.

²¹⁶ *Dykes v. Hosemann*, 743 F.2d 1488, 1494 (11th Cir. 1984)(quoting *Smith v. Organization of Foster Families for Equality . . .*, 431 U.S. 816, 97 S.Ct. 2094, ___ L.Ed2d 14 (1977) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 370, 91 S.Ct. ___, 28 L.Ed.2d 113 (1971))).

²¹⁷ *Dykes*, 743 F.2d at 1494.

²¹⁸ *Nicholson*, 203 F.Supp.2d at 237 (quoting *Tennebaum v. Williams*, 193 F.3d at 594 (2d Cir. 2001).

²¹⁹ *Nicholson*, 203 F.3d at 237.

²²⁰ *Hebein Ex Re. Berman v. Young*, 37 F.Supp. 1035, 1044 (N.D. Ill. 1998).

²²¹ *Campbell v. Burt*, 949 F.Supp. 1461, 1467 (D.Hawaii 1996).

²²² *Campbell*, 949 F.Supp. at 1467 (citing a Fourth Circuit case *Jordan v. Jackson*, 15 F.3d 333).

²²³ *Campbell*, 949 F.Supp. at 1468; see also *Hebein ex re Berman v. Young*, 37 F.Supp.2d 1035 (N.D. ILL. 1998) (holding that delay of two months is not prompt absent special extenuating circumstances).

interim decision may have been mistaken."²²⁴ In weighing these interests "[i]t is clear that the private, fundamental liberty interest involved in retaining the custody of one's child and the integrity of one's family is of the greatest importance."²²⁵

Other procedural due process rights include the equal right of both parents in the custody and control of their children, until a court order or other due process provides otherwise.²²⁶ Thus, the police cannot take a child from one parent and return the child to another parent without a court order determining custody. *Id.* On the other hand, the Ninth Circuit Court of Appeals has distinguished the due process rights of parents who have legal custody and other people who do not have legal custody.²²⁷ However, in this same case, the court of appeals affirmed the ruling of the district court, which held that "state law which gives [a parent] mere 'visitation rights' does not undermine the importance of [the] parental rights under the federal constitution."²²⁸

The parent's right to a hearing before alteration of her custody by a state official includes the "right to a proceeding free of perjury by state officials."²²⁹ In *Chi*, the state official signed a petition alleging that Ms. Chi had abused her child when the state official did not believe this and falsely testified to the same at the hearing. The court found that this violated Ms. Chi's constitutional rights to a fair tribunal.

Inherent in all of these due process rights is the right of an individual to have adequate, effective and meaningful access to court procedures. This right of access is sometimes found to be grounded in Article IV of the Constitution and sometimes under the Fourteenth Amendment due process clause.²³⁰ "The right to present a claim before a court of law is basic to our system of government, and is, consequently, one of the most fundamental rights protected by the United States Constitution."²³¹ Delays in court proceedings, suppression or destruction of evidence and the failure to inform a *guardian ad litem* of a legal proceeding and to make a record of that proceeding, all violate the right to access.²³² Proceedings in a youth court that are merely pre-textual to facilitate the enforcement of a court order from a chancery court judge also violate the right to access.²³³

²²⁴ *Campbell*, 949 F.Supp. at 1468 (quoting *FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988)).

²²⁵ *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2nd Cir. 1977) (holding that a 36 month delay violated due process).

²²⁶ *Anderson v. Roberts*, 659 F.Supp. 19, 23 (C.D. Cal. 1986).

²²⁷ *Campbell v. Burt*, 141 F.3d 927 (9th Cir. 1998).

²²⁸ *Campbell*, F.Supp., 1461, 1466 (D.Hawaii 1996).

²²⁹ *Chi Chao Yuan v. Rivera*, 48 F.Supp.2d 335 (S.D.N.Y. 1999).

²³⁰ *Chrissy F. By Medley v. Mississippi DPW*, 780 F.Supp. 1104, 1120 (S.D. Miss. 1991).

²³¹ *Medley*, 780 F.Supp. at 1119.

²³² *Medley*, 780 F.Supp. at 1126-27.

²³³ *Medley*, 780 F.Supp. at 1127.

Fourteenth Amendment Equal Protection

A mother and child must be treated equally under all of the above listed Amendments, including the Fourth, Ninth, and Fourteenth Amendments. Treating them differently under a state law or practice because of their status as victims of domestic violence or treating the mother differently because of her gender violates their rights, unless the state can give an appropriate reason that satisfies the constitutional standard.

Distinctions in gender "must serve important governmental objectives and must be substantially related to the achievement of those objectives."²³⁴ In addition, the analysis of the distinction must not apply "traditional, often inaccurate, assumptions about the proper roles of men and women," and must not allow the distinction to perpetrate "archaic and stereotypical notions."²³⁵

Distinctions in the law against women and children who are victims of domestic violence require the state to provide a rational justification of how the legislation or practice is related to legitimate governmental objectives.²³⁶ Although this standard is not as stringent as that for gender distinctions, "the rational-basis standard is 'not a toothless one."²³⁷

If the law or policy is stated in a neutral manner and is not discriminatory on its face, the law or policy may still be unconstitutional if it is applied in a discriminatory manner.²³⁸ To be found unconstitutional, the discriminatory impact of the law or policy must have been intended or have been a motivating factor. The Ninth Circuit has stated that, "a long line of Supreme Court cases make clear that the Equal Protection Clause requires proof of discriminatory intent or motive."²³⁹ The First and Eighth Circuits have held that discriminatory purpose must be proven, which means proof that the action was taken in part "because of" not merely "in spite of" its adverse effects on the identifiable group.²⁴⁰ Proof of intent can include historical background, irregularities in the passage of legislation, and legislative or administrative history, such as statements from the decision makers.²⁴¹

Thus, in summary, a law or policy violates the rights of children or women who are victims of domestic violence if it impacts them differently than those who are not victims of domestic violence, the state official enacting or enforcing the policy does so

²³⁴ *Hynson v. City of Chester Legal Dept.*, 864 F.2d 1026, 1029 (3rd Cir.1988); see *U.S. v. McClelland*, 72 F.3d 712, 717 (9th Cir. 1995).

²³⁵ " *Hynson*, 864 F.2d at 1029 (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26, 102 S.Ct. 3331, 3336-37, 73 L.Ed.2d 1090 (1982)).

²³⁶ *McClelland*, 72 F.3d at 717.

²³⁷ *McClelland*, 72 F.3d at 717 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981)).

²³⁸ *McClelland*, 72 F.3d at 716; *Hynson*, 864 F.2d at 1030; *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998); *Ricketts v. City of Columbia, Missouri*, 36 F.3d 775, 781 (8th Cir. 1994).

²³⁹ *McClelland*, 72 F.3d at 716; see also *Watson v. Kansas City*, 857 F.2d 690 (10th Circuit 1988) (holding by the Tenth Circuit that discriminatory motive is necessary to show that a policy is unconstitutional)

²⁴⁰ *Hayden*, 134 F.3d at 453; see also *Ricketts*, 36 F.3d at 781.

²⁴¹ *McClelland*, 72 F.3d at 716.

with the intent or motivation to adversely impact the women and children who are victims of domestic violence, and the reason for the difference is not rationally related to a legitimate governmental objective.²⁴² A law or policy violates the rights of women if it treats victims of domestic violence differently than other victims and this different treatment disproportionately impacts women, impacts the enforcement the law or policy is intended to have or is motivated by the disparate impact on women, and the reason for the difference is not substantially related to important governmental objectives.

APPLICATION OF FACTS TO CONSTITUTIONAL LAW

Judgments on Custody and Visitation

The statistical evidence in the Arizona BMTP provides disturbing proof of how the custody and visitation judgments of the court system violate the mothers' and children's liberty interests and equal protection under the law. One hundred percent of the participating mothers in the study said that the father of their children threatened them physically or made them afraid. Nevertheless, the court judgments gave sole custody, sole legal custody and joint custody to those fathers. For example, fifty-two percent of the fathers who were granted sole custody used violence against the mother during their time together. Of fathers who won legal custody, forty percent used violence against the mother. Ninety percent of the women said that fathers given joint legal custody used physical force against them, and fathers given joint physical custody used violence against the mother in eighty three percent of the cases. When there is a custom or policy of treating victims of domestic violence differently than others, that constitutes gender based discrimination.²⁴³

The significance of this evidence is that the abuse suffered by these mothers continued after separation; thus, interfering with the mothers liberty interest in raising her child and maintaining familial relationships with her child. Post separation, forty percent of the fathers used violence against the mothers and sixteen percent of the time it was during the visitation exchanges of the children. Even when the fathers were awarded sole custody, they continued to abuse the mothers twenty-three percent of the time.

In other words, in asserting their liberty interests in raising their children and maintaining familial relationships, the mothers had to endure physical violence. This is only permissible if the court orders are the result of a compelling state interest to which they have been narrowly tailored. Presumably, that interest is in maintaining the relationships between the father and child; however, is this interest truly compelling where the father physically abuses the mother? Even if the unlikely answer to that question is yes, the court orders giving sole custody to the fathers are clearly not narrowly tailored to serve that interest.

For example, one mother stated that

²⁴² *Hynson*, 864 F.3d at 1031 (stating the proffer of evidence necessary to support a claim of discrimination).

²⁴³ *Pinder v. Commissioners of Cambridge*, 821 F. Supp. 376 (D. Md. 1993).

I'm supposed to have liberal phone visits, but most of the time he doesn't let them answer the phone.

Another mother stated,

I have supervised visits at 40 hours and 15 minutes of talking on the telephone, but contact with the child will endanger her life. He has threatened my daughter against me. I am trying to keep him at peace from not harming my daughter. To push visitation will endanger her life.

Finally, one mom summed it up as a "*totally, unfair, unconstitutional taking of my child.*"

It is no wonder that these women, who were once abused by these same fathers and, in the case of some, are still being abused, now have difficulty enforcing their rights to visitation. This inability to assert the right to maintain contact with the children because of the threat their ex-partners poses interferes not only with the mother's right to raise and maintain a relationship with her children but also with the children's right to maintain relationships with the mother. In summary, the Fourteenth Amendment's protection of these basic human rights requires more than court orders that disregard the threat to the mother's life in pursuing her and her children's liberty interests. As one woman stated,

The judge and the system has torn my family apart.

Even more disturbing are the effects of the judgments on the danger to the children. The statistics show that of the fathers who received sole custody, thirteen percent had actually harmed the children during the time the parents were together, and twenty percent of the fathers who received sole legal custody had actually harmed the children during the time the couple was together. Of those who got joint custody, one actually harmed the children during the time the mother and father were together. Post separation, when sole custody was given to the fathers, thirty-eight percent continued to harm the children as opposed to twenty-eight percent of the fathers who continued to harm the children when sole custody was given to the mothers. With joint physical custody, fifty percent of the fathers continued to abuse the children and with joint legal custody, forty-four percent continued to abuse the children. In fact the evidence shows that sixty percent of the mothers stated that the court made rulings putting the child in unsupervised visitation with the ex-partner or with someone not a professional. Only eight percent who had harmed the children during marriage stopped harming them after separation. In addition, the statistics reveal that the risk to the children for sexual abuse doubled when sole custody was given to the fathers. The findings that sexual abuse actually increased after divorce were consistent with other research. When the state knows or suspects that a person is going to harm a child, it is a violation of substantive due process for the state to place the child in that danger.²⁴⁴

²⁴⁴ *Hebein ex rel Berman v. Young*, 37 F. Supp 2d 1035 (N.D. Ill 1998).

Finally, the courts refuse to acknowledge and give weight to documentation of and testimony about the abuse. For example, the statistics show that when sole custody was awarded to the mother, twenty-nine percent said that they had given documentation of a history of abuse to the court, but when custody was awarded to the father, forty-one percent said that they had given documentation of a history of abuse. For sole legal custody, when awarded to the mother, thirty percent had given documentation of abuse, and when awarded to the father, fifty percent had given documentation. For joint legal custody, sixty percent had given documentation of abuse and for joint physical custody, one hundred percent provided documentation. Thus, even when the mother provides documentation of violence, the courts by and large ignore it.

In some of the cases where Child Protective Services (CPS) was involved, the reasons included a son who returned home from visitation with his father with bruises, a daughter who stated that her father "touched her", a daughter's school principal reported that the father kicked the daughter, a daughter with vaginal irritation (two reports were filed by the mother and two by pediatricians), a child with a hand print bruise on her leg and complaints of vaginal bleeding, yet in most cases, the reports were discounted. Teachers, doctors and parents called CPS involving sexual and physical abuse yet CPS did not act. The testimony of the mothers also portrays their frustration with the courts disregard of their evidence involving abuse. A mother stated,

No one seems to care or want to listen to my child - no matter the age.

Another mother stated,

CPS is useless, especially in Arizona. If I could sue them I would for allowing my sons to live in a "concentration camp" home, living under conditions of being kicked, punched, slapped, bitten, beaten with objects, verbally and emotionally abused. My sons are acting out now and are survivors now; however, they are not surviving very well. . . When I tell CPS, they don't seem to be concerned. They don't care about mental health. They want to see bruises.

Awarding sole custody to the father increases the risk of harm to the children according to the participants. Although Fourteenth Amendment protection of the child's liberty interest in the right to personal safety requires state custody of the child, at least one circuit court, the Seventh Circuit, has stated that the duty to not place a child with a custodian that the state knows or has reason to know to cause likely abuse, includes placement with family members. It may be arguable then to say that the state is responsible when it takes a child away from a mother and places that child with an abusive father and the state knows or should know that it is endangering the life of the child. When the state has knowledge of a special danger, it may be held liable.²⁴⁵ It should be held liable especially if the state created or enhanced the danger.²⁴⁶ Intentional acts of the government that show disregard for physical safety can amount to a colorable

²⁴⁵ *Lowers v. City of Streator*, 627 F Supp 244 (N.D. Ill 1998).

²⁴⁶ *Semple v. City of Moundsville*, 963 F. Supp 1416 (N.D.1 W.VA. 1997).

claim.²⁴⁷ If this is not an abuse of the Fourteenth Amendment, then the analysis under the Fourteenth Amendment is as illogical as one mothers' recognition of the craziness of the "Arizona Court [that] sent a child back to live with an abuser even though [she] left for her own safety."

Similarly another mother stated,

(T)he court has ordered me to deliver my child into the hands of an unstable unpredictable possibly dangerous person.

Mothers are held responsible for the harm to their children when they don't protect them from the abuser. The state should be held responsible when it deliberately puts the children into the arms of the abuser.

Right to be Free from Perjury

When state actors lie or present misleading information, the state violates the mother's right to a fair tribunal protected by the procedural due process analysis under the Fourteenth Amendment. The evidence regarding the CPS workers, court evaluators, and *guardians ad litem* shows that these state actors disregarded documentation of abuse against the mothers and children when recommending custody and wrote biased inaccurate reports. Besides the statistical evidence, the mothers' testimonies describe the reports.

Box 6: Participants Talk About Experiences with State Actors

The CPS caseworker seemed supportive at first. She got important information from me, thoroughly reviewed abuse evidence on the father. [Then] she promised me that she would see to it that the father would not get custody if I would agree or at least sign to a dependency against me. But she would not put this in writing, so I declined. At that point, she did a one-hundred-eighty degrees immediate turn, supported the dad, harassed and threatened me and my supporters, and used everything I had told her against me...

(The worker) failed to investigate my home and environment, never observed my interaction with my girls or spoke to my older children.

The mediators stated that we both were unwilling to make an agreement and could not continue in mediation when my husband refused classes.

The evaluator said that I was the better parent, but he never recommended sole custody. Big mistake here. The judge followed his recommendation.

²⁴⁷ *Woodrum v. Woodward County, Okl* 866 F 2d 1121 (9th Cir. 1989).

Box 7. Participants Talk About Experiences with State Actors - continued

The psychological evaluator said that according to a previous couple's therapist I was violent, when the therapist said my ex-partner was violent. He also used school input in a way that misconstrued the interview.

Dr. ***** lied regarding my child's behavior as we left his office.

When evaluation was done, [the evaluator] spent four hours with the father, ... did not interview anyone else - parents, ex-partner, ex-girlfriend, did not take personal history into account, and blamed his depression and behavior on a 'custody battle', which actually didn't occur.

The psychological evaluator "lied, failed to present data. He's condescending, perpetually late, doesn't return phone calls, etc. He failed to disclose that in the 1980s he founded ***, with *****, what's now***, and he is very pro father, pro joint custody. ***** himself lost custody of his kids."

This testimony about bias and inaccurate reports by state actors from several different women should be sufficient to make it clear that the procedural due process rights of the mothers in Arizona family courts are being violated. This is simply not tolerable under the Constitution. One mother summed it up as follows, *"I think there should be some accountability. Everything should be recorded. Lies should not be an acceptable practice."*

Legal Assistance and Cost

The statistics reveal that only seventy-eight percent of the mothers had an attorney at some point during the litigation, but worse yet, only thirty-seven percent had an attorney throughout the litigation. In addition, if a mother had no legal counsel, it appeared to contribute to the father winning custody.

The mothers' testimony reflects that lawyers who give effective legal counsel are desperately needed. One mother stated that she would recommend changing family court by getting *"lawyers for people who can't afford one, who have been kicked out into the cold without any clothes and no money, and who have to start over again with nothing."*

Another woman simply stated that there should be a *"system that is not biased toward low income woman."*

The need for a lawyer is because the mothers are *"completely uninformed"*, and it is *"impossible to represent [themselves]"*. In addition, the mothers who did not have attorneys complained that they did not get the necessary attention. Finally, the mothers expressed the need for attorneys, who are *"knowledgeable and sensitive about abuse."* Without this, the mothers risk losing their children without having due process afforded to them.

Not Able to Tell their Story, and the Failure to Follow State Laws

The judges themselves appear to violate procedural due process by not allowing the women time to present their cases. A mother is entitled to a fair hearing before her rights to the custody of her child can be violated. Clearly, that right includes the right to be heard and to present witnesses and evidence. However, several of the women stated that they were not given the opportunity to tell their stories. One woman stated:

The judge only allowed three hours to hear the case; the attorney wasn't prepared. Domestic violence was never brought up, and DUI was brought up, but dropped.

Another mother stated that the judge did not want her to talk or defend herself about the lies her ex-husband and family told.

The mothers also reported that the judges failed to follow state law. Although judges are entitled to absolute immunity for their judicial decisions, the fact that they have immunity does not mean that they can act outside the bounds of the Constitution. The consistent failure of judges to follow the law is a matter of constitutional concern.

Discrimination by State Actors

Since Arizona law or policy does not on its face discriminate against women or against victims of domestic violence, the evidence only shows discrimination if it points to disparate treatment in the application of the law, the intent to cause an adverse impact in the application of the law, and that the reason for the disparate treatment is not substantially related to an important governmental interest, in the case of gender discrimination, or is not rationally related to a legitimate governmental interest, in the case of discrimination against victims of domestic violence. Proof of disparate impact and discriminatory intent can come from statistical information and records of statements from decision makers. Sadly, the evidence from this study provides this proof.

First, the statistical evidence revealing the blatant disregard of the documentation of abuse in the decisions of custody strongly suggests that bias or discrimination is motivating the decisions. Where documentation of domestic violence was provided, the father was more likely to gain joint custody than when the documentation was not

provided. Also, the high percentage of men who were given custody when documentation of abuse was provided suggests disregard for the victims of domestic violence, including both the mothers and children.

In addition, besides the orders rendered, other behavior of state actors suggests a biased motive about domestic violence. For example, the fact that a week after the mediator gave the father visitation, the mother arrived at the mediation with a black eye and the mediator failed to ask about it, reflects a callous bias towards mothers who are abused. The bias is so great that the mediator did not even want to believe what was evident right before his eyes.

Second, the reliance on Parental Alienation Syndrome illustrates discrimination against both women and victims of abuse. Forty-nine percent of the mothers testified that Parental Alienation Syndrome was used against them in their case. This theory is supported by the Father's Rights movement and is most often used against women to suggest that they are alienating their children from their fathers. Thus, in practice, the theory has been used to favor men over women and was generally promoted as a backlash to the false notion that women receive custody most of the time. However, under proper legal standards for the introduction of scientific theories, the Parental Alienation Syndrome should not be considered as evidence because it lacks scientific support and foundation and fails the proper test for the introduction of scientific evidence. The fact that the courts are allowing this as evidence or even giving consideration to this theory suggests a bias against women and motivation to act in support of this bias.

Third, the statements and behaviors of the state actors themselves as described in the words of the mothers' supports findings of discriminatory motive. The following are examples of these statements:

1) An evaluator said that if men aren't given joint custody they won't pay child support and the government will have to pay welfare. Thus, this person suggests that women cannot support themselves without child support and that domestic violence is not significant enough to prevent regardless of the cost.

2) One mother stated that the process was biased, unfair, not in the child's best interest, domestic violence was not considered and no drug rehabilitation or drug testing was ordered for the father.

3) The judge had his own agenda in the courtroom to see if he could re-unite the children with their father, and he wouldn't listen to the lawyers.

4) One judge stated that the mothers' sons "cried wolf" and that she called the police and CPS too much.

5) In a gesture that was both condescending and lacking in understanding and respect for victims of abuse, a mediator congratulated one mother on her growth and stated that she was withdrawn, quiet and afraid of him in the beginning.

6) One mother requested that a sheriff's deputy be present; but the deputy laughed at the abuser's jokes.

7) A mother had to point out to a court-ordered psychological evaluator that the evaluation sheet that she was given had no acknowledgment of abuse and no attention to abused women's issues, indicating that the evaluators do not consider abuse important.

8) A court psychologist who was condescending, perpetually late, and failed to present data also failed to disclose the fact that he founded *****, which is now ****, an organization that is notorious for being anti-mother.

9) A *guardian ad litem* testified that the mother did to the father what the mother had told the GAL the father did to her.

10) Showing a lack of understanding of the effects of domestic violence, a judge faulted one of the mothers for not working full time as not trying, when in reality she was struggling with the consequences of domestic violence and the court stresses.

11) The judge made disparaging remarks about one mother.

12) When an abusive husband became violent in the courtroom, a judge remarked, "It would be nice if both parents could get along!" Thus, her remarks show a bias against domestic violence victims because the judge could not even give credence to the reality of the victimization when it was displayed in her own courtroom.

13) Finally, several of the mothers claimed that the judges, evaluators, CPS, and courts were very disrespectful and condescending.

In light of all this proof of disparate impact and intent, the next consideration is the governmental interest in discriminating against women or against victims of domestic violence. Clearly, the government can have no interest, not even a legitimate one as required by rational review, to award custody to an abusive father. The evidence indicates that the state is violating the mother's and abused children's rights to equal protection under the law.

IMPLICATION FOR INTERNATIONAL LAW

INTRODUCTION

The evidence gathered by the Battered Mothers' Testimony Project demonstrates that human rights violations are occurring throughout Arizona's courts. This study has shown that perpetrators of domestic violence are awarded joint or sole custody of children, which endangers children's lives and inflicts grave physical and/or psychological harm on victims of domestic violence.

It is clear that through these proceedings Arizona's courts are violating the basic human rights of women and children, such as the right to life, equality before the law, freedom from violence and torture, and economic security by awarding children to perpetrators with repeated documented convictions.²⁴⁸ Furthermore, the severity of the harm inflicted upon the victims by perpetrators of domestic violence, and the very fact that the courts enable this to happen, must be recognized as torture just as we understand that state sponsored or supported violence against an individual is torture. The state violates the human rights of both parents and children when it fails to prosecute these cases of torture by perpetrators of domestic violence. Matters are only made worse when, in cases of child torture, Arizona's courts grant these same perpetrators joint or sole custody of children.

To effectively examine the role of the state in the violation of human rights this section will first review relevant literature on why domestic violence is a human rights issue and how domestic violence constitutes torture. The following sections will address the United States' commitment to human rights through ratified international treaties, and obligations under human rights norms set by the international community. Having established both the validity of domestic violence as a human rights issue, and more specifically as torture, we will look at the United States' commitment to protect human rights. Then, using the data obtained by the Battered Mothers' Testimony Project we will demonstrate how Arizona violates international laws and norms by the practices taking place in its courts. Finally, we will address under international treaties and norms what recourse exists for both survivors of domestic violence and additional means of addressing the human rights problems found here in Arizona.

In many countries, including the United States, human rights have traditionally been restricted to the public sphere with private abuses of human rights largely remaining outside of the scope of international human rights law.²⁴⁹ Conventionally, domestic violence has not been considered a human rights issue because of the fact that it occurs within the home, outside of the public sphere. In Abhinaya Ramesh's recent article, *Why is domestic violence a human rights concern?*, she refers to recent international women's human rights law and states that under these new interpretations of human rights domestic violence has become "visible in the human rights discourse."²⁵⁰ Thus, these newer human rights conventions have brought into the public discussion of human rights what were before, because of their private nature, taboo.

Moving beyond domestic violence as a human rights issue, the international community is slowly shifting towards recognizing domestic violence as torture because it is equal in scope to the acts, as defined by the United Nations, that constitute torture. In the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Hereafter, UN Convention on Torture), torture is:

²⁴⁸ Dietz, Elizabeth, "Violence Against Women in the United States: An International Solution", *Arizona Journal of International Comparative Law*, Vol.13, No.2 1996, p. 563.

²⁴⁹ Ramesh, Abhinaya, *Why is domestic violence a human rights concern?*, p.4

²⁵⁰ Ibid.

“[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁵¹

Using the traditional definition of torture as pain intentionally inflicted by the state to influence the victim, Amnesty International demonstrates that domestic violence is torture in their publication *Broken Bodies, Shattered Minds*. Amnesty International argues that many of the domestic abuses are intentionally inflicted, and that they are often inflicted for the same reasons that torture is used by the state.²⁵² When torture is used by public officials it is a tool used to create “profound dread... to break their will, to punish them and to demonstrate the power of the perpetrators[,]” while in domestic cases torture is used for similar purposes such as intimidating women into obedience or to punish women for...their disobedience.”²⁵³ Seeing domestic violence as not only a human rights issue but as torture, makes International law extremely important in examining these facts because it is the only arena where not only can we hold perpetrators of domestic violence accountable for torture, but where we can also hold the state responsible for failing to protect the victims’ human rights.

A similar argument, that domestic violence and child abuse are examples of torture, comes from human rights activist Catherine MacKinnon. She argues that the international community views disappearance and murder as “core” examples of torture, and thus as violations of human rights.²⁵⁴ She also points out that nearly all of the international community denounces inequality based on sexual discrimination. “So why,” she asks us, “is torture in the form of rape, domestic battering, and pornography not seen as a violation of human rights?”²⁵⁵ In other words, we should see the torture that occurs in cases of domestic violence equally as serious as the cases of torture in the public sphere.

INTERNATIONAL LAW

From the data gathered by this project it is evident that domestic violence is not only a human rights problem but also an act of torture. In an effort to understand the United States’ international commitment to human rights we will examine both the

²⁵¹ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1, General Assembly Resolution 3452 of 9 December 1975. Found in, *Broken Bodies, Shattered Minds*, Amnesty International Publications, London, 2001, p. 4.

²⁵² Ibid, p. 5.

²⁵³ Ibid, p. 5.

²⁵⁴ Ramesh, Abhinaya, Why is domestic violence a human rights concern?, p.5

²⁵⁵ Ibid, p.5

responsibility of the United States to formal laws and treaties as well as international norms.

The United States has an unfortunately weak record of compliance and ratification of international treaties and conventions against human rights violations. There are, however, several conventions to which the United States has given its support: the United Nations Charter, the Universal Declaration of Human Rights (UDHR), The UN International Covenant on Civil and Political Rights (ICCPR), the UN Convention on Torture, and UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). This section will begin to outline the obligations of the United States by examining the international laws that prohibit torture as well as all treaties that have implications for the failure to of the state of Arizona to grant equal protection in cases of child custody.

United Nations Charter

The first relevant document is the United Nations Charter. This Charter was signed by the United States in 1945, and thus, as with all ratified treaties, it has the effect of becoming municipal law in the United States.²⁵⁶ The UN Charter states in Article 55 that its goal is to, “[p]romote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁵⁷ Similarly, Article 56 states that “[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Vague as the charter’s language is, these articles imply at the least that “any country that moves backwards as far as human rights are concerned would probably be regarded as having broken Article 56.”²⁵⁸

Universal Declaration of Human Rights

In The Universal Declaration of Human Rights, the United States has pledged to work with the United Nations to promote human rights. The Universal Declaration of Human Rights was approved without dissenting vote on December 10, 1948 by the General Assembly of the United Nations.²⁵⁹ The provisions set out by the resolution can be grouped into two major categories.

The first category states the provisions on civil and political rights. These provisions are the most important for the purposes of this study, although the second group of provisions, those that address economic, social and cultural rights, also have some relevance to this study. Examples of this first group of Articles are: Article 5, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[;] Article 7, All are equal before the law and are entitled without any

²⁵⁶ Malanczuk, Peter, *Akehurst’s Modern Introduction to International Law*, 7th ed., London: Routledge, 1997, p.212.

²⁵⁷ *Ibid*, p.212

²⁵⁸ *Ibid*, p.212

²⁵⁹ *Ibid*, pp. 212

discrimination to equal protection of the law[;] Article 10, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal[.]”²⁶⁰

UN Covenant on Civil and Political Rights

The UN Covenant on Civil and Political Rights (ICCPR), which was implemented by the UN in 1976, was ratified by the United States in 1992. Article 7 in this document states that, “[N]o one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” which certainly applies to the treatment of the survivors in this study.²⁶¹ However, many other articles in this document apply to the actions by the courts and the judicial system in general towards the women in this study.

For example, Article 2: 1 calls on all state members to, “[U]ndertak[e] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 2:3, adds that, “Each State Party to the present Covenant undertakes...to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy... [and] that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy[.]”

Article 3, states that, “State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

Most significantly, Article 14:1 makes it law that, “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” And in 14:3.1 the law says that, “[E]veryone shall be entitled [t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;” and Article 14:3.4 “To have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

The family is the subject of Article 23, which states that (1.), “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State[.]” (4), “States Parties to the present Covenant shall take appropriate steps to ensure equally of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Finally, Article 26 makes known that, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective

²⁶⁰ Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948

²⁶¹ <<http://www.hrweb.org/legal/cpr.html>> (4/3/03)

protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Another treaty, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention on Torture), was ratified in 1994. The UN Convention on Torture acts under the UN Charter to protect equal rights of all members of the family (article 55, see UDHR above).²⁶² The UN Convention on Torture relates to UDHR, Article 5, and to Article 7 of the ICCPR, both of which stress the right to be free from torture.²⁶³ Article 14, adds that “Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”²⁶⁴

International Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination was also ratified by the United States in 1994. It set out to acknowledge that, “[V]iolence against women is compounded by discrimination on the grounds of race, ethnicity, sexual orientation, social status, class and age. Such multiple discrimination further restricts women’s choices, increases their vulnerability to violence and makes it even harder for them to gain redress”.²⁶⁵ In its preamble it says, “Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin, Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination[.]”²⁶⁶

To address these goals the treaty defines “racial discrimination” in Article 1:1:

“In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

²⁶² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, UN General Assembly resolution 39/46 of 10 December 1984. Found in Broken Bodies, Shattered Minds, pp. 293.

²⁶³ Dietz, Elizabeth, “Violence Against Women in the United States: An International Solution”.

²⁶⁴ Convention Against Torture.

²⁶⁵ Found in, Broken Bodies, Shattered Minds, Amnesty International Publications, London, 2001, p. 5.

²⁶⁶ <<http://www.hrcr.org/docs/CERD/cerd2.html>>

footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁶⁷

In Article 2, “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms....” The article goes on to say that this is especially important to, “[E]nsure that all public authorities and public institutions, national and local, shall act in conformity with this obligation[.]”

In Article 5, the treaty states that, “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution[.]”

INTERNATIONAL NORMS

The United States has an obligation to act under international norms in addition to its responsibilities under international law. Norms are important because, “International norms established by the vast majority of international actors demand attention when they are violated by a participant in the international community, especially when the country is an advanced industrialized nation.”²⁶⁸ This section of the chapter will demonstrate the treaties that apply to the issue of torture in the state of Arizona.

Convention on the Elimination of All Forms of Discrimination Against Women

Despite its not being ratified by the U.S., the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an important treaty to consider in this section because it is so widely ratified that the concepts and laws that it contains have become international norms. The United States was very involved in drafting CEDAW, and the former President Jimmy Carter signed the convention on behalf of the United States in 1980. Since then, for one political reason or another, the Senate has not ratified CEDAW.²⁶⁹

“As of November 2001, 168 countries have ratified CEDAW. The U.S. stands out as the only industrialized nation that has failed to do so. In fact, in refusing to ratify CEDAW, the United States. is in the company of countries such as Afghanistan and Iran, where violations of women’s human rights are particularly rampant.”²⁷⁰

²⁶⁷ <<http://www.hrcr.org/docs/CERD/cerd3.html>>

²⁶⁸ Wellesley Report, <<http://www.wcwonline.org/wrn/battered.html>>(12/02)

²⁶⁹ Milani, Leila Rassekh, Human Rights for All, Published by the Working Group on Ratification of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, 2001, p.9.

²⁷⁰ Ibid, p.6.

One of the main goals of CEDAW is to elaborate on the anti-discriminatory principles outlined in the UDHR. The treaty reads, “Recalling that discrimination against women violates the principles of equality of rights and respect for the dignity, is an obstacle to the participation of women, on equal terms with men[.]”²⁷¹ In Articles 2(b) and (c), the goals of CEDAW are made very clear: “Article 2(b), To adopt appropriate measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men... and to ensure the protection of women against any act of discrimination.”²⁷²

Other important articles of CEDAW include: Article 15(1): “State parties shall accord women equality with men before the law;” Article 16 (1): “[E]liminate discrimination against women in all matters relating to marriage and family relations[;]” (d) “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to children; in all cases the interests of the child shall be paramount;” (f) “The same rights and responsibilities with regard to guardianship... in all cases the interests of the child shall be paramount.”²⁷³

Declaration on the Elimination of Violence Against Women

Another important treaty that the United States has not yet ratified is the Declaration on the Elimination of Violence Against Women. This treaty is based in the three previous conventions UDHR, CEDAW, and the UN Convention on Torture. The goal of this treaty is to “recognize that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men.”²⁷⁴

Significant articles in this document include: Article 1, Violence Against Women is “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women....”; Article 2, psychological violence conducted by the state; Article 3 (b) right to equality, (e) right to be free of all forms of discrimination (g) right not to be subjected to torture; Article 4 (c) Exercise due diligence.”²⁷⁵

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights is another treaty that was sent to the United States Senate by President Carter in 1978. This treaty is seen as one of the two main implementing treaties that came from the Universal

²⁷¹ Convention on the Elimination of Discrimination Against Women (Introduction).

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Declaration on the Elimination of Violence Against Women, Forty-eighth session of the General Assembly, 1993.

²⁷⁵ Ibid.

Declaration of Human Rights. The other treaty, the International Covenant on Civil and Political Rights, along with the International Covenant on Economic, Social and Cultural Rights, have come to define international human rights law, and therefore are called by some “the International Bill of Rights.”²⁷⁶

In Article 2:1 gives the goal of the document as being, “The States Parties to present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 3, adds to that statement that, “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

Convention on the Rights of the Child

The United States is one of only two countries that has not yet ratified the Convention on the Rights of the Child (the other is Somalia).²⁷⁷ This 1989 treaty was almost universally ratified only six years after introduction, and has been the only treaty to be ratified by so many countries so quickly.²⁷⁸ The purpose of the treaty is to acknowledge that, “child[ren]...nee[d] special safeguards and care, including appropriate legal protection.”²⁷⁹ The treaty is derived from the language of the UDHR, Articles 23 and 24 of the UN Covenant on Civil and Political Rights, and Article 10 of the Convent on Economic, Social and Cultural Rights.²⁸⁰

Some of the most important articles for the purposes of this report are: Article 3, “the best interest of the child shall have primary interest;” Article 19, freedom from abuse, violence, injury[.]; Article 27, Standard of living adequate for physical, mental, moral... development; Article 37, children must be free from torture; and Article 39, state parties should take all appropriate measures to promote recovery of a child victim of ... torture.²⁸¹

Inter-American Convention to Prevent and Punish Torture

The Convention was adopted in Cartagena de Indias, Columbia on December 9th, 1985 and entered into force on February 28th, 1987.²⁸² As in the case of the above treaties, the United States has not yet ratified this treaty. However, since a majority of American states (16 of 30) have signed on to this treaty it has international significance as a legal norm.

²⁷⁶ <<http://www1.umn.edu/humanrts/instree/auob.htm>>

²⁷⁷ Arizona Republic, October 5, 2002, A30.

²⁷⁸ *Broken Bodies, Shattered Minds*, Amnesty International Publications, London, 2001.

²⁷⁹ Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² <<http://www.oas.org/juridico/english/Sigs/a-51.html>>

The following is the introduction statement made by the charter:

Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights[.]²⁸³

The language of this treaty is very progressive in protecting citizens of member states, and as a norm other states internationally, from torture. Article 3 of this document defines guilty parties in cases of torture as, “(a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.”

Article 6 demands that states, “[S]hall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”

Article 8, “The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case[,] and “After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.” In other words, if a person makes an accusation of torture and all that countries legal procedures have been exhausted, the case may be taken to an international tribunal so long as the country involved has agreed to be bound by that tribunal.

Article 9, “The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.”

Laws and Norms Violated by Practices in Arizona

In this section we will examine data from the project to first show that domestic violence in Arizona is torture and then to further demonstrate how the failure of Arizona’s legal system to prevent torture places the state in non-compliance with international laws and norms that condemn torture. While the Maricopa Superior Court

²⁸³<<http://www.oas.org/juridico/english/Treaties/a-51.html>>

has a Children's Bill of Rights on their web site, it does not mention the most important rights – to be free from physical, sexual and emotional abuse and the right to a safe, healthy and loving environment. Arizona is allowing and in many cases aiding the torture of parents and children by: not prosecuting abusers; discriminating against women in court; not acting in the best interest of children; and aiding the torture of women by allowing abusers to continue their abuse through the legal system.

Domestic Violence and Child Abuse in Arizona Are Torture

In the introduction to this section, we have already demonstrated that domestic violence and child abuse constitute torture. The data that was collected in this study demonstrates how widespread this torture seems to be in Arizona. For example of the 57 women interviewed, 100% were threatened physically, 93% said that they suffered physical abuse, almost all said that they endured psychological or emotional abuse, 89% said that their ex-partner used money to hurt or control them, and 32% said that they feared that their children were in danger of being physically hurt by their ex-partner.

In the interviews with the survivors, women told of horror stories like the women who said of her daughter,

He always told her he didn't love her, acting like he was molesting her. He played the "prisoner" game with her tying her up; he degraded her constantly; he always told her she was a "bad" kid, a failure, and "no good".

Another woman told interviewers that the hardest part of her ex-partners abuse was,

[for her] Watching my daughter cry while trying to get my husband off of me. [And for her kids] I wanted to kill myself, because I didn't want to worry about anything again.

The effects of this sexual abuse, psychological cruelty, and the physical violence meet the definition of "torture" provided in this section. Another woman told of even more heinous treatment of her children, saying:

He beat them; treats them like they were there to serve him.... [He] put them in the back of a truck for a "Life lesson." [He] spun the truck around and drove recklessly (the older children had to hold onto the younger ones to keep them from being thrown out). This is documented and he admits to it. [He defended his actions saying] They needed to know how dangerous being in the back of a truck is. The courts comments are "he is just a big kid who needs parenting classes."

These cases meet the traditional severity of the term torture (kidnapping, murder, rape, etc.), and also fit into the more modern definition of torture that extends the concept

of torture to the violent actions of private individuals. In fact, when we look back at the definition of torture:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

We certainly see this in the interviews with survivors documented by our study.

Another survivor wrote:

[H]e was trying to leave with the child. He was drunk, we struggled and he hit me. This escalated from pushing to throwing me and grabbing me by my arms.... He choked me, restrained me. He hit me with a trunk, smashing my hand. [There were] bruises all down my side and on arms and legs. [It was] non-stop verbal and emotional abuse. [He] stalked me when I worked, harassed my parents and friends.

Another woman describes the torture she suffered, explaining that she and her children suffered

Just total deprivation – shelter, food, clothing, medical, dental – for the children and myself.

Making matters worse, for many of the victims interviewed in this study, the torture they suffered only increased when litigation began. One survivor told the interviewer:

The most horrible sufferings have been not only physical, they have been emotionally, psychological and financial! He never stops harassing me - the courts are his legal playgrounds! He uses the courts to inflict suffering – he constantly and I do mean constantly has me in court – his lawyer helps him to wear us out.... The end is never coming – it never ends!

The facts gathered by this study demand that action be taken.

The International Community's Stance on Torture

Through the laws and norms addressed in this section, we can see that torture is strictly condemned by the international community. The actions by the State of Arizona violate the Universal Declaration of Human Rights, the UN Convention on Civil and

Political Rights, the UN Torture Convention, CEDAW, and the CRC by allowing perpetrators to continue their torture.

Consent and Complicity of State Actors to Domestic Violence

The majority of the women interviewed felt that state actors were not acting in their interest. One woman wrote that she,

Felt battered and abused by the system.

Another wrote of her experience in the family courts,

That all areas [of the court] are involved in allowing the abuse, the courts, the moderators/evaluators, CPS, and the police department.

The reactions of these two women were not unusual in the data gathered by this study. In fact, 65% of the women interviewed said that they felt the court treated them disrespectfully, scornfully or condescendingly. In a related issue, 63% of the women interviewed said that they felt afraid to raise issues or concerns because they were afraid that the court would use the issues against them. For example, many feared raising histories of child abuse because they were afraid that the court would claim that PAS existed.

Many women perceived the same bias in favor of their ex-partners by other state actors. Of the nine women who had a *guardian ad litem* (GAL), 63% felt that they were treated disrespectfully, scornfully, or condescendingly, and 44% felt that there were issues that they could not raise because they would be used against them.

The women who had court mediators saw the same kind of bias. Of those who had mediators, 54% felt the mediators treated them disrespectfully, scornfully, or condescendingly. Finally, encounters with Child Protective Services (CPS) led to the same 54% of women who felt that they were treated, disrespectfully, scornfully, or condescendingly, and 52% who had issues that they did not bring up because they feared it would be used against them.

All of these findings suggest that Arizona is guilty under Article 3 of the Inter-American Convention to Prevent and Punish Torture, where guilt in cases of torture is placed on those “who directly commi[t] it or who, being able to prevent it, fails to do so.” The culpability of the state lies in the failure to help prevent this kind of torture from continuing.

Arizona's Responsibility Under the Law

The United States has a clear responsibility under ratified international treaties and under the international norms to prevent human rights abuses.²⁸⁴ Violations of human rights law, as mentioned above, traditionally only encompassed abuses suffered at the hands of a state agent. Under international law, the state's responsibility has recently expanded to encompass, not only human rights abuses committed directly by the state, "but also the state's systematic failure to prosecute the actions committed by the state or the private individuals."²⁸⁵ In the latter case however, culpability of the state is much more difficult to prove. Finding states to be responsible for human rights abuses by private individuals requires that one can "show a pattern of non-prosecution of acts that violate human rights", and that the state has agreed to enforce those human rights.²⁸⁶ The facts from this project show just such a pattern of non-prosecution in the cases of torture of battered mothers and children in Arizona.

The facts presented by this study show that states are not seriously addressing cases of torture when they are classified as child abuse or as domestic violence. For instance, in Maricopa County, Arizona, 74% of the women interviewed in this study reported that the abuser was given sole or joint custody. In all of the other counties in the state, combined the average was 56% of all cases where the abuser was granted sole or joint custody. That so many children were kept under the control of violent and dangerous perpetrators shows the lack of consideration that exists in the judicial system in Arizona. Many of the victims were forced because of these custody decisions to live full or part time with violent criminals, and many of the mothers who participated in this study were placed in continuing contact with these perpetrators. The result is that the torment and the torture of the victims continued - aided by the legal system.

Amnesty International defines state guilt for human rights violations in a similar way. In the same report cited above, they write, "The way in which the state is responsible [for its failure to take reasonable steps to prevent human rights abuses by private individuals] is categorized... [as] complicity, consent or acquiescence, and failure to exercise due diligence[.]"²⁸⁷ In the abuses that we have documented to be occurring in Arizona we find examples of all three of these crimes.

Complicity

Several of the questions in the survey data look at the issue of state complicity in regards to torture. State actors for the most part seemed to pay little attention to histories of domestic abuse. For example, 68% of participants stated that they feel that the judge, "*Failed to take the partner abuse history seriously.*" Additionally, in cases of documented partner abuse the mother was awarded sole custody in 29% versus the

²⁸⁴ Dietz, Elizabeth, "Violence Against Women in the United States: An International Solution," Arizona Journal of International Comparative Law, Vol. 13, No.2, 1996, p.559.

²⁸⁵ Ibid Note 13, p.560.

²⁸⁶ Ibid Note 15, p.561.

²⁸⁷ Ibid.

fathers' 41% out of the 17 cases where sole custody was awarded either to the mother or to the father.

Consent

Many studies have shown that tacit consent or acquiescence in domestic violence is common among law enforcement and the court system.²⁸⁸ One mother told interviewers,

There is no support for mothers of children who have been victims of violence, children have no voice, ... in Arizona the police are barbaric, and almost always made me feel like it was my fault.

Like this woman, many interviewed felt that the police blamed them for the violence that they or that their children suffered. On this same topic, another woman wrote,

Don't believe that the justice system, including the police, is going to protect you.

Many of the participants also stated that the abuse by the courts, law enforcement, and other state actors was worse than the torture that they had been subject to by their ex-partner. For example,

The one-sided court antics over many years are so damaging, so abusive, that it's almost as bad as the actual domestic violence itself – maybe worse!

Due Diligence

The failure of the state to protect the victims of violence amounts to a failure to exercise due diligence. One survivor wrote,

There is no system to protect victims – be ready to go broke and to fight the abuse.

This is the same sentiment that echoed throughout the entire report. That,

the courts have allowed someone to take our lives away while they should be protecting us. The courts allowed him to destroy a family.

“The concept of due diligence describes the threshold of effort which the state must undertake to fulfill its responsibility to protect individuals from abuses of their rights.”²⁸⁹ The standard of due diligence has also been cited in a number of international treaties, such as the Declaration on the Elimination of Violence Against Women, which states in Article 4, “[States should] exercise due diligence to prevent, investigate and, in

²⁸⁸ Ibid, Note 13.

²⁸⁹ Ibid, Note 6.

accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”²⁹⁰ The Inter-American Court of Human Rights expressed similarly that, “The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to impose appropriate punishment and to insure the victim adequate compensation.”²⁹¹

The data gathered by our study shows that these human rights are being violated in Arizona. Multiple documented cases of parents and/or children being tortured by perpetrators of domestic violence seem to have little impact on rulings in custody cases in Arizona’s courts, in flagrant violation of the human rights of the innocent parties. The courts acquiescence to the perpetrator’s actions, and its failure to meet the minimum standards of due diligence have left many victims fearful of the legal system. It is this massive failure of our legal system to provide justice in cases of domestic violence, and the denial by state actors that this is in fact a problem, that makes the role of international law and norms so important in bringing light to these issues.

Several of the international treaties mention specifically that the state is responsible for due diligence in all cases involving torture. For example, the Convention on the Elimination of All Forms of Discrimination Against Women, states in Article 4 (c), “[States shall] exercise due diligence [in cases of discrimination against women].” In specific reference to torture, the Inter-American Convention to Prevent and Punish Torture says in Article 6, that states, “[S]hall take effective measures to prevent and punish torture within their jurisdiction.” From the above information, and the information that has been gathered by this study, it is clear that Arizona is not adequately exercising due diligence in cases of torture involving survivors of domestic violence and child abuse. For example, of the 21 parents who were given sole custody, 11, or 52% of them were fathers who were physically abusive to their partners and often these same perpetrators were abusive with their children as well. Another disquieting figure is that 13% of the parents who were given sole custody had actually physically injured their children during a violent episode.

Naturally, when seeing these figures one should ask whether the judge was aware of these acts of violence, and whether they were actually documented. In 68% of the cases the women said that the judge had failed to take the partner abuse seriously, and in 65 % of these cases the abuse was documented. When these figures are compared to custody, in cases where partner abuse is documented, 41% of fathers receive sole custody, versus the 29% of the cases where sole custody goes to the mothers. A similar trend is apparent in cases of sole legal custody, where 50% of fathers with documented histories of abuse were given custody compared to 30% of mothers. In these cases, documentation of domestic abuse seems to work against the mothers.

Even worse, 77% of women felt that the court failed to take concerns about their child seriously. In 63% of these cases the court was given documentation or evidence of

²⁹⁰ Declaration on the Elimination of Violence Against Women, UN Resolution, 48 Session, 1993.

²⁹¹ Dietz, “Violence Against Women in the United States: An International Solution”.

child abuse or the negative effects of the partner abuse on the children. In determining custody, however, the courts seem to have paid little attention to this data. Of the 19 parents given sole custody, six were fathers with documentation of having harmed their children. Likewise with sole legal custody, of the 12 parents total in this group, four were fathers with this kind of documentation against them.

As far as other state actors are concerned the data shows that their failure to act is just as severe as that of the court. In the case of GALs, 66% of the women interviewed felt that their GAL failed to take partner abuse seriously, and 44% said that the same GALs failed to take concerns about their children seriously. Court mediators not only failed to take into account partner abuse in 85% of the cases, and child welfare in 89%, but also asked women they knew had histories of partner abuse to go into mediation with their ex-partner. Of the 23 women who answered the question on whether CPS took partner abuse seriously, 70% answered “No.” Of the 24 responses to the question regarding whether their concerns about the safety of their children were listened to, 80% said “No”.

Finally, one of the most drastic examples of a failure to act by state actors is found in the data on court appointed psychological evaluators. Eighty-four percent of women said that these psychological evaluators failed to take into account the effects of partner abuse on either the mothers or the children when making assessments, in spite of the fact that in 82% of the cases they were given documentation of the partner or child abuse. Many of these psychological evaluators (64% of 28 respondents) used psychological testing on either of the partners as a means of discrediting the reports of abuse made by the mothers. Significantly, 70% of the women who responded felt that they were held equally accountable or blamed entirely for the partner abuse that they suffered. These evaluators also have a high correlation of recommending custody to fathers.

Agents of the State Are Not Acting in the Best Interests of Children

It is recognized in international law that, to quote the UN Covenant on Civil and Political Rights, Article 23, (1), “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State[,]” and “(4), States Parties...shall take appropriate steps to ensure... provision shall be made for the necessary protection of any children.”²⁹² The Convention on the Rights of the Child (CRC) elaborated on this principle by stating in Article 3, “the best interest of the child shall have primary interest.” The cases seen in this study not only violate these articles but they go so far as to violate Article 19, “[That children deserve] freedom from abuse, violence, injury,” and Article 27, which grants that children must have, “[A] standard of living adequate for physical, mental, moral... development.”

Looking back at the data presented above on the court, GALs, mediators, CPS, and psychological evaluators, in every case the vast majority of women questioned reported that the state actors did not make decisions in the child’s best interest, a clear

²⁹² United Nations Covenant on Civil and Political Rights, Article 23 (1).

violation of Article 3 of the CRC. They also failed to take into account evidence presented on child abuse by the father. The very fact that of those who received sole custody of the children, 13% were fathers who had actually physically or sexually harmed their children, shows just how little concern there is for the children in Arizona. These court rulings clearly place the children in danger and violate the right to be free from abuse, violence and injury, that they are entitled to in Article 19 of the CRC.

Bias and Discrimination Against Women in the Judicial System

In the data collected by the study, Arizona is shown to be violating several key general civil rights as presented under the UDHR. For example, Article 7, states that, “All are equal before the law and are entitled without any discrimination to equal protection of the law.” When 72% of the women interviewed felt that they were not given an adequate chance to tell their side of the story or to present evidence in support of their case, it is very likely that some bias exists. By comparing this figure to the custody outcomes it seems that there is a high correlation between women not being given enough time to present their cases and custody going to fathers with histories of domestic violence. For instance, of the 19 applicable cases of sole custody, mothers were granted custody of children in only six cases, and of the 14 cases of legal custody, mothers were given custody in only three cases. This clear bias against women also violates Article 14:1 of the UN Covenant on Civil and Political Rights, which demands, “All persons shall be equal before the courts and tribunals.”²⁹³

Another common complaint of discrimination was that the women were discriminated against because they did not speak English. Fifty percent of the women in this study who did not speak English as a primary language said that an interpreter was not available for them in the family court. The fact that half of the women who needed interpreters were not given one by the court indicates that Article 14:3.4 of the UN Covenant on Civil and Political Rights, “To have the free assistance of an interpreter if he cannot understand or speak the language used in court[,]” is violated by the Arizona courts.

The results of the study show that the largest percentage of participants felt that they were discriminated against on the basis of their sex. In the Convention on the Elimination of All Forms of Discrimination Against Women, it is made clear that discrimination against women is not to be accepted by the international community. For example, Article 2(b) states, “To adopt appropriate measures, including sanctions where appropriate, prohibiting all discrimination against women;” and in Article 2(c) “To establish legal protection of the rights of women on an equal basis with men... and to ensure the protection of women against any act of discrimination.”²⁹⁴ Furthermore, in Article 15:1 it is stated that, “States Parties shall accord to women equality with men before the law.”²⁹⁵

²⁹³ United Nations Covenant on Civil and Political Rights, Article 14(1).

²⁹⁴ Ibid.

²⁹⁵ <<http://www.hrweb.org/legal/cdw.html>>

The women involved in this project certainly did not feel that they were being treated equally with their ex-partners in the Arizona family courts. When asked if they felt that they were discriminated against in family court in ways other than for being the victim of domestic violence, 84% of the 21 respondents said, “Yes.” The following is a summary of some of the statements on this topic made during the interviews.

Box 8. Participants Talk About Experiences with Judges – continued

Judge **** uses his judicial power inappropriately to favor Mormons and seemingly to punish women.

Mormon bias was evident by Judge **** decisions; Father’s rights bias apparent by **** (evaluator).

There were issues and concerns that I was unable to raise because I was afraid they would be used against me.

They just made me feel powerless, and it was predetermined that the outcome was to his favor.

A professional witness’ testimony was changed after the judge spoke to this witness in her chambers and told the witness – I’m not going to accept this.

Child sexual abuse, judge didn’t give a chance to discuss domestic violence

Child sexual abuse – Judge **** ordered her “not to tape calls from the girls anymore” – They were played in court and showed children telling the mother of father’s abuse.

(They didn’t listen to) Issues of domestic violence, *** lying under oath; not (allowed) to rebuttal accusations used against me by my husband as times allotted would run out. Judge **** would give more time to husband during hearings, He would not place limits on issues husband would raise, but would limit me.

Judge **** was unwilling to hear ex-partner’s documented history concerning: 1. His domestic violence records 2. His diagnosed manic depression illness 3. His failure to comply with court-ordered attendance at anger management classes 4. His repeated violations of orders of protection 5. The lack of documentation on his allegation’s in August 2001 hearing 6. Lack of the credibility of his witnesses in that hearing.

Economics Rights Are Being Violated in Arizona

The International Covenant on Economic, Social and Cultural Rights, in Article 3, makes clear that it is the role of, “The States Parties to the present Covenant to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” However, when 82% of the women we spoke with said that they feel that their ex-partner has used the courts or the legal process to deliberately harm them financially, the failure of the state to protect these victims is obvious. For many of the survivors, money was a tool that the ex-partners used to continue the abuse. During their relationship, 84% of the mothers interviewed said that their ex-partners had used money to hurt or to control them. The largest category for harming these women was the 72% of women who stated that this harm was carried out through “high legal expenses”.

Another important issue in economic rights has to do with the failure of the state to enforce child support payments, or even to take them into consideration when deciding on custody. Of the 43 cases where child support was ordered, in 37 the men were the payors, in two cases the women were the payors, and in four cases both paid. Of the 41 women who received child support, only 32% reported that the father was in compliance. For many of these women the lack of child support had serious legal and humanitarian consequences. For example, 63% of the women interviewed said that they wanted to hire a lawyer but that they felt it was too expensive.

Another important article of the International Covenant on Economic, Social and Cultural Rights is Article 6, “The States Parties... recognize the right to work... and will take appropriate steps to safeguard this right.” This right is violated by the long and emotionally draining legal battles that these victims are dragged into by their ex-partners as ways of perpetuating the abuse and torture. For example, 79% of all women interviewed who work outside of the home reported missing work to go to family court. The results of this missed time at work were devastating for many of the women. 11% reported losing their jobs, 2 had their pay reduced, 1 was demoted, and several were criticized or warned by their bosses. In addition to the duress caused by missing work, it is important to note that the amount of legal fees paid by the participants of this study were on average upwards of \$34,000.

Arizona Fails in its Responsibility to Help Victims of Torture to Recover

Several of the international laws introduced above make it clear that the state is responsible for providing help for the recovery of the survivors of torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 14, adds that “Each state party shall ensure in its legal system that the victims of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”²⁹⁶ The findings of this study show that this is not the practice in Arizona, where victims of torture at the hands of their partners are forced to continue to suffer physically,

²⁹⁶ Ibid.

emotionally, and financially at the hands of their torturer, who has the support of the state. The CRC phrases this in Article 39, by saying that, “State parties should take all appropriate measures to promote recovery of a child victim of . . . torture.”²⁹⁷ But to the contrary, children who are the victims of abuse are, in many of these cases, put in the custody of their abusers.

HOW TO HOLD THE UNITED STATES LIABLE UNDER INTERNATIONAL LAWS AND NORMS

The following are some suggestions for means of using international law to hold the U.S. and Arizona accountable for failing to meet human rights standards in cases of child custody and domestic violence. It is important here to recognize that although international law is certainly limited, it is by no means insignificant.²⁹⁸ Part of the strength of international law is that in the United States international treaties once ratified have the same weight as municipal laws.²⁹⁹

If the government refuses to react to the human rights violations occurring in Arizona, international law allows for alternative means of addressing the matter. For example, “[T]he International Law Commission of the United Nations classified in Article 19 of the Draft Articles on State Responsibility, ‘a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid’ as an international crime.” Such fundamental human rights, which perhaps also include protection from torture, may even be *jus cogens*.³⁰⁰

We have shown that actions of the Arizona courts are violating human rights and international law, by allowing torture in the form of domestic violence and child abuse to continue. Therefore, the United States and Arizona are liable under these laws to take actions to prevent these human rights violations and to compensate the survivors of domestic violence. Furthermore, the language in domestic laws is not progressive enough to recognize that domestic abuse, forcing children to live with abusive parents, and the psychological harm done to mothers by state actors is torture. Due to these existing limitations on domestic law, it is important that we look to international laws and international norms.³⁰¹

HOPE OF REDRESS FOR PARENTS AND CHILDREN WHO HAVE BEEN VICTIMIZED

Although we do have ways to address human rights violations under domestic law, given the pervasiveness of the problem and the denial that there is even a problem, we

²⁹⁷ Ibid.

²⁹⁸ Dietz, “Violence Against Women in the United States: An International Solution”.

²⁹⁹ United States Constitution, Article VI(2).

³⁰⁰ Dietz, “Violence Against Women in the United States: An International Solution”.

³⁰¹ Dietz, “Violence Against Women in the United States: An International Solution”, p. 562. e.g., we cannot sue for failures involving due diligence in U.S.

can look to international bodies for assistance. There are a number of possible avenues for holding the U.S./Arizona responsible under international law. We believe that the international laws and norms cited above provide ample legal recourse in the international realm to hold the United States, and specifically Arizona, accountable for its violations of human rights. One of the main goals of prosecution would be to hold the “U.S....legally accountable for nonprosecution of violent crimes against women.”³⁰² And because, “A state which violates international obligation is responsible for the wrongful act towards...under certain circumstances, to the international community as a whole[,]”³⁰³ it is possible to address these issues to a number of international bodies. The following list functions as a starting point for obtaining redress for the victims of torture in the United States:

- I. Submit the report to the U.N. Special Rapporteur on Violence Against Women
- II. Submit the report to The CEDAW committee
- III. Submit the report to The World Health Organization that just recognized domestic violence as a major health problem
- IV. Submit the report to The Human Rights Committee (established by the CCPR, and U.S. ratified)
- V. Ask one or more of the above groups to send the report to the prosecutor of International Criminal Court to begin individual prosecutions of those who violate international law and put women and children in danger.

It is our hope that with the involvement of as many of these groups as possible, there will be an improvement in domestic human rights issues, and an end to inaction or denial on the part of the state actors. Once this goal is met then the need for all acts of torture to be illegal under domestic criminal law can be addressed. The need for impartial investigation and for victim compensation and redress can then also be addressed.

CALL FOR ACTION

THE COURT

Training

The need for adequate training is axiomatic. All judges and other court personnel including evaluators, mediators, conciliation court personnel, family court advisors, and *guardians ad litem* should have at least 40 hours of training provided by knowledgeable experts in domestic violence and child abuse before they hear any cases in family law or juvenile court. The training should include education on the developmental stages of children, information on litigation abuse and post separation violence. Additionally, actual on-site visits to shelters and meetings with groups of battered and formerly battered women would prove educational and give the judges grounding in the

³⁰² Dietz, “Violence Against Women in the United States: An International Solution”, p.562.

³⁰³ Dietz, “Violence Against Women in the United States: An International Solution”.

community that they serve. Continuing annual training should be at least 20 hours including four hours in the community.

Procedures

Findings of Fact

Courts are required under A.R.S. §25-403(J) to make detailed findings of fact when custody is contested. However, courts also should be required to make written conclusions of law, including the standard of proof applied in the case, so that the facts they relied on are known and their reasoning is clear. This will result in better decisions.

A mandatory bench book, checklist, computer program or other method should be developed to ensure that all judges follow the legal presumptions and best interest factors and write detailed findings of fact and conclusions of law. Such a procedure would assist incoming judges in the judicial rotation and would ensure consistency and a higher quality of decision-making.

Orders for Custody Evaluation

The need for a custody evaluation should not be presumed when there is domestic violence, child abuse, one parent is in prison or mentally ill, or criminal charges are pending against that parent for abusing that or another child. The presumptions that already exist in the law should be applied. If an evaluation is ordered, the offending parent should be required to pay for it.

Any order for payment should be made into a blind trust fund, which the team members and evaluators bill, so that no one is aware of who has paid the funds. This will eliminate harassment of the less wealthy parent and discrimination against them based on socioeconomic status.

When there is domestic violence, child abuse or child sexual abuse, no single evaluator should be appointed but rather a multi-disciplinary team consisting of experts in domestic violence, child protection and mental health. Others, such as substance abuse specialists, education specialists, parenting experts or a medical doctor, also can provide valuable input. Cause should be shown before a parent or child is ordered to take a psychological examination, which should be done by someone outside the team. This model has been very successful in criminal cases with full service family and child advocacy centers.

When there are allegations of sexual or physical abuse of children, an evaluation should be done by a forensic expert in child abuse investigation and a well-trained detective. The ramifications of a wrong decision are enormous both to the child and the parents. Serious consideration and investigation should be done for the best interest of all concerned.

Legal Representation

In order to allow the financially less well off parent to litigate the case, judges should make early divisions of liquid assets and orders of attorney's fees. Without the funds for an attorney, the less well off parent is severely impacted in attempts to litigate.

Protection of Victims

When there is violence, the offender should be given supervised parenting time as the statute requires. The offending parent should be required to pay for all of the costs of such supervision. The county should continue to seek funds for a supervised visitation center.

When there is violence, there should be no mandatory face-to-face meetings between victim and abuser. On the contrary, orders of protection should be strictly enforced and those who break them held accountable.

Hearing/Trial Priority

Custody cases should be given adequate time to be heard and equal time to both sides. Contested custody cases should not be limited to 20 minutes or three hours. Priority should be given to contested child custody matters allowing the hearings to proceed straight through from start to finish. Litigants who abuse the court process should be sanctioned and not allowed to repeatedly file frivolous cases in an attempt to harass or bankrupt the other parent.

Child Support Orders

Child support awards should be ordered according to the guidelines after verification of income. Enforcement should be far more rigorous in order to avoid plunging the poorer party into poverty. It is not acceptable to give custody to the richer party simply to avoid having the other party need public assistance. That is not the best interest standard and should be stopped immediately. Child support is supposed to be what provides for the child and so it should be ordered in appropriate amounts and enforced with due diligence.

Administrative

Gender Bias Study

The Chief Justice of the state Supreme Court should order a full-scale gender bias study in the courts as was requested in 1992. Thirty-two states have done gender bias studies and all have found bias against women. We cannot claim to have justice if half the population is discriminated against in our courts.

The Chief Justice should also convene a task force of Supreme and Appellate Court judges, Superior Court family judges, family law attorneys, State Bar representatives, advocates, organizational representatives, custody evaluators, experts in domestic violence, child abuse, and child sexual abuse, CPS personnel, and consumers to reform the system.

After the initial gender bias study, there should be an audit every three years that would focus on gender, racial, sexual orientation and ethnic bias, custody and visitation outcomes, child support amounts and enforcement, and litigant satisfaction. Minnesota recently conducted a study of judicial communication. They then used this to improve the communication methods and found that it increased compliance and litigant satisfaction.

Statistics

Better statistics must be kept. The court should keep statistics to know the number of contested and uncontested divorces annually, the number of both that involved custody and visitation disputes, the number that involved allegations of domestic violence and/or child abuse, the disposition of the various types of divorce and custody cases, the number in which multidisciplinary teams and/or evaluators were appointed, the types of recommendations they made to the court, and the number of times the court followed those recommendations. These statistics should be made public, by judge, on a quarterly basis.

Grievance Procedures

Several issues need to be addressed such as the complaint process against judges and evaluators, delegation of judicial authority, and cost. The current complaint process against judges is ineffective. Neither the complainant nor the public has any idea what happens to the complaint. Unless the behavior is extremely egregious, the public never hears about judicial misconduct. Most attorneys and litigants fear making complaints against judges no matter how egregious the behavior because they fear retaliation and some have in fact suffered it.

The Commission on Judicial Conduct must reform their process so that consumers know the results of their complaints and so that judges are held accountable in less than egregious matters. When a complaint is filed against a judge, that judge should be removed from the case and a panel, including consumers, should evaluate the complaint. When a judge has been shown to ignore or violate the law, discipline must be administered, and on a second time, the judge should be removed from the bench.

The procedure to complain about a judge must be posted and available in Spanish and English at every court. When a complaint is filed against a judge, that judge should be removed from the case and a panel, including consumers, should evaluate the complaint before the judge is allowed to continue on that case. If the complaint is found

to be frivolous or for harassment purposes, the judge can continue on the case. A judge who is currently involved in a contested divorce should not sit on the family law bench.

Public Commitment to Reform

We ask the Chief Justice of the Supreme Court and the presiding family judges of the 15 Superior Courts to release a public statement acknowledging that problems still exist throughout the family court system in the handling of custody cases where there has been domestic violence and/or child abuse and expressing the commitment of the courts to rectify the situation through serious and wide-ranging reforms.

The State Bar should modify its ethics opinion that prohibits judges from sitting on domestic violence councils and committees. Judges should be involved with the community. It will help them in understanding the dimensions, dynamics and impacts of domestic violence not only in the lives of litigants but in the society as well. It is not biased for judges to be against domestic violence, which is, after all, a crime. The more the courts know about domestic violence and child abuse, the better they will be able to ascertain the accuracy of claims by both the victim and the perpetrator.

Almost all of the participants in the study felt discriminated against on a variety of factors. That is a violation of Canon 3 and should be taken seriously. The court should fund the Courtwatch program to enable all courts to be observed by impartial observers who will provide checks and balances to the power of the court. The court should establish a panel to review cases. A number of cases can be pulled at random from closed cases and studied by experienced judges, family law attorneys, advocates, evaluators, and consumers who have knowledge of domestic violence, child abuse and child sexual abuse. Video or audiotapes of the actual court proceeding can also be viewed. The parties and the attorney could be interviewed with structured interviews. Such review of a random selection of cases that involve domestic violence would create a quality control mechanism, establish accountability, and provide training scenarios. Everyone would benefit – the court, the judges, the litigants, the children, and the system of justice as a whole.

CUSTODY EVALUATORS/FORENSIC EXPERTS

Training

All evaluators, mediators, conciliation court personnel, family court advisors, and GAL's should have at least 40 hours of training provided by knowledgeable experts in domestic violence and child abuse before they evaluate or work with any cases in family law or juvenile court. The training must include education on the developmental stages of children, information on litigation abuse and post separation violence. Additionally, actual on-site visits to shelters and meetings with groups of battered and formerly battered women would prove educational and give the evaluators grounding in the community they serve. Continuing annual training should be at least 20 hours including four hours in the community.

Procedure

Procedure for Conflicts

Litigants should be afforded a Notice of Change of “expert” as they are Notice of Change of Judge. The appointment of custody evaluators to cases should be randomized so that a few evaluators don’t receive all the cases and judges are not able to choose someone consistent with their pre-existing philosophy. There should also be limits on how many times one evaluator can be appointed in a year. These changes would result in a higher quality of evaluations. The Superior Court mental health committee should establish a certification process for persons wishing to do custody evaluations. Only those certified with the appropriate education in domestic violence, child abuse and child sexual abuse will be allowed to be on the court appointed list. Today there is no guarantee that those on the list have any knowledge of domestic violence or child abuse issues. If an evaluator is currently involved in a contested custody case themselves, they should not be on the court-approved list. Consumers should be on the Superior Court mental health committee that selects the evaluators who are appointed by the court. When a complaint is filed against an evaluator, that evaluator should be removed from the case and a panel, including consumers, should evaluate the complaint before the evaluator is allowed to continue work. If the complaint is found to be frivolous or for harassment purposes, the evaluator can continue on the case.

Procedures for Oversight

Guidelines must be established for who can be an evaluator and what procedure will be followed in all evaluations. All evaluators should follow an established time line and use a standardized format approved by the court for their evaluations to ensure that they are using the proper criteria, following the best interest standards in the law, observing the presumptions in the law, and assessing each side equally without bias. Since the evaluators have quasi-immunity because they are engaging in a judicial process, they must adhere to the law. A standardized report will not only be easier for the court and litigants to understand, but it will ensure that proper procedures were followed and that unscientific theories were not used. Likewise the court should establish a litigant’s rights form to explain the evaluation process and their right to a fair evaluation. The list of rights should include safety measures for victims of violence and the children.

The court should also establish a panel to review cases. A number of cases can be pulled at random from closed files and studied by experienced judges, family law attorneys, advocates, evaluators and consumers who have knowledge of domestic violence, child abuse and child sexual abuse. Video or audiotapes of the actual court proceeding can also be viewed. The parties and the attorney could be interviewed with structured interviews. Such review of a random selection of cases that involve domestic violence would create a quality control mechanism, establish accountability, and provide training scenarios. Everyone would benefit – the evaluators, the courts, the litigants, the children, and the system of justice as a whole.

In addition, the court should create a Commission on Custody and Evaluator Conduct that has meaningful powers of investigation and sanctioning. The members should include domestic violence and child protection professionals and survivors as well as be representative of the diverse population of Arizona. This commission would create protocols, monitor compliance, and monitor continuing education ensuring a high quality of evaluation. The Commission would have the power to remove an evaluator from the court-approved list.

In cases that involve domestic violence, child abuse, or child sexual abuse, the evaluator should be required to submit the final investigation and recommendation to a peer review panel to reduce the likelihood of errors. Such panel should be made up of domestic violence experts. Such a procedure protects both the evaluator and the child.

Guardians ad litem

The role of *Guardians ad litem* should be changed and structured according to the American Bar Association protocol for GAL's and attorneys for children. The ABA has an ongoing project to educate attorneys for children to ensure better representation. If they are to be assigned, they must undergo the same degree of training in domestic violence and child abuse as the judges and evaluators. The cost should be apportioned to the parent who is creating the need for a GAL or attorney. The GAL's should be held accountable through a complaint process as well.

LEGISLATURE

The legislature needs to fund the necessary improvements in the family law system including additional legal services, on-site daycare and at least one victim advocate in every family court. They also need to amend current law to ensure that there are no mandatory face-to-face meetings between victims and abusers and eliminate the "friendly parent" provisions. They need to pass statutes that guarantee that a parent who makes a lawful report of child abuse will not subsequently be punished in family court for making that report. They should pass an affirmative statute that regulates custody evaluators and holds them accountable. They should pass a law that family court judges should investigate and consider the criminal record of the alleged abuser as a presumption against joint or sole custody. They should ensure that legislative committees established to look at family law matters are nonpartisan and balanced.

LAWYERS

Adequate legal representation should be available for litigants in custody cases. It is vital that lack of representation not be the deciding factor in placement of a child. Legal aid needs to be funded at appropriate amounts and should do active litigation of family law cases. Pro bono attorneys need to step up to the plate and see that justice is not a chimera.

Even those who have attorneys have no guarantee they will have a qualified one. “The private bar is remarkably uninformed about domestic violence, and the quality of representation afforded victims by the bar is uneven...”³⁰⁴ Even when the women have attorneys, due process often is violated because attorneys are not well trained in representing victims of violence, even attorneys who are “certified.” To obtain certification as family law specialists, attorneys are not required to have any education or training in interpersonal violence cases. Further, attorneys are a part of the system and hesitate to speak up about abuses especially when done by judges. Many attorneys fear retaliation against them and their clients from that judge in the future so they fail to speak up on behalf of the actual client in front of them now. Likewise, several attorneys assisted in obtaining information for this report, but would not be publicly identified for fear of retaliation.

All lawyers who take family law cases should have specialized training in domestic violence, child abuse, and child sex abuse, especially if “certified” in family law. Such training would teach the attorneys how and why to oppose mediation, psychological evaluations, and theories such as PAS. It would illustrate the use of and cross-examination of experts, interviewing techniques with victims and children, and concepts such as the Stockholm Syndrome. Quality representation should include upholding principles of due process and equal protection and protecting clients from retaliation and unfair processes even when it’s the judge who is doing it. As officers of the court, lawyers have an obligation to report a judge when s/he is not following the law, using proper procedures, or violating the Canons.

EXECUTIVE

The involvement of Child Protective Services is vital to ensure that these cases are properly handled. CPS should not blame the victim of violence but should instead assist the victim and child to find a life free from violence. For that, they need cross training with domestic violence and child abuse advocates so that the three systems work better together.

One problem is that CPS drops the case when the divorce is filed. The victim is then left to fend off the abuser often with no attorney and no money. If the victim then loses in family court, often because CPS has failed to substantiate the abuse, the children are then placed with the abuser. When the abuser next harms the children, CPS removes them and the non-offending parent now loses custody as well. In a recent case in northern Arizona, CPS said they had no justification to testify at the custody trial against the father who then won custody. Two weeks later, CPS came to his home and removed the children because he would not let them inspect the house and they feared for the children’s safety. If they feared for the children’s safety, why didn’t they testify at the custody trial so the abuser did not win custody? Now the mother is left to fight the system alone to try and protect her children.

³⁰⁴ Lemon, 2002, 26.

Within the past year, issues have arisen with the Board of Psychologist Examiners and their treatment of complaints against child custody evaluators. A task force was formed with evaluators, consumers and board members to try to resolve the problem. It has not yet been resolved. Since the Board is an executive agency, the Governor needs to ensure that they are operating within the law and treating complaints against custody evaluators with the same depth they do other cases.

The procedures for appointing and retaining or electing judges should have more public awareness and input. In the counties with merit selection, more consumers need to be included on the selection and evaluation panels. Often when issues of violence are brought to the attention of the committees, they are ignored. At retention and elections, the public needs to have more information about judges such as the statistical information requested in this report in order to make intelligent choices at the ballot box.

A Crimes Against Children Citizen Review Panel should be convened as an appeal process to ensure safe placement. By petition, the panel would review any case in which a child has been placed in the custody of a parent the child has identified as a physical or sexual abuser, where the child's statement has any corroborating evidence. The Panel would create judicial accountability. It would have the power to file a petition for a trial de novo in which the panel's findings would be given presumptive weight in the re-determination of the placement. Providing for independent citizen oversight would have a chilling effect on misconduct by both litigants and court officials, thus preventing the re-victimization of children in family courts.

NEWS MEDIA

The news media must be made aware of the myths surrounding violence and custody and report facts, not myths. Most of the participants felt they were held to a higher parenting standard than the fathers. Both parents need to be held to the same standard. The media should investigate and report on the allegations of discrimination in the courts.

PUBLIC

Likewise the public should realize that they might have myths about the treatment of battered women and children in our courts. Once they realize that, they can do a better job of electing people who really care about children. They can hold agencies accountable for their statutory duties. They can themselves seek positions on the boards and commissions that oversee the processes and actors in the system. If personally involved, they can file complaints against those who violate the rights of victims. They can participate in Courtwatch to hold judges accountable and in the citizen review panel to ensure that children are not placed with abusers.

We call on other organizations to create an urgent action mobilization program that responds immediately in cases where custody is awarded to a batterer. This can include letter writing, a call in campaign and collaboration with the media. We also call

on other organizations to help create a list of good attorneys, evaluators and judges for referral and to assist litigants in filing complaints against system actors who do not follow the law or procedures. We call on the public to support the existing Arizona Protective Parents Network that is dedicated to stopping child abuse including litigation abuse.

The United States says we are a country that values its children. The public must show that they mean it. The children are our future, we must not squander that legacy and put children directly into harms way.

CONCLUSION

Arizona is not alone in this problem. Significant problems have been identified in many different states.³⁰⁵ The recent murder of Crystal Brame, by her estranged husband, Tacoma, WA Police Chief David Brame, is an example of the failure of professionals who should know better to take domestic violence seriously. Though there were many indications that he was an abuser, and these allegations were made public in divorce proceedings, the city attorney said “divorce was none of the city’s business”. His gun was not taken away and the next day he killed his wife and himself. The failure of the legal system to take abuse seriously is deadly. The impact has a cumulative effect, rippling on for generations.

The findings of this study, though exploratory, indicate that the family court system in Arizona is seriously flawed. Certainly neither the state actors nor the public intend it. But because of these flaws, children are put directly into danger. Battered mothers are forced to face continual abuse - physical, emotional, verbal, sexual, economic - and through constant litigation in the court system.

The refusal of the legal system to take domestic violence seriously and the lack of accountability allow the extensive power of the court to become abusive itself. A comprehensive approach including further research, data gathering, public input, and identification of adequate resources is necessary. Our intent was to show the trends and phenomena in the court and we have done that. Our hope was that this research would start a serious dialogue for change that would include the voices of victims and survivors and protect the rights of children. We need all of you to do that. The system should ensure that the goal of the Rule of Law and the promise of our Constitution are met with equality and fairness for litigants and protection for victims. Justice belongs ultimately to the people. We, as citizens in a democracy, must ensure that justice prevails.

³⁰⁵ Just as this report went to press, we received yet another report on the courts: Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community, Women’s Law Project, Philadelphia, PA, April 2003. Their conclusions were that justice is elusive, cases are backlogged, equality, fairness and integrity are undermined, and legal decisions are inconsistent with applicable legal standards and hard to enforce. They concluded that there was a crisis in their Domestic Relations Division and a court in crisis cannot serve families in crisis.

HOW YOU CAN HELP

If you want to help work on resolving the problems identified in this study, please fill in this page, then tear it out and return it to:

Arizona Coalition Against Domestic Violence
100 W Camelback Rd, #109
Phoenix, AZ 85013
602-279-2900
FAX 602-279-2980
Email: acadv@azcadv.org
Website: www.azcadv.org

Name: _____

Address: _____

Phone: _____

Email: _____

I am interested in helping to solve this problem. I can:

_____ Serve on a committee to formulate solutions

_____ Have special expertise to offer

_____ judge

_____ court personnel

_____ lawyer

_____ State Bar

_____ Arizona Psychological Association

_____ psychologist, social worker, mental health worker

_____ lobbyist

_____ fundraiser

_____ computer expert

_____ data base expert

_____ media

_____ investigator, police officer, private detective

_____ writer/editor/newsletter

_____ other (please state)

_____ Can raise or donate money \$25 \$50 \$100 \$200 \$500 \$1,000