

EVALUATING THE EVALUATORS: Research-based Guidance for Attorneys Regarding Custody Evaluations in Cases Involving Domestic Abuse

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Among the most consequential decisions in family law are those involving child custody and parenting time in cases of intimate partner violence (IPV). Decision-makers are increasingly aware that serious harm can result if sole or joint physical custody is awarded to a violent parent, or if children's visits with that parent are poorly supervised (American Psychological Association, 1996; Hayes 2012; Neustein and Leshner 2005; Radford and Hester 2006; Saunders 2015). In both scenarios, children may be re-exposed to IPV or abused physically and psychologically (Hardesty and Chung 2006; Jaffe and Crooks 2007; Saunders 2007). Shared physical custody arrangements and pressures to co-parent also present risks to the non-abusive parent. Harassment, threats, and stalking are common after separation and the risk of homicide increases. Additionally, joint legal custody can be harmful to children and IPV victims even when sole physical custody is awarded to the victim. One scientific review concludes that "Not only are batterers poor decision makers, they also tend to use the power of joint parenting to exert control over the other parent" (Conner 2011, 260). Many abusers use joint legal custody to continue harassment and manipulation through legal channels (Bancroft and Silverman 2002; Hayes 2012; Jaffe, Lemon, and Poisson 2003; Zorza 2010). They can insist on joint attendance at school events or medical appointments, and interfere with a child's counseling sessions, medical procedures, and extra-curricular school events.

Custody evaluations that attend to the effects of IPV on the safety and well-being of both children and parents can be valuable resources for courts in making custody and parenting time determinations in the best interests of children. This article is meant to help attorneys understand the qualifications required of custody evaluators in IPV cases and to assess the quality of evaluation reports. It provides research-based guidance for judging the qualifications of custody evaluators and their reports, including evaluators' assessment methods, education, means of bias reduction, and professional back-grounds. Improving the quality of custody evaluations in IPV cases is likely to lead to increased safety and well-being for all family members.¹

Evaluation Guidelines

Attorneys need to understand that courts and evaluators must set out clear expectations for the form and content of reports, as well as for the processes and methods to be used in preparing an evaluation report. Several professional organizations provide guidelines for evaluators and supervised visitation programs. These are "aspirational" rather than mandatory standards. However, evaluators may be reported to licensing boards for failure to follow ethical standards, including practicing outside their areas of expertise (Keilitz et al. 1997; American Psychological Association 2010; Supervised Visitation Network 2006; Luftman et al. 2005). One agency, Child Abuse Solutions, provides templates that can guide evaluators (<http://www.childabusesolutions.com/>). California statutory and administrative code provisions (California Judicial Branch 2014) require court-based evaluators to provide safety planning, including planning for all family members in the home and workplace. The Association of Family and Conciliation Courts (2016) recently published its guidelines for custody evaluators in IPV cases. The Guidelines emphasize that

- a victim may respond in ways unexpected by the evaluator, but normal in certain contexts;
- coercive behaviors deserve careful assessment and may exist in the absence of physical abuse; and
- children may deny or minimize violence.

The American Professional Society on the Abuse of Children (APSAC 2016) cautions that even with thorough evaluations, the substantiation of child abuse may not be possible:

Professionals need to be mindful that failure to prove interpersonal violence does not prove that violence has not occurred nor (sic) that the child has been indoctrinated by the non-accused parent (9).

"Corroboration" of IPV through official reports can also be extremely difficult, since the majority of victims do not report to the police or health professionals (Barrett and St. Pierre 2011); Tjaden and Thoennes 2000; Kantor and Straus 1990). APSAC further cautions that parental alienation needs to be

defined and assessed carefully. Some ways in which “parental alienation” is misapplied will be addressed in more detail later in this article.

Evaluator Qualifications

In some jurisdictions, attorneys may have input on the selection of custody evaluators. For example, some counties establish approved lists of evaluators from which to choose. The extent of IPV training and relative lack of bias are important considerations in evaluator selection (Keilitz et al. 1997).

It is essential that evaluators have solid training in IPV, since IPV knowledge acquisition is associated with believing that

- IPV is an important consideration in custody evaluations;
- false allegations are rare (which aligns with empirical studies);
- safety must be emphasized over co-parenting; and
- a focus on coercive-controlling violence is important (Haselschwerdt et al. 2011; Saunders, Faller, and Tolman 2011).

Training on post-separation violence and danger assessment is especially important (Saunders, Faller, and Tolman 2011). A guidebook from the National Council of Juvenile and Family Court Judges emphasizes:

Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are now requiring custody evaluators to take a minimum amount of training in domestic violence, that “basic training” by itself is unlikely to qualify an evaluator as an expert, or even assure basic competence, in such cases. (Dalton, Drozd, and Wong 2006, 17).

Another focus of training can involve overcoming negative stereotypes of victims. This may be accomplished by making emotional connections with victims that parallel the beliefs and responses of evaluators who have relatives who are survivors (Saunders, Faller, and Tolman 2011; Saunders and Oglesby 2016). Evaluators with IPV survivors in their families are more likely to believe that IPV is important in custody-visitation determinations and that mothers do not often make false IPV allegations (Saunders, Faller, and Tolman 2011). Hearing from survivors during evaluator training can be done through interactive theater, speaker panels, and documentaries (Saunders and Oglesby 2016). Although it is vital that evaluators understand the impact of IPV on children, it is equally important that they understand the economic and psychologi-

cal traps that hold survivors in or pull them back into abusive relationships. Otherwise, they may tend to blame survivors for harming the child by staying in the relationship. Evaluators need to understand that survivors may also stay because they

- are concerned for the children’s safety if they leave;
- fear financial loss;
- believe the children need their father;
- fear losing custody to a potential child abuser;
- fear harm to themselves and the children from stalking, abuse and/or physical assault; and
- are subject to family pressures (Hardesty and Chung 2006; Hardesty and Ganong 2006).

With increased recognition of different types of IPV, some evaluators are receiving training in differential assessments on which to base their recommendations (See Jaffe and Crooks 2007; Jaffe et al. 2008; special issue of *Family Court Review*: Olson and Ver Steegh 2008; and *Journal of Child Custody*, 2009, Vol. 6). For example, in some cases, IPV appears to be part of pattern of severe coercion-control and severe violence, almost always perpetrated by men, while in other cases, it seems to arise from conflict between the partners and is less severe. The latter type has been labeled “situational couple violence.” It is initiated more equally by women and men, although gender differences in power are still likely to exist. It is also important for evaluators to understand that the coercive-controlling type of abuser consists of two very distinct types (Holtzworth-Munroe et al. 2000): an anti-social type who is likely to have a long criminal history, who is able to let go of his partner at separation; and a borderline type not likely to have an extensive criminal history, but who fears abandonment and seems most at risk to kill his partner (Saunders and Browne 2000).

The National Center for State Courts (NCSC) (Keilitz et al. 1997) further suggests that any roster of court-approved evaluators should reflect the cultural composition of the community and that evaluators should be assessed for misconceptions or biases about IPV. Evaluators can be asked about the methods they use to counter bias and about any trainings on bias reduction they might have attended. Bias reduction training can involve exploration of core values and awareness of implicit bias. Evaluators might be asked whether they follow the recommendations of NCSC, for example to “identify sources of ambiguity and impose greater structure in the decision-making context” and “institute feedback mechanisms” (p. 15). Custody evaluators should also be alert to the common phenomenon of “confirmatory bias” i.e., beginning with a hypothesis and finding facts that fit with it (Gould and Martindale 2007). Other forms of bias can be assessed as well (Drozd, Oleson, and Saini 2013), such as gender bias and uncritical use of parental alienation theories.

Gender bias is of special concern in custody evaluations (Rosen and Etlin 1996) (For a review of gender bias reports see Dragiewicz 2010). This bias is manifest as mistrust of women, including beliefs that they have a propensity to make false allegations of child abuse and domestic violence, which is tied strongly to the belief they try to alienate the children from their father (Saunders, Tolman, and Faller 2013). Sometimes mothers are punished for reporting abuse, given unfair financial settlements, and held to a higher standard than fathers.

Another type of bias is evaluators' uncritical use of parental alienation theories. Erroneous assumptions may be made that allegations, especially from mothers, are likely false and do not need to be investigated, or that parents' motives and mental states can be determined from observations of the children. (For examples of such assumptions in evaluation reports, see Pence et al. 2012). Family violence appears to be much more prevalent in custody cases than parental alienation and offers an alternative explanation for the reluctance of children to visit or live with a parent (Saunders and Faller 2016). Not only are sexist beliefs tied to the tendency to believe that survivor-mothers make false allegations and alienate the children, these beliefs are also related to recommendations that abusive fathers be given sole or joint custody or unsupervised visits (Saunders, Faller, and Tolman 2011).

The National Council of Juvenile and Family Court Judges' guidebook cautions:

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS." Under relevant evidentiary standards, the court should not accept this testimony. The theory positing the existence of "PAS" has been discredited by the scientific community. If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable. Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimizes the impact on children of violence against a parent or pathologizes the abused parent's responses to the violence. (Dalton, Drozd, and Wong 2006, 24–25).

A final consideration in evaluator selection is professional background. Compared with psychologists and other professionals, social workers may bring a broader, systems framework

to evaluations that focuses more on family interactions and community supports (e.g., Lewis 2009). In one study, social workers were more likely than psychologists to make home visits (Horvath, Logan, and Walker 2002). In other studies, social workers were more likely than psychologists to recommend custody to survivors (Hardesty et al. 2015; Saunders, Faller, and Tolman 2011). In one of the studies, social workers were more likely than psychologists to recommend supervised visits for the abusive father in an IPV case vignette and had attitudes more supportive of survivors (Saunders, Faller, and Tolman 2011).

Assessment Of Abuse

Evaluators and their reports can also be evaluated based on the assessment instruments they use. For assessing lethality risk, the Danger Assessment index (Campbell 2003) is the most rigorously validated. Other measures have been developed to assess the risk of repeated severe or non-severe violence (e.g. Ontario Domestic Assault Risk Assessment, Hilton and Harris 2008; and the Spousal Assault Risk Assessment, Kropp 2009 are well validated) (For reviews of measures and protocols see Geffner et al. 2009; Gould and Martindale 2007; Hardesty and Chung 2006). Recently, measures of coercive-controlling behavior have been developed. Problems with evaluation reports occur when they focus on separate incidents of physical abuse without looking for patterns of controlling and coercive behavior, which can cause serious harm even if violence is not present (Beck and Raghavan 2010; Pence et al. 2012). One instrument, "The Mediator's Assessment of Safety Issues and Concerns" (MASIC) (Holtzworth-Munroe, Beck, and Applegate 2010), includes a Coercive Control Subscale, which seems suitable for use in a variety of settings. Evaluators who assess for this behavior tend to create parenting plans with higher levels of safety (Davis et al. 2011); they are also more likely to recommend custody for survivor-mothers (Saunders, Faller, and Tolman 2011). A focus on coercive violence is linked with IPV workshop attendance (Saunders, Faller, and Tolman 2011) and more extensive IPV training (Haselschwerdt, Hardesty, and Hans 2011).

Another key area for assessment is the motive for violence. Survivors seeking help are more likely to use violence in self-defense than for other reasons (Bair-Merritt et al. 2010). However, in custody determinations, a single act of self-defense on the survivor's part might frame the problem as "mutual combat." In cases labeled "mutual combat," violence by either party tends to be minimized or ignored (Pranzo 2013). To determine whether one of the parties is the primary aggressor, each partner needs to be asked about fear levels when subjected to force and to be assessed for post-traumatic stress disorder (PTSD). Many clinical studies show more fear and PTSD in women than men when both have experienced force in the relationship (Hamberger 2005; Hamberger and Larsen 2015).

Despite recommendations that evaluations need to use a variety of methods—interviews, observations, information from collaterals, and official records—some evaluators rely too heavily on psychological testing. In one study, 16% of evaluators relied on a general measure of personality/psychopathology and did not use IPV screening and assessment tools (Saunders et al., 2011). These evaluators were more likely to believe that mothers make false allegations and, in one case vignette, tended to award sole or joint custody to the father. Caution is especially needed when interpreting test scores and survivors' behavior (Dalton, Drozd, and Wong 2006; Dutton 1992; Rosewater 1988) (see, for example, Pence et al. 2012). The National Council of Juvenile and Family Court Judges (Dalton, Drozd, and Wong 2006) cautions:

Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated (21).

Survivors' symptoms of depression and anxiety need to be interpreted through the lens of their trauma histories, specifically as reactions to violence and controlling behavior. The possibility of losing child custody to a known abuser can intensify stress and produce even greater psychological symptoms (Erickson 2006). Evaluators need to be adept at evaluating complex forms of PTSD that include

- difficulty regulating emotion;
- suicidal thoughts;
- explosive anger or inhibited anger;
- variations in consciousness, for example, forgetting trauma and episodes of dissociation (i.e., feeling detached from mind or body);
- negative self-perception such as shame, guilt, stigma, sense of being different;
- perception of the perpetrator as having total power;
- alterations in relations with others, including isolation and distrust; and
- loss of or changes in one's sense of meaning, such as loss of faith and sense of hopelessness and despair (Courtois 2004; Herman 1997).

These symptoms may mimic those of some personality disorders such as borderline and paranoid personality disorders.

Evaluation reports indicate that some survivors' fears underlie their guarded and negative behavior, which may be interpreted as personality flaws (Pranzo 2013). With increased safety, the symptoms of PTSD and depression normally decrease (Erickson 2006).

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Endnote

- 1 This article focuses primarily on male-to-female violence because of the evidence on gender bias and because:
 - women use violence in self-defense more often than men, especially in lethal situations,
 - women are more severely injured physically and psychologically than men as a result of violent incidents,
 - women are sexually assaulted and stalked at much higher rates than men, and
 - women have more difficulty leaving violent relationships than men.

(Hamberger and Larsen 2015; Kimmel 2002; Saunders 2002). In addition, the most rigorous studies show gender disparities (Tjaden and Thoennes 2000). Custody evaluators in one study reported their cases as: 51% male instigator; 17% bidirectional mostly male; 14% bidirectional mutual (both male and female instigators); 11% female instigator; and 7% bidirectional mostly female (Bow and Boxer 2003). See also Pranzo 2013.