

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

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One statement in ***Breaking the Silence: Children's Voices*** that has provoked controversy was my statement that "the studies are showing" that up to 2/3 of accused or adjudicated batterers receive joint or sole custody in court. While no empirical study can definitively determine a universal statistical rate, the key point is that the research consistently shows that accused and adjudicated batterers receive joint or sole custody disturbingly often. This confirms the anecdotal experience of domestic violence attorneys and victims around the country. The following research supports this perspective.

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

The remarkably consistent research on this issue is compiled in my previously-issued statement, *Research Indicating that the Majority of Cases that go to Court as 'high conflict' contested custody cases have a history of domestic violence* (Nov. 9, 2005).

One good example is a study cited by Janet Johnston, a leading researcher of parental alienation, which found that, among custody litigants referred to mediation, "[p]hysical aggression had occurred between 75% and 70% of the parents . . . even though the couples had been separated. . . [for an average of 30-42 months]". Furthermore, [i]n 35% of the first sample and 48% of the second, [the violence] was denoted as *severe* and involved battering and threatening to use or using a weapon."

- Janet R. Johnston, "High-Conflict Divorce," *The Future of Children*, Vol. 4, No. 1, Spring 1994, 165-182) citing Depner et al., "Building a uniform statistical reporting system: A snapshot of California Family Court Services," *Family and Conciliation Courts Review* (1992) 30: 185-206

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

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

- American Psychological Association Presidential Task Force on Violence in the Family (1996) at p. 40.

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

The research on this has only emerged in recent years, and most studies have been small and local. Nonetheless, they document disturbing trends, which surprised even me when I first discovered them.

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

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

The Massachusetts Supreme Judicial Court Gender Bias Task Force was one of the first states to document the gender bias against women in family courts. This court-initiated study expressly

found that “our research contradicted [the] perception” that “there is a bias in favor of women in these decisions.” Moreover, it found that “in determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.” The Court’s study further found that “the courts are demanding more of mothers than fathers in custody disputes” and that “many courts put the needs of noncustodial fathers above those of custodial mothers and children.”

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

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

- Wellesley Centers for Women Battered Mothers’ Testimony Project, *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* (Nov. 2002)(hereafter “BMTP”), *Executive Summary* at 2.

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

- Arizona Coalition Against Domestic Violence, *Battered Mothers’ Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003), pp. 47, 49, 6.

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

- Tracy, Fromson & Miller, *Justice in the Domestic Relations Division of Philadelphia Family Court: A Report to the Community*, DOMESTIC VIOLENCE REPORT, Vol. 8, No. 6 (Aug/Sept. 2003), p. 94.

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

My own survey of the case law in 2001 identified 38 appellate state court decisions concerning custody and domestic violence. The survey found that 36 of the 38 trial courts had awarded joint or sole custody to alleged *and adjudicated* batterers. Two-thirds of these decisions were reversed on appeal. - Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, A.U. J. Gender, Soc. Pol. & the Law, 11:2 (2003), 657-731, p. 662, n. 19, and Appendix.

These cases included a case in which the perpetrator had been repeatedly convicted of domestic assault;¹ in which a father was given sole custody of a 16-month old despite his undisputed choking of the mother resulting in her hospitalization and his arrest;² in which the father had broken the mother’s collarbone;³ had committed “occasional incidents of violence”;⁴ and had committed two admitted assaults.⁵ More such instances can be found in *Meier, supra*.

¹ *In re Custody of Zia*, 736 N.E. 2d 449 (Mass. App. Ct. 2000)

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

³ *Couch v. Couch*, 978 S.W.2d 505 (Mo. App. 1998)

⁴ *Simmons v. Simmons*, 649 So. 2d 799, 802 (La. App. Ct. 1995)

⁵ *Hamilton v. Hamilton*, 886 S.W.2d 711, 715 (Mo. App. 1994)

A multi-state study found that, even in states with a presumption against custody to a batterer, 40% of *adjudicated* batterers received joint (legal or physical) custody. In states with competing (e.g. friendly parent or joint custody) presumptions, only 4% of courts gave sole physical custody to a mother. Morrill et al, "Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother," *VIOLENCE AGAINST WOMEN*, Vol. 11, No. 8, Aug. 2005, 1076-1107.

The American Judges Association has found that approximately 70% of batterers succeed in convincing authorities that the victim is unfit for or undeserving of sole custody. Another way of saying this is that 70% of batterers obtain sole or joint custody.

- American Judges Association, "Domestic Violence and the Courtroom: Understanding the Problem . . . Knowing the Victim" <http://aja.ncsc.dni.us/domviol/page5.html> (at "Forms of Emotional Battering. . . Threats to Harm or Take Away Children")

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

- Arizona Coalition Against Domestic Violence, *Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003), pp. 33-34, 47-49

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

- Neustein & Goetting (1999), "Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse," *Journal of Child Sexual Abuse* 8 (4): 103-122.

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

- BMTP, *supra* at Appendix A.

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

- Gender Bias Study at 831-832 and citing Middlesex Divorce Research Group relitigation study and Phear et al., 1983.

It is likely that a substantial proportion of the fathers in this study had committed domestic violence.

- Meier Statement, *Research Indicating that the Majority of Cases that go to Court as 'High Conflict' Contested Custody Cases have a History of Domestic Violence* (Nov. 9, 2005).

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