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**ONE MORE BATTLEGROUND: DOMESTIC VIOLENCE, CHILD CUSTODY, AND THE BATTERERS' RELENTLESS PURSUIT OF THEIR VICTIMS THROUGH THE COURTS**

**INTRODUCTION**

*He's forced me to go back to court endlessly. I can't remember how many motions we have on our docket. There's got to be 150. Every time I turned around for years, there was another piece of paper coming in the mail from the courts.*

--Sonia, a mother interviewed by the Battered Mothers' Testimony Project<sup>2</sup>

Sonia's story is just one example of common situations faced by women who are escaping abusive relationships.<sup>3</sup> She and her former husband, Michael, fought for custody of their son, Luke. Sonia had police reports “that clearly documented [Michael's] violence against his new wife.”<sup>4</sup> Those reports indicated not only that Michael was abusing his new wife, but also he was abusing her in front of Luke. There was additional evidence that while in Michael's care, Luke had “exhibited severe behavioral problems ... including sexually assaulting a girl.”<sup>5</sup> Sonia made repeated efforts to show the judge and guardian ad litem this evidence:

When we went into court and when Michael was looking for sole custody, I told [the judge] that I felt that Luke was in a violent home and was in danger of being harmed, and [the judge] wouldn't have anything to do with it. He wouldn't listen to me. I had documents there that I wanted to show him but he refused to look at them .... [A] few weeks later, [he] gave Michael sole legal and physical custody of Luke.

**\*1054** I called up [the guardian ad litem] and said, “Did you know [Michael] was arrested for assault and battery, assault with a dangerous weapon, and mayhem and domestic violence on his wife?” and he admitted that he did .... I said, “Please go to the police station and talk to the police. I've had concerns about what's going on.” He refused to go. He refused to call the police station.<sup>6</sup>

In Sonia's case, the evidence was never considered, and she lost custody of her son to Michael. For whatever reason, the court found such evidence irrelevant to its custody determination. Without being present at the hearings or privy to the court records, we don't know all the factors that may have weighed against Sonia's right to custody, however, the court's decision to ignore the abuse altogether is inherently flawed. This case indicates two common problems: an abuser's behavior may be ignored by courts, and an abuser can continue abusing the mother and child in custody proceedings by forcing the mother back into the court "endlessly"--as Sonia described above.

No matter how much we have learned over the years, no matter how many advances are made, domestic violence continues at a staggering rate in the United States. Approximately one-third of women in the United States will be physically assaulted by an intimate partner sometime during adulthood.<sup>7</sup> According to the Department of Justice, one million women are beaten, raped, or murdered by intimate partners every year.<sup>8</sup> And, although survivors<sup>9</sup> of domestic violence have begun to find help through protective orders, enhanced police response, and criminal prosecutions, there is evidence that even these tools are prone to some substantial problems.<sup>10</sup> Additionally, family pressure, lack of financial resources, absence of community support programs, and fear of retaliation keep many women feeling trapped in violent situations.<sup>11</sup>

Sadly too, if children are present in these relationships, they not only witness the abuse (as Sonia's son did), but they often become victims of the abuse themselves. Anywhere between 50 and 70 percent of children growing up in violent homes will be physically abused.<sup>12</sup> Women in these \*1055 situations are inevitably caught in a catch-22. If the woman stays, she risks further abuse to her and her children. On the other hand, separating from an abusive partner may lead to other problems. It is a myth that simply leaving an abuser will solve the problem, that simply getting away from him will free them of the violence. In truth, a woman escaping an abusive relationship has a 75 percent greater risk of severe injury or death than a woman who remains with her abuser.<sup>13</sup>

The high rate of continued physical violence after separation is only one problem a woman may face after escaping an abusive partner. Even if survivors of abuse succeed in leaving their abusers, there is another arena in which an abuser can continue his abuse: family court.<sup>14</sup> If a batterer wants to, he can turn dissolution, child support, custody, and visitation proceedings into a nightmare; he can turn the courts into a new forum that allows his abusive behavior to continue.

If there are children present in the abusive relationship, she is unlikely to give into his custody demands and will continue to fight for her children while they are at risk, *even* after she's given into all of her abuser's other demands during the separation and/or dissolution process. Because of this, survivors of domestic violence who are trying to escape their abusers often find themselves trapped in family courts, trying to retain custody of their children. Sadly, experience shows that they often fail--courts frequently grant visitation and custodial rights to fathers despite a history of violence against mothers.<sup>15</sup>

In fact, abusive fathers are more than twice as likely to seek sole custody of their children as are nonviolent fathers.<sup>16</sup> And, with studies confirming that courts award sole or joint custody to fathers in 70 percent of all custody cases, then statistically speaking, it is undeniable that men who abuse women can and do end up with control over the children after the relationship is over.<sup>17</sup> Thus, family court has become one of the final and often unavoidable battlegrounds between survivors and their abusers.<sup>18</sup> Through a variety of tactics, batterers have found ways to manipulate the \*1056 justice system and abuse the process in order to further coerce and control survivors and their children.

This article examines the unfortunate prevalence and often unpunished abusive behavior perpetrated by batterers in our family courts, what the behavior looks like, and why it continues unabated. Although the focus will be in the family court setting (particularly in visitation and custody disputes), the majority of the discussion is applicable to any part of the justice system where a history of domestic violence is present. In order to understand why batterers use the courts as a forum for abuse, it is helpful to discuss domestic violence generally. Part I provides this background and lays out some of the prevailing definitions of domestic violence. Parts II and III look more specifically at the batterers who engage in this behavior, discussing why they engage in such behavior and what tactics they commonly use to continue abusing their former partners in the courts. Part IV acknowledges that the court may also play a role in failing to address the problem. This section discusses how, in some ways, courts may even foster and perpetuate the abusive behavior. Part V explains the effect that abusive litigation has on survivors and their children. Part VI provides a review of the remedies currently available to both survivors and the courts when batterers abuse the system and explains why these remedies have failed to adequately address the problem thus far. Finally, Part VII suggests a few potential solutions to the problem--ways in which the courts can better utilize these already existing remedies with more focused judicial education and the implementation of more nuanced approaches to family disputes.

An important point to mention at the outset, which will also be discussed again in the final section of the article, is that a tension can arise when trying to address these abusive tactics of batterers. There are ways in which courts and survivors can attempt to proactively address these abusive tactics; however, in trying to control and limit an abuser's behavior, courts and survivors could be, at the same time, violating the batterer's constitutional right to access the courts. Just as the mothers in these \*1057 situations have a right to protect themselves and their children from abusive behavior, the batterers have a right to use the court system as it was intended--as a place to resolve conflict--though that right is not unlimited. In that same vein, judges have a right and a duty to control those who appear before them, but they cannot unduly restrict anyone's access to the courts, particularly in divorce proceedings.<sup>19</sup> So, while judges might be justified in their reluctance to impede a batterer's access to the courts, they also have a duty to ensure fair and just proceedings. Thus, a tension arises between the role of the judges and the rights of the litigants before them.

## I. BACKGROUND

It is commonly accepted among social scientists that “knowing how domestic violence operates is important in understanding how women might succeed in decreasing it.”<sup>20</sup> Therefore, being able to identify and distinguish between types of conflict can help courts differentiate “normal and functional” conflict from conflict that may signal pathology and be dysfunctional, which is especially important where children are involved.<sup>21</sup> If courts cannot distinguish between healthy and dysfunctional relationship behavior, then they might fail to correctly resolve the legal conflicts before them. If a judge does not have the tools, or fails to use the tools that he or she is given, then the likelihood that the judge will provide or facilitate the best resolution decreases.

The old adage “knowledge is power” seems particularly apt in this discussion. To a certain degree, domestic violence--as well as abusive litigation--continue unabated because misunderstandings about the batterer and survivor persist. Therefore, defining and uncovering the underlying problem of domestic violence is a precondition to examining the tensions seen between individuals in the courtroom and why abusers are successful at manipulating the justice system.

In addition to helping frame the problem for this article, knowing what domestic violence looks like will also aid courts in making better decisions \*1058 for families. Again, without this knowledge as our baseline, myths and misunderstandings will only further contribute to the cycle of violence against women and children. For example, some judges believe that a batterer's abusive behavior towards the mother has no bearing on his treatment of the children.<sup>22</sup>

However, statistics already cited above indicate that in a relationship where the mother is abused, there is a strong likelihood (somewhere between 50 and 70 percent) that the children will be abused as well.<sup>23</sup> Providing that information to misinformed judges could certainly lead to fewer abusive fathers obtaining custody of their children; but, at the very least, no matter what the judge's ultimate decision, the judge would be armed with the *correct* information.

Psychologists, scholars, and social scientists agree that domestic violence is defined as “a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics.”<sup>24</sup> “These tactics may include fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets, isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”<sup>25</sup> Domestic violence is about coercive control of another and deprivation of their liberty.<sup>26</sup> This is the advocate's perspective and the accepted definition outside of the justice system.

In contrast, the justice system has narrowly defined domestic violence and limited the types of abuse that can be considered illegal.<sup>27</sup> Most criminal legal definitions of domestic violence focus on the physical aspects of the abuse.<sup>28</sup> It is important to emphasize that physical violence is only one manifestation of domestic violence.<sup>29</sup> Many criticize the justice system's failure to expand this definition of domestic violence to include more than just physical violence and criminal acts, because failure to do so deprives the women in these situations from obtaining protection and remedies.<sup>30</sup> However, while expanding the definition of domestic violence would both acknowledge the fact that nonphysical violence is worthy of a remedy, as well as allow judges to make more accurate assessments of \*1059 clearly harmful and abusive behavior, it may also allow both sides in any civil dispute, particularly those in family court, to use the broader definition to bring unjustified, nagging claims against their spouse. Such a definition might delegitimize or trivialize all forms of domestic violence.<sup>31</sup> This narrow view of domestic violence does, however, present a barrier to women by allowing family courts to ignore certain types of abuse that the court believes do not directly harm the children.<sup>32</sup>

Whether the abuse is physical, sexual, psychological, or economic, each involves distinct acts of control. Aside from some of the more obvious acts of physical violence--which can include hitting, pushing, throwing, restraining, and burning--abusers may pressure, coerce, or physically force women into having sex.<sup>33</sup> Abusers use threats against other family members or children to psychologically intimidate and control the victim.<sup>34</sup> Economic coercion is also a common tactic: controlling family spending, not contributing financially to the family, and controlling the victim's access to resources including money, health insurance, transportation, employment, or child care.<sup>35</sup>

Batterers may use these different acts in distinct ways. Not all batterers appear the same and not all batterers are triggered by the same conditions. Certainly, every relationship that contains domestic violence is unique, even if they all contain common behaviors. And, obviously, not all men who engage in abusive behavior towards one woman will do so in other relationships, nor will they necessarily abuse the children. However, because the tendency towards abuse is present, and because abuse can take so many forms, courts must be vigilant to ensure the safety of the survivor and the children to prevent the abuser from misusing the courts and continuing his abuse.

## \*1060 II. REASONS WHY BATTERERS USE FAMILY COURTS TO CONTINUE THEIR ABUSE



*When a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse. Custody and visitation may keep the battered woman in a relationship with the battering man; on the battleground, the children become the pawns.*<sup>36</sup>

After looking at how domestic violence operates as a mechanism of control, perhaps it is not surprising to discover that batterers manipulate the courts and their victims during dissolution, custody, and visitation proceedings. After all, domestic violence is a *pattern* of behavior that is not easily reversed, so separation alone is unlikely to break the pattern of abuse. There are numerous *reasons* why a batterer chooses to use the courts and the litigation process; many of them are explored below. Before delving into the specific reasons, it is important to discuss the frequency with which batterers decide to participate in family court proceedings.

As mentioned earlier, fathers who abuse are twice as likely to seek sole custody of their children as nonviolent fathers, and notably, abusive fathers are three times as likely to be in arrears of child support.<sup>37</sup> In one recent study in Massachusetts, fifteen of the forty fathers (approximately 38 percent) who sought custody received sole or joint custody of the children, despite the fact that each and every one of these men were reported to have abused *both* the mother and the child/children prior to separation and continued to do so after separation.<sup>38</sup> Thus, before exploring why courts may choose to disregard a history of domestic violence,<sup>39</sup> it is important to note that a history of violence does not stop batterers from obtaining custody. In fact, a history of abuse seems to increase the likelihood that the batterer will seek custody.

So, *why* do batterers use family courts as a battleground at all? What is it about the courts, and family courts specifically, that is so appealing to them?

#### **\*1061 A. Only Available Contact Left**

One of the most obvious reasons batterers use family courts is because it is often the only way they can legally maintain any contact with the survivor.<sup>40</sup> After leaving their abuser, survivors may try to keep their contact information private in order to keep as much distance from the batterer as they can. They may seek formal protection through restraining orders or civil protection orders. They may move without allowing the batterer access to their current address or phone number. However, even if a survivor can achieve this physical distance from a batterer, the batterer may try to initiate contact through the courts by seeking custody of or visitation rights with his child/children. In this way, the courtroom may present an opportunity to prolong contact with the victim or seek contact that is not otherwise available.<sup>41</sup>

As mentioned earlier, not all batterers who abuse the mothers will abuse the children. Certainly, nuanced solutions exist that can provide an opportunity for fathers, even those with a history of domestic violence, to remain in some sort of communication with their children. Every family has unique circumstances that can allow for a variety of solutions; however, because the courts may be the only way and the only forum for abusive fathers to continue abusing their former spouse and children, it is important for courts to take a comprehensive look at each situation and to act carefully if a history of abuse is present.

#### **B. Continuing to Control and Dominate Through Harassment**

After a relationship has ended, the batterer's upper hand is weakened and they no longer have the ability to impose control over their victim. Custody litigation becomes an important “arena through which they seek to re-impose the control and domination” that was lost when the victim left.<sup>42</sup> The justice system becomes one of the few ways that batterers can continue to perpetuate abuse. The dispute over the children allows batterers to reassert themselves as the authority figure in the relationship.<sup>43</sup>

\*1062 Documented evidence supports this theory, showing a high rate of voluntary custody petition dismissals.<sup>44</sup> It is argued that fathers' voluntary dismissals indicate that their petitions were not meant to secure custody rights but were filed for other purposes.<sup>45</sup> Batterers may seek custody simply to remove the child from the mother's care and exert control over her, not out of any genuine desire to care for the child.<sup>46</sup> Studies, anecdotal evidence, and attorneys in the field also support this theory--that fathers will file for custody in order to control, intimidate, or retaliate against the victim for either leaving the relationship, securing a protective order, or starting a new relationship.<sup>47</sup> Family court is just a new way for the abuser to harass and control the victim.

### *C. Easy to Manipulate Pro Se Victims*

An unfortunate fact facing female abuse survivors in family court proceedings is that they are less likely than men to be represented, which places them at a disadvantage.<sup>48</sup> The most common reason why they are without representation is because they cannot afford to hire an attorney.<sup>49</sup> This fact is not surprising, as studies show that the financial situation of divorced fathers improves after a divorce, which places men in a better position to afford representation in the first place.<sup>50</sup> For example, one study noted that the average post-divorce per capita income of wives and children approximates 68 percent of their before-divorce per capita income; whereas, the per capita income of husbands increased by 182 percent after divorce.<sup>51</sup> Another study noted that households of divorced women and children have replaced the elderly as the most likely households to live at or below the poverty level.<sup>52</sup> In the end, the predominantly pro se female litigants become vulnerable targets.

Without an advocate, the abuse survivor is at a tremendous disadvantage in custody proceedings. First, when judges are determining what is in the “best interests of the child,” they will often strongly consider financial security in addition to a series of other factors.<sup>53</sup> Indeed, two well-respected \*1063 researchers in the area of domestic violence have observed cases where “the batter's economic advantages appeared to sway the custody evaluator, who felt that the children would be happier in the more fortunate class circumstances of the father.”<sup>54</sup> Second, regardless of whether the court attaches relevance to this fact, any party who can afford a trained advocate will be at an advantage for several reasons.<sup>55</sup> Statistics show that represented parents are more likely to be awarded physical custody than unrepresented parents.<sup>56</sup> Additionally, without an attorney, pro se litigants have problems navigating the often-confusing court system, determining how and where to file, as well as understanding court procedures and forms.<sup>57</sup> It is also not surprising that mothers might settle cases on terms they consider “detrimental to their children” because they are simply unable to pay for litigation.<sup>58</sup> Without representation, the survivor is placed at a disadvantage--one that is difficult to overcome.

### *D. Lack of Finality to the Proceedings*

Batterers also use the courts as a new forum for abuse because the proceedings can drag on for years; indeed, it is a process that often lacks any sort of finality.<sup>59</sup> Whereas final judgments and settlements end litigation in most other areas of law, verdicts in child custody cases do not put an end to the dispute.<sup>60</sup> A grant of joint custody leads to drafting a parenting plan, forcing parents to remain communicative and cooperative while their children grow up.<sup>61</sup> Parenting plans and visitation rights also remain modifiable for the child's "best interest," which can lead to more court dates and more hearings, if not an additional trial.<sup>62</sup> Similarly, sole custody judgments can be retried if new circumstances arise for one of the parents.<sup>63</sup> In many cases, there are often legitimate reasons to modify parenting plans, and families decide to do so frequently, but such open-ended "resolutions" can also be abused by those who wish to drag their families back into court.

For example, recently, a father in New York petitioned to obtain visitation rights of his children, despite the fact that (1) the children had \*1064 indicated that they did not wish to visit with their father, (2) the father had been convicted of "manslaughter in the first degree for bludgeoning and strangling his estranged wife, the mother of his children," and (3) the father had previously "engaged in a pattern of domestic violence against the mother and children."<sup>64</sup> And, although the New York Appellate Division affirmed the trial court's determination that the evidence on the record was sufficient to determine visitation rights for the incarcerated father were not in the children's best interest, making that determination required filing motions before both the family court and the appeals court.<sup>65</sup> A case such as this, which involves someone so violent, someone whom the children did not want a relationship with, demonstrates how even in such instances, the victims can be dragged back into court again and again.

As demonstrated by this case and the other reasons discussed above, custody litigation presents a unique opportunity for batterers to continue their abuse, and sometimes it is the only opportunity they have left after a survivor leaves them. Now that it is clear *why* a batterer might turn to the family court setting, it is appropriate to examine *how* the batterer might use the courts to further abuse his wife, ex-partner, and/or children. The following section discusses the many tactics that a batterer might use and offers a set of potentially abusive behaviors that courts should look for in cases involving domestic violence.

### III. TACTICS THAT BATTERERS USE IN FAMILY COURTS TO CONTINUE THEIR ABUSE

Perpetrators of domestic violence become very adept at using the legal system as one more tactic of control against the victim, and they do this in a variety of ways. Some of these tactics are used before the parties have officially separated--before they have even begun to resolve their disputes in the courts--but many are used during adjudication of the disputes in family court. Again, the focus of this article will remain in the custody dispute setting.

\*1065 It is important to stress the existence of these tactics because they can easily go unnoticed by the courts. Part V of this article discusses the ways that courts ignore these abuse tactics and how the *system* perpetuates an atmosphere conducive to these tactics; however, acknowledging domestic violence as well as these tactics used by batterers is certainly the first step courts must take. It is an unfortunate fact that professionals in the family court setting may approach claims of domestic violence with skepticism.<sup>66</sup> They might assume that the claims being made are either exaggerated or being used for strategic purposes.<sup>67</sup> Therefore, it is important for court professionals to understand the intricacies of a batterer's behavior. Doing so will allow the court to more carefully and accurately consider the domestic violence claims in the cases before it.<sup>68</sup>

### *A. Manipulating the Children*

Abusers will often seek custody simply to harass the survivor, not out of a genuine desire to care for the children.<sup>69</sup> In this way, children simply become another weapon that batterers can use to further torture their adult victims. A grant of visitation rights to a batterer will often give him access to the mother and a way to continue monitoring her if he cannot get access otherwise. If a batterer does have access to the children, he may manipulate or intimidate them, influencing their statements made to custody evaluators or the courts.<sup>70</sup> “It is not uncommon for a batterer to succeed in persuading the children that *he* is the victim in the adult relationship or that the mother's behavior causes the abusive incidents.”<sup>71</sup>

Further, children in families with an abusive parent may feel neglected by that parent, something the abuser may eventually use to his advantage.<sup>72</sup> If a custody dispute arises and the abusive parent begins to show an interest in the child for whatever reason, that child may be easily swayed or manipulated out of a desire to gain the attention that he or she has been craving.<sup>73</sup> Fear may also play a large part in children's responses to situations that arise in custody disputes due to threats by the abusive parent. \*1066 They might fear for their safety or the safety of their mother; consequently, children might decide not to disclose domestic violence or confirm their mother's claims.<sup>74</sup> In this way, fathers can use either intimidation or newfound attentiveness to manipulate the child and gain an advantage in court.

Being able to manipulate and utilize the children to their advantage, batterers can both sway the court in their favor and continue to abuse the mother. The manipulation and resulting victimization of children, even after an abusive relationship has ended, are discussed in this section first because the court's role in custody disputes is to determine the “best interests of the child.”<sup>75</sup> If abuse existed between the two adults prior to separation, that fact is obviously relevant for the court to consider in determining future custody rights--a determination of which parent provides an environment and a future that is in the child's best interest. And, because the opportunity exists for the abuser to manipulate the children, prior domestic violence should not only be a factor in the court's determination of which environment is the safest, but should also be considered when the children are directly involved in the dispute, either through court testimony or interviews. If domestic violence was present in the relationship, that fact may shed light on the reasons motivating a child's behavior and/or testimony.

### *B. Offensive Tactics: Projecting a Nonabusive Image to the Court*

Emotions obviously run high in custody disputes, and the parents involved will likely display a variety of passionate reactions in the courtroom. Certainly, relationships involving domestic violence are no exception. Batterers may exhibit their aggressive tendencies in the presence of judges or court personnel, and arguments may erupt between the parties, but the batterers-- manipulative by definition--may also use their skills to display a different image than the one described by the victim.

\*1067 By speaking in a calm voice, using sensitive language, and proclaiming love for their children, batterers can persuade evaluators and judges that they are the better parent, a nonviolent parent.<sup>76</sup> Such a simple approach can often be quite effective, particularly since the judges in these cases must assess credibility of the parties to make custody and visitation determinations. Experts in this area of law often describe batterers as being “skillfully dishonest,” convincing “not only other people, but also themselves that they are ‘right.’”<sup>77</sup> In doing so, the batterer can convince himself of his worthiness and portray that confidence and charming persona to the court.<sup>78</sup>

Such a smooth personality can also become even more appealing if the mother is particularly angry or emotional. Although, a mother's anger or her displays of strong emotion may be understandable and justifiable responses to domestic violence and subsequent custody and visitation claims, such reactions could backfire on her in court, especially when the abuser appears calm and rational in comparison.<sup>79</sup>

### *C. Defensive Tactics: False or Exaggerated Accusations Against the Mother*

A batterer may completely deny or turn a mother's allegations of abuse back onto her. Alternatively, he may also find ways to discredit her. He might start by simply denying that the abuse ever took place, that the allegations against him are merely an attempt by the mother to retaliate for an affair he had or a new relationship he is in.<sup>80</sup> In order to deflect blame, he may claim that the relationship involved mutually destructive behavior.<sup>81</sup> To increase credibility, he might also admit to "less serious acts of violence such as shoving [her] or throwing objects."<sup>82</sup> Whatever his tactic, a batterer can portray himself as a gentle and loving father while minimizing or completely denying the claims of abuse. Additionally, there are several ways batterers can claim the *mother's* behavior is to blame.

**\*1068** As mentioned above, abused mothers, for obvious reasons, may appear angry, distrustful, or emotionally unstable in the presence of their abusers. And, in the courtroom, this might be used to the batterer's advantage. By playing to some courts' expectations--that a battered woman would present herself only as victimized or helpless--the batterer may argue in court that the woman's emotional state is proof that the domestic violence claims are false, that she is falsely reporting the abuse because she is angry at him for other reasons.<sup>83</sup>

In cases where the mother has started a new relationship, the abuser might use that fact against her in several ways. Obviously, if the mother has a new partner, the abuser can always make claims that the new partner is the abusive one or has some problematic behavior or trait, and the children would be in danger if the mother, with her new partner in the picture, is given custody.

Also, as uncovered in recent articles and attorneys practicing in the field, it is not uncommon for male abusers to claim that a mother's decision to date a woman is an indication that the children would be placed in an "unhealthy" environment if given to the mother.<sup>84</sup> The male abuser may claim that the mother's "new" sexual orientation or relationship indicates an unstable psychological state or makes her unfit. Certainly, in a country where confusion and ignorance about sexual orientation persists, such allegations by an abuser could be seen as convincing evidence in some jurisdictions that a mother is indeed "unstable" or "unhealthy" even if no evidence--other than the new relationship--would suggest any such problem.<sup>85</sup>

Some batterers also make false allegations that undermine a woman's credibility.<sup>86</sup> These may include baseless accusations of the woman "abusing, neglecting, or kidnapping the children, or denying [the batterer's] visitation rights."<sup>87</sup> In addition, the use of discredited psychological "syndromes" such as Parental Alienation Syndrome (PAS) is not uncommon. According to the doctor that established PAS, Dr. Richard A. **\*1069** Gardner, PAS is supposedly applicable almost solely to women<sup>88</sup> and is a condition in which a psychologically overwhelmed parent, either knowingly or unknowingly, creates misrepresentations of the other parent in the child's head in the hopes that the child will alienate that other parent.<sup>89</sup>



Despite being “untested, unproven, and unreliable,” PAS can and has been used in custody cases to malign the reputation of mothers, portraying them as malicious, hostile, and mentally unstable.<sup>90</sup> Allowing evidence of PAS in custody disputes, unfortunately, might mislead the court when real abuse is present.<sup>91</sup>

Although Gardner repeatedly insists that PAS is never present when there is ‘real’ abuse, he offers no useful guidance in differentiating these cases. Clearly, children who have witnessed one parent battering the other, or experienced abuse themselves, will have negative feelings about the abuser. PAS provides a convenient explanation for behaviors that legitimately might occur in abuse cases ... [and] appeal[s] to an understandable desire to minimize the realities of domestic violence and sexual abuse of children. No one wants to think of a child in pain, especially if that pain is caused by a parent. However, the courts must recognize that by taking [this syndrome] seriously, they send a clear message to abused women and children: Do not come to us because we will not believe you.<sup>92</sup>

Such defensive tactics not only misdirect the court in particular instances but also risk placing the children in these cases with an abusive parent. Regardless of which spurious claim is made by the batterer, the court should remain skeptical of them whenever claims of domestic violence are involved.

#### ***D. Filing Multiple Harassing or Retaliatory Motions and Generally Abusing Court Procedures***

Civil litigants of all backgrounds, not just batterers, may use the courts as a tool to file vexatious claims. As many litigators have undoubtedly found, a commonality among most litigants who abuse the judicial system is the \*1070 filing of a seemingly endless stream of various complaints and motions that amount to harassment, retaliation, or intimidation. Batterers who abuse family courts are no different. Abusers may ask for repeated changes to the parenting plan as a way to both access the survivor and maintain control over her.<sup>93</sup> Even a batterer who sees his children infrequently may file motions to obtain visitation rights during important holidays simply to frustrate and cause emotional anguish for the mother.<sup>94</sup>

One woman's story supports this common occurrence:

There has been no visitation since 1995 because he was sexually molesting [our daughter] on visitation. And she's scared to death of him. But that doesn't stop him from trying to go for visitation constantly to harass us. There's a whole pattern of the next court date, and the motions I go through building up to it, and then actually being there and seeing him, and him stalking me in the halls ... and having to do that week after week, year after year. It just never gets any better.<sup>95</sup>

The effects of such behavior can be emotionally draining on a woman trying to escape her batterer, and as discussed later, these tactics may be the source of financial strain that leaves her without money to fight her abuser in court and may even cost the woman her job.<sup>96</sup> This behavior may not be difficult for courts to spot--as the number of filings in and of itself will provide the evidence--but it may be difficult for courts to determine whether such actions are legitimate or whether they cross the line into harassment or retaliation.

Simply having the wherewithal to recognize the behavior is a necessary first step for courts to take before the abusive behaviors can be addressed. Perhaps, because the judicial system is meant to encourage an individual's access to the courts, courts might not be able to ask the abuser to stop filing motions. But if a court acknowledges that the behavior being exhibited by an alleged abuser seems egregious, it may be able to spot other problematic behavior that *can* be addressed and may, at the very least, allow the court to remain conscious of that potential behavior as the proceedings continue.

**\*1071 E. Providing Inconsistent Child Support Payments or Withholding Financial Support**

Economic abuse is commonly present *during* abusive relationships, and it may continue *after* separation as well. Batterers may use inconsistent child support payments to economically abuse their children and former spouse.<sup>97</sup> They may lie about their job or income in order to alter or hide evidence of their genuine financial status.<sup>98</sup> Moving from job to job is also a common way for batterers to simply avoid child support payments altogether.<sup>99</sup>

As discussed previously, fighting for custody might, in and of itself, be done for reasons other than obtaining rights over the children. A batterer may also seek custody as retaliation for a woman's request for an increase in child support.<sup>100</sup> In turn, a batterer might use a custody battle as leverage to get some trade-off in another area, such as reduction of child support.<sup>101</sup> And, because courts appear to lack vigilance in ensuring the veracity of these financial claims of the batterers, money owed to the mother and children can be withheld indefinitely.<sup>102</sup>

Some women have said that custody and visitation litigation has cost them tens or even hundreds of thousands of dollars in legal fees and court-related costs; others had to resort to food stamps to make up for not getting child support that was due them.<sup>103</sup> Any decrease in financial stability can have wide-ranging effects for a woman, including the inability to adequately provide for her children or to pay for her attorney (if she is fortunate enough to have one), which could possibly be seen by the courts as a sign that she is a poor provider.

**F. Using the Court or Visitation as Opportunities to Abuse or Threaten Abuse**

Court proceedings and visitation, in and of themselves, present actual opportunities for the batterer to physically abuse or threaten physical abuse of his victim.<sup>104</sup> The batterer may threaten violence against the victim or her children, threaten to kidnap the children, follow or stalk the victim, or may **\*1072** even physically attack the victim.<sup>105</sup> Any opportunity for the batterer to be physically present with the victim or her children affords an opportunity for physical violence or threats of such violence. Though there is little doubt that this sort of overt behavior would be dealt with by the court in the event it occurred, it is indeed this type of behavior that should be considered at the outset of custody disputes, not after the event has taken place. Instead of waving off the potential for such an event, the court should consider how it might alter the proceedings or grants of visitation in order to avoid such problems in the first place. Again, recognizing domestic violence at the outset of any dispute will provide the court with better opportunities to protect the parties and children involved.

The tactics discussed above do not represent an exhaustive list; rather, this is an attempt to present some of the more common tactics utilized by batterers and some that often go unseen by courts. Some batterers will use any action to keep the proceedings going. By requesting repeated delays in proceedings and dragging the process out over several years, batterers not only control the court process itself but also show the abused party that they are in control, not the court.<sup>106</sup>

#### IV. ROADBLOCKS TO CHANGE: REASONS WHY AND WAYS IN WHICH COURTS MAY CONTRIBUTE TO THE PROBLEM

Certainly, the justice system has made improvements since the women's movement of the 1960s and 1970s, which is credited with making many of the necessary advancements in the justice system and beyond. In those early years, feminists, many of whom were abuse survivors themselves, “developed the first safe houses and shelters for battered women” in an attempt to provide immediate assistance to women seeking help.<sup>107</sup> Then, the movement began to make systemic changes, focusing not only on the individual assistance needed by abuse survivors but also on changing laws and policies that previously had the effect of ignoring or minimizing domestic violence.<sup>108</sup>

\*1073 However, despite these important strides, huge gaps remain. Some critics aptly compared the improvements over the last thirty years as a movement from the “dark ages” to an “age of partial enlightenment” because, unfortunately, judges continue to be criticized for treating domestic violence claims in a hostile manner.<sup>109</sup> The Wellesley Battered Mothers' Testimony Project (“BMTP”), published in 2002, found that judges commonly treat mothers as “hysterical and unreasonable,” and openly ascribe to biased views against the mother because of her race, ethnicity, socioeconomic status, sexual orientation, or simply because she is not a man.<sup>110</sup>

Obviously, appropriate acknowledgement of domestic violence still presents a giant hurdle to those before the court. Naturally, if courts remain hostile to, or consistently skeptical of, survivors' claims, then any abusive tactics used by batterers during litigation will likely be ignored or simply seen as normal efforts of loving and determined fathers to gain rights over their children. On the other hand, even if domestic violence is acknowledged, the new hurdle becomes convincing the court that the current actions of the batterer are extensions of that abuse and should be curtailed, prohibited, and/or punished.

Therefore, the rules and procedures governing the courts, the judges, and the court personnel present additional problems to survivors; each may act as an obstruction to survivors seeking redress for the problems caused by a batterer's abusive use of the system. If the court is going to recognize batterers' behavior as harmful, these additional obstacles must be addressed as well.

It is important to discuss this aspect of the problem because if the court system is complicit in the actions of abusers, then it acts as another barrier for those hoping to address abusers' manipulation of the courts. So while the following discussion may seem to address broader domestic violence-related concerns present in the courts, it seems impossible to ask courts to address this specific problem that stems from domestic violence--batterers' \*1074 using courts to further abuse their former partner--without first identifying the already existing roadblocks in the system itself. Remedies suggested later in this article only work if the system recognizes *and* can effectively deal with the problem in the first place. Therefore, discussing the tactics of batterers certainly helps identify the immediate problems facing abused mothers in custody disputes with their abusers; however, we must, at the same time, acknowledge how the courts also play a role in furthering the cycle of abuse.

##### *A. Failing to Define Domestic Violence Correctly*

How we *as a society* define domestic violence is one thing; even if social scientists, psychologists, scholars, and even pop culture define domestic violence to include all forms of abuse, that will only go so far in trying to stop the violence.

This definition must also find a place in our courts. The Washington Domestic Violence Manual for Judges makes this point well:

Domestic violence is repeated because it works. It is overtly, covertly, and inadvertently reinforced by all of society's institutions .... [However], the fact that most domestic violence is learned means that the perpetrator's behavior can be changed. Most individuals can learn not to batter when they take responsibility for their behaviors and there is sufficient motivation for changing their behavior. The court plays a strong role in providing perpetrators with sufficient motivation to change, and [it] participates in the rehabilitation process by holding perpetrators, not the victims, accountable for both the violence and for making necessary changes to stop their patterns of coercive control. <sup>111</sup>

So before courts can be expected to tackle the abusive litigation tactics of batterers, they must first acknowledge that these tactics are part of a pattern of domestic violence behavior. Unfortunately, the current statutory definition of domestic violence is extremely narrow in most state schemes, often only providing protection for women and children suffering from \*1075 overt physical acts of abuse. <sup>112</sup> That narrow definition can limit the court from providing adequate remedies to victims who are being further violated in the courts. If a woman suffering from domestic violence cannot obtain an order of protection because the type of abuse she is suffering is not recognized under the relevant statutes, she will not only be without protection--but if she leaves her abuser and ends up in a custody or dissolution proceeding--the court will not recognize the relationship as containing domestic violence. Hence, the inadequate protection in one area of the justice system has immediate and serious effects on her being able to seek protection in related disputes. If she is unable to obtain an order of protection, the court is likely going to view her claim of abuse during a custody dispute with skepticism, because *why*--if she claims she is being abused and those claims are valid--would she *not* be granted an order of protection? A court would conclude that if there is no order of protection, there is no abuse, and therefore, no abusive litigation tactics.

Consequently, if the court fails to properly define domestic violence, and in turn fails to recognize certain types of domestic violence, then it is also unlikely that it will recognize the batterer's abusive litigation tactics. In this way, the justice system's failure to expand the definition of domestic violence will act both as an aid to those batterers choosing to continue their abuse in the courtroom and as a barrier to a victim seeking protection from these tactics.

### ***B. Marginalizing or Failing to See Domestic Violence as Relevant***

It is difficult to imagine why a court would fail to see a history of domestic violence as relevant in a custody dispute, particularly given new research regarding the effects of domestic violence on children. <sup>113</sup> However, not all courts do; in fact, courts may claim that a father who has been and/or continues to abuse the mother will not necessarily abuse the children. <sup>114</sup> The courts may consider the problem as one between the mother and father, not one involving the children. The court may simply ignore the history of \*1076 abuse as irrelevant, despite statutes requiring a court to either "consider" the abuse as a *factor* in its custody determinations and statutes creating a "rebuttable presumption" *against* granting custody to an abusive parent. <sup>115</sup> Unfortunately, there is evidence proving just the opposite-- that even if there was no abuse during the relationship, separation may trigger abuse, and when there has been a "pattern of abuse," the violence is likely to escalate after separation. <sup>116</sup> In fact,

There have been a number of cases where children were killed or harmed for the first time during or immediately following legal proceedings. The violence had been directed at the adult victim in the past,

but when it appears that the adult victim is no longer under their control, some batterers will direct their violence against the children.<sup>117</sup>

And, irrespective of the presence of direct physical abuse before or after separation, children suffer tremendously by simply living with the abuser.<sup>118</sup>

In addition to ignoring or disbelieving claims of abuse, courts may also marginalize or neutralize such claims by blaming both the abuser and the victim for the “mess.”<sup>119</sup> This tendency toward what is referred to as “mutuality” finds both parties at fault for not acting like “mature adults” and, instead, both are berated for bringing their case before the court at all.<sup>120</sup> Even those that advocate for battered women are willing to acknowledge that mothers are not perfect, that abused women carry with them flaws of their own, but there is something different about physical violence-- there is something very different about a batterer's behavior that cannot be blamed on both parties.<sup>121</sup>

Again, this is not meant to advocate or encourage a system that ignores each parent's responsibility for the children in a custody dispute, but rather, it is meant to support a system that emphasizes that domestic violence is different and should not be ignored, marginalized, or blamed on someone else. A court must weigh all factors, certainly, but any analysis must begin with the recognition that domestic violence “impairs, if not destroys, the \*1077 partner's autonomy, holds the mother and children hostage (metaphorically), and allows the father to take power over the other individuals in the family.”<sup>122</sup> In this way, it is inappropriate for courts to hold a woman “mutually” responsible when she is reasonably still in fear of her abuser.<sup>123</sup> The batterer in these situations remains in power and in control of the relationship as well as the family; other flaws a mother may have are not comparable to those of a batterer.<sup>124</sup>

Keeping this differentiation in mind, the court can acknowledge the behaviors of both individuals. The mother/survivor's behaviors, whatever they may be, can be included in the court's analysis. On the other hand, the batterer's abuse is not attributable to the woman in any way. The court cannot use the mother's actions or her failure to act as exculpatory of the batterer's abuse. Each party cannot be blamed for the other's conduct; they are separate. In the end, responsibility for the violence should not be deflected from the batterer but should always be weighed and considered along with the rest of the issues presented in court.

### *C. Combination of Inadequate Resources and the Complex Nature of the Cases Themselves*

Currently, in *all* civil domestic disputes, judges and courts are faced with a very serious fact-finding gap.<sup>125</sup> This gap is created by inadequate resources, a huge volume of cases, a lack of representation, and pressures for settlement, among other things.<sup>126</sup> Place on top of that, the tendency for judges to have strong emotional responses (potentially biased ones) to custody cases in general, and the stage is already set for potential disaster. In addition to these general difficulties faced by courts in custody disputes, domestic violence can add one more problematic factor to the pile. Courts or mediators may acknowledge a history of domestic violence and endeavor to remain mindful of the problems presented by that history; unfortunately, custody disputes in and of themselves are very “murky, ambiguous, and difficult cases that any decision maker, no matter how wise or experienced, \*1078 would find challenging to resolve.”<sup>127</sup> And, therefore, if batterers decide to manipulate the proceedings or the abuse survivor, for that matter, then the factual picture can often become even less clear.<sup>128</sup> Regardless of which piece of a custody dispute presents problems for a particular judge, custody and domestic violence are two subjects that should not be discussed without mentioning the sheer intricacy and



difficulty faced by the decision-making parties. Each of these pieces pushes available remedies a little further out of the reach of victims of domestic violence and their children.<sup>129</sup>

#### *D. Continuing Bias Against Women*

Bias against women continues to pervade many areas of American society, and unfortunately, the legal system is no exception.<sup>130</sup> Judges and evaluators in the courts are not openly claiming that one parent is better or worse simply because of their sex; however, their actions indicate that women are regarded with a certain degree of skepticism when making domestic violence claims.<sup>131</sup> Certainly, custody cases which allow evidence of PAS<sup>132</sup> or similar “parental alienation” theories are in and of themselves proof that courts are willing to accept rejected theories rather than listen to a woman.<sup>133</sup> Theories such as PAS--even if they claim to be gender-neutral--in reality, act as ammunition against a mother claiming abuse:<sup>134</sup>

[I]t is almost unheard of for an evaluator or court to even recognize, let alone penalize a father by limiting access to a child because of his intentionally alienating conduct. In contrast, women who allege fathers are abusing children are increasingly being subjected to draconian punishments, including complete loss of contact with the children.<sup>135</sup>

In addition to this arguably more sophisticated “syndrome” evidence, there is also still the tendency for the courts, either judges or juries, to disbelieve the credibility of a witness simply because she is an abused woman with common symptoms of posttraumatic stress disorder (PTSD); in short, her demeanor leads the court to believe she is unreliable.<sup>136</sup> A \*1079 battered woman may be prone to looking distraught in the courtroom due to the abuse she has suffered, in contrast to her abuser who may be more capable of hiding personality disorders.<sup>137</sup> Female jurors, according to one study, already believe that women are generally “less rational, less trustworthy, and more likely to exaggerate than men.”<sup>138</sup> Add on signs of distress and anger to the average woman, and the tendency for jurors to discredit her testimony will likely increase.

If courts and jurors remain uneducated about domestic violence and its effects on those involved, these same biases--whether enforced by superficial demeanor evidence or more innovative “syndrome” theories--will remain unchanged. Courts and jurors will simply continue to perpetuate the myths and misconceptions surrounding domestic violence by failing to view the parties and their behaviors accurately.

#### *E. Throwback to Old Views of Domestic Violence as a Family Problem and Problems with a Gender-Neutral Approach*

Undoubtedly, the battered women's movement, which began in the 1970s, is the reason that victims of domestic violence can more effectively seek remedies in the justice system, but that system and the policies now in place are not entirely effective at resolving the problem. The lack of progress in recent years has been attributed by some critics to a recent throwback to old conceptions of domestic violence where women were as much or more to blame for the violence inflicted on them--a reversion back to the argument that “domestic violence is a ‘family’ matter, a ‘sick dance’ that is best addressed outside the legal system.”<sup>139</sup> Outside forces and critics of the current statutory scheme are reverting to this old view of domestic violence and encouraging the courts to do the same.<sup>140</sup>

This strain of criticism includes the belief that men are now victims of a domestic violence system gone mad, that women are just as violent, that women are provocateurs, aggressors, psychologically sick, or not credible, and that battered women will simply say or do anything to obtain rights **\*1080** over their children.<sup>141</sup> Some of these beliefs are encouraged by the men's rights movement, which has become disturbingly prevalent in recent years. Proponents of the men's rights movement argue that "the extent of violence perpetrated by men against women is exaggerated and that the criminalization of domestic violence has stereotyped all men due to the actions of a few."<sup>142</sup> This movement should not be confused with the father's rights movement that is made up of advocates and groups arguing "that fathers are subjected to systematic discrimination as men and fathers in a system that is biased toward women and dominated by feminists."<sup>143</sup> While their titles may seem innocuous enough, both groups are seen as a backlash to the feminist movement and offer extreme solutions to the current legal and political framework surrounding domestic violence and the family.<sup>144</sup> Because both movements may offer dangerous criticism and problematic solutions to the current system, they can detract from viable arguments that might be made by fathers who seek positive changes to the current system in order to encourage healthy outcomes for families experiencing separation.

Irrespective of the impetus for these criticisms, insofar as they affect any decision maker's final judgment, they pose yet another barrier to women who are seeking remedies from battering spouses. Victims of domestic violence have enough to face from their batterers, they do not need a system with biased judges, ineffective remedies, or antiquated views influencing the parties or policies meant to protect them.

## V. EFFECTS OF ABUSIVE LITIGATION ON SURVIVORS AND THEIR CHILDREN

*[T]he behavior of men who batter sends a set of destructive ripples through the lives of families, ripples that are far more complex than has commonly been recognized.*<sup>145</sup>

In many ways, the effects of abusive litigation mimic those suffered during the underlying acts of domestic violence; though, there are unique **\*1081** problems associated with the abuse women suffer in the courts. The kinds of tactics used by batterers are only further evidence that if a mother leaves an abusive father, physical separation may only go so far to alleviate the risk of abuse. When the batterer is the legal father of the woman's child/children, his ability to pursue custody and visitation rights directly inhibits the mother's ability to protect herself and her children. If a batterer wants to continue abusing the mother and/or her children, the justice system is one of the few places that a remedy can be found, but if the system is failing her, then where will she go? A mother is forced to continue efforts in court if she wants to truly free herself and her children from the batterer; but doing so may place her and her children in a position where they can, and often do, suffer further abuse before a remedy is received--if a remedy is ever received.

The effects of domestic violence are too far-reaching and complex to fully address here.<sup>146</sup> Thus, instead of delving into all of the intricacies of those effects, this section is an attempt to identify a helpful cross section of those addressed in recent literature.

### A. Effects on the Survivor

A woman trying to escape her abuser is seeking physical distance to guarantee her safety and the safety of her children, but she is also seeking emotional distance from the abuser in order to begin healing. If an abuser decides to seek visitation

or custody of the children, a woman is automatically forced to maintain contact until the court reaches a resolution, something that interferes directly with her desire to escape and her need to heal.

### 1. Emotional Trauma

Being forced back into the courts to determine custody and visitation rights immediately places the survivor in a position where she continues to be under the control of the batterer, a position she made efforts to change. \*1082 So, when an abuser begins to abuse the system by filing multiple pleadings that require responses and hearings, seeking frequent changes to parenting plans, etc., he not only seeks to maintain the control he had, but he also makes the mother susceptible to additional harm.

Assuming the custody or visitation proceedings begin soon after the physical separation, women are left with no time to repair the damage that the original violence caused. And, even if there is time between the separation and the legal proceedings, further contact with the abuser can only open the door to new forms of abuse and feelings of revictimization. The types of tactics used by batterers to continue abusing the mother “tend to maximize emotional trauma.”<sup>147</sup> Memories of past emotional trauma are resurrected when the mother is forced back into the courtroom and may render her “inarticulate or angry, making it difficult for her to express her position during [the proceedings].”<sup>148</sup>

### 2. Financial Burden and Job Loss

The unfortunate reality for most women suffering from domestic violence is that the initial decision to leave her abuser is often dependent on financial security. There are several reasons battered women may decide to stay, but economic dependency is repeatedly cited as the primary reason that women stay with their abusers.<sup>149</sup> In fact, Barbara Hart, an attorney and battered women's advocate, said that “[t]he most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.”<sup>150</sup> Not surprisingly, if a battered woman is able to escape with her children, the prospect of excessive court hearings and filings can place an unbelievable financial strain on her and potentially threaten her ability to support herself and her children.

In her book, *I Closed My Eyes: Revelations of a Battered Woman*, Michele Weldon describes the extensive financial strains of her own experience to show how devastating her abusive ex-husband's court battle \*1083 was on her: “I spent nearly the equivalent of three college educations ... for my children on hearings, motions, pleadings, mediations, complaints, violations, and attempted settlements. And I am still spending. I thought once the divorce was over there would be no more legal battles. I was wrong.”<sup>151</sup> Losing such a significant amount of money not only threatens the immediate security of the battered woman and her child, but it also has secondary effects in the proceedings themselves and on her ability to remain employed.

First, the financial status of each parent will play a role in the court's final custody determination. Generally, the court prefers to place children in homes that show a certain amount of financial stability.<sup>152</sup> If the abuser continues to force the battered woman into court and it causes her financial resources to decrease, this may threaten her custodial rights.

Second, if a batterer continues to harass and burden the mother with excessive filings and hearings, she will lose money and also, potentially, jeopardize her job. Abusive tactics not only cause emotional trauma and deterioration of economic self-sufficiency, they often require the battered mother to appear in court when she should be at work.<sup>153</sup> Some employers may understand the reasons for her absence and allow an amount of leeway in extended or repeated

absences. And some states may even have leave statutes that mandate employers provide time off “to address the effects of domestic violence.”<sup>154</sup> But, even an understanding employer or a leave statute will have limits. If repeated or unexcused absences persist, a woman might lose her job. Losing her job would lead to more than just a difficulty to make ends meet. A mother in that position may be forced to take more than one job, leaving her with even less time to care for her children, which could negatively affect her custody rights.

### 3. Pressure to Settle, or Worse, to Return to the Batterer

Out of fear, the victim may feel pressure to settle or compromise, continuing to believe that the abuse will stop if she simply decreases her \*1084 demands.<sup>155</sup> If the court fails to recognize the problem (i.e., the abusive tactics) and the woman is running out of financial resources or emotional energy, she may resort to desperate measures in order to survive. This might lead to her relinquishing custody of the children, giving up demands for child support, giving in to less desirable resolutions in order to end the fight, or even returning to the batterer out of fear or necessity. A report found that “20 [percent] of battered mothers involved in custody litigation stated that they had returned to the batterer at least once in the past due to his threats to hurt or take the children.”<sup>156</sup>

### 4. Undermines the Mother's Authority at Home

Court proceedings, aside from taking time away from a mother's job or other responsibilities, often take away from her ability to care for her children. The batterer may have this as an intended result. Batterers understand that the less time a mother is able to spend with her children, the more the children will feel neglected and find solace in a father's renewed interest in their lives. Children may be hurt by their mother's neglect and seek affection from the batterer. In this way, abusive litigation tactics not only allow the batterer to assert authority and control over the woman's schedule and life by forcing her into court so often, but such tactics can also undermine her authority as a parent to the judge, evaluators, and even her own children.<sup>157</sup> The court has limited resources. If it appears that the mother is neglecting her children, the father suggests that she is not providing adequate care for them, and the children--not understanding the situation--agree that their mother is absent, the court could be swayed into awarding greater custody rights to the abusive father.

#### B. Effects on Children

*[The court] should not assume that the children are not in physical danger simply because there was not evidence of physical harm in the past. There have been a number of cases where children were killed or harmed for the first time during or immediately following \*1085 legal proceedings. The violence had been directed at the adult victim in the past, but when it appears that the adult victim is no longer under their control, some batterers will direct their violence against the children.*<sup>158</sup>

Even though the abusive litigation tactics appear directed at the mother, often the effects of these tactics extend to the children.<sup>159</sup> Obviously, custody disputes are about the children and their future, so the outcome of the dispute will have immediate implications for them. But, because the abusers are often only using the children as a weapon against their mother in these cases, manipulation of them during the proceedings has both immediate and potentially long-term effects.

### 1. Continued Exposure Increases Risk to Children's Safety and Exacerbates Existing Effects

As just mentioned with mothers, continued exposure to an abuser places children in immediate danger. Even if the abuser has never directed his abuse at the children, post-separation conflict can increase the chances that the child will become the target. In fact, there is a strong probability that a man who abuses his wife will eventually abuse the children. Studies show that between 50 and 70 percent of batterers also abuse the children.<sup>160</sup> And, aside from the possibility that the child may experience direct abuse, children caught in the middle of these custody disputes suffer indirect harm.

Studies indicate that children from violent homes “are more likely to run away, use drugs and alcohol, and attempt suicide.”<sup>161</sup> Because of this data, any court deciding that a history of domestic violence is irrelevant to custody decisions where the abuse has not directly involved the children is *not only* failing to acknowledge the reality--that abuse between parents *does* have an effect on the children--*but it is also* failing to acknowledge the likelihood of future abuse. In effect, any court failing to take domestic violence claims into account where children are involved is acting as an agent of the abuser and contributing to any harm suffered by the children.

### \*1086 2. Modeling Destructive Behaviors

Domestic violence is a learned behavior; it is not caused by stress, anger, alcohol, or behaviors of the abused woman.<sup>162</sup> Because domestic violence is a learned behavior and not one based on biology or genetics, not surprisingly, children who grow up in violent homes have a high likelihood of increased aggression as children and adults. So, if an abusing father continues to abuse the mother through the courts, and the children become pawns in their dispute, the behavior of the parents continues to be a model for the children.

Generally speaking, witnessing abuse can cause an increased likelihood of committing crimes outside the home and of being in a violent relationship, either as an abuser or as a victim.<sup>163</sup> More specifically, male children have a high likelihood of battering intimate partners in their adult relationships.<sup>164</sup> In fact, in one study, 81 percent of men who batter had fathers who abused their mothers.<sup>165</sup> Girls also learn destructive behaviors--but often from the other side. “Girls who are raised in homes with domestic violence may form their images of acceptable male behavior from observing the batterer and, therefore, may not believe that nonviolent or respectful men exist.”<sup>166</sup> Subsequently, when girls grow up, they may seek male partners who mirror the abuse they experienced in their childhood. The reasons for this stem from the idea of “modeled behavior,” and from the common ability of batterers to convince their children that the mother is to blame for the violence. Therefore, when a girl seeks out this abusive relationship as an adult, she has the tendency to self-blame for her partner's abusive behavior.<sup>167</sup> Consequently, women are less likely to seek assistance for abuse in their adulthood if they experienced it as children.<sup>168</sup>

Certainly, while statistics indicate that children are prone to model the behaviors of the same-sex parent, it is also possible that the opposite will happen: male children could exhibit behaviors more typical of the female child--seeking or ending up in relationships where they are abused--and female children could grow up to model their behaviors after the father--  
\*1087 subsequently abusing their partner or children. Irrespective of the outcome, the fact is that both behaviors are unhealthy and both continue the cycle of violence and abuse that exists in too many relationships.

### 3. Interrupting Childhood Cognitive and Psychological Development



In addition to the learned behaviors and safety concerns above, children who witness or experience abuse will suffer developmental impairment in a number of ways. Children may exhibit any of the following behaviors: “eating/sleeping disorders; mood-related disorders, such as depression or emotional neediness; over-compliance, clinging, withdrawal, aggressive acting out, destructive behavior; detachment, avoidance, a fantasy family life; somatic complaints, finger biting, restlessness, shaking, stuttering; school problems; and suicidal ideation.”<sup>169</sup> In addition, children may use aggressive or passive behaviors when faced with particular obstacles, including verbal/physical striking out or withdrawal and compliance instead of more assertive problem solving skills.<sup>170</sup> Since important developmental tasks are interrupted early in these children's lives, their future academic and career achievements may be affected in addition to their relationships and interpersonal skills.<sup>171</sup>

Aside from securing immediate physical and emotional safety, protecting mothers and children from batterers' abuse can help prevent these long-lasting, detrimental effects on both the survivor and her children.

## VI. REMEDIES CURRENTLY AVAILABLE AND WHY THEY FAIL TO ADDRESS THE PROBLEM

*The situation in family courts, and particularly in domestic violence ... cases, cries out for a remedy. While attorneys and clients are always frustrated when judges make legal or fact-finding errors, the pervasive and systemic nature of family court deficiencies is striking. Family courts, particularly those with domestic violence ... dockets, are often dismal places, overcrowded, underfunded, and inhumane in their working conditions and their results.*<sup>172</sup>

\*1088 Currently, the justice system *does* have some remedies in place to deal with the abusive behavior discussed here; unfortunately, these remedies have failed to adequately address the problem and have left battered women floundering and their children caught in a tug-of-war.

If the battering father's behavior is reported by the mother or recognized by the court and is deemed sufficiently abusive to warrant a remedy, the court has several procedural tools available to punish the batterer, punish his attorney, or control the proceedings more directly.

### A. State Sanction Provisions

In federal courts, the judge can discipline any party for filing frivolous or improper claims under [Rule 11 of the Federal Rules of Civil Procedure](#) (Federal Rule 11).<sup>173</sup> The purpose of this rule is to deter the abusive conduct, not to compensate those harmed.<sup>174</sup> Therefore, monetary damages should be limited to “part or all of the reasonable attorney's fees and other expenses directly resulting from the violation,” which leaves the court with limited discretion in assigning monetary sanctions.<sup>175</sup> But, in addition to those monetary sanctions, there are a number of possible alternative sanctions available under Federal Rule 11, including the ability of the courts to (1) strike certain pleadings or claims; (2) issue admonitions, reprimands, or censures; (3) require offenders to participate in seminars or educational programs; or (4) refer the case to disciplinary authorities.<sup>176</sup> However, family courts are state courts, and while many state courts have chosen to enact state rules that parallel Federal Rule 11, the state counterparts vary widely and fall into one of three rough models: “a ‘high threshold’ model that favors the interest of preserving free access to the courts; a ‘low threshold’ model that

favors the interest of reducing perceived litigation abuse; and a 'hybrid' model that borrows elements from both the high threshold and low threshold models.”<sup>177</sup>

Depending upon which of the three models a state's sanction provision follows, a judge trying to impose sanctions on an abusive party may \*1089 encounter hurdles based on the type of provision in place. The “high threshold” model requires a more difficult-to-establish, subjective bad faith standard (or absence of good faith) to be met by judges; therefore, absent some clear evidence that the person (the batterer in these cases) was acting in actual bad faith, the judge is unable to impose sanctions.<sup>178</sup> On the other hand, the “low threshold” and “hybrid” models simply require the judge to use an objective standard (i.e., finding of unreasonable behavior), which can be more unpredictable than the high threshold standard.<sup>179</sup> Regardless of which type of model is followed, the sanction that is most commonly used by the courts is a sanction in the form of a fee award.<sup>180</sup>

Thus, while the type of statute in place may have a profound effect on whether the judge will be able to impose sanctions, the rules are in place, and the opportunity is there. The wide range of possible sanctions under these statutes--despite the predominance of fee awards--and the discretion bestowed upon the courts makes sanctions a prime tool for addressing the abusive behavior of batterers. It allows courts to be creative in finding effective solutions that mere monetary fines may fail to achieve.<sup>181</sup> Additionally, civil sanctions can punish attorneys who enable litigation abuse while also holding the abusers accountable.<sup>182</sup>

The reason that sanctions have not been utilized more frequently or effectively is because courts appear hesitant to use them in most cases, particularly if pro se litigants are involved.<sup>183</sup> However, this is merely the preference or tendency of courts; there is no law or legal mandate requiring such a limited use of sanction provisions. With additional efforts, the door could be open to using this tool more effectively.

### ***B. Inherent Authority of Courts to Restrain Abusive Litigation***

In addition to the above statutory authority, courts have “inherent powers” to discipline an abusive litigant, which “extends to a full range of litigation abuses” and includes the ability to restrict a litigant's filing future lawsuits.<sup>184</sup> As discussed in *Chambers v. NASCO*, courts have the authority \*1090 to punish parties who have “acted in bad faith, vexatiously, wantonly or for oppressive reasons,” but they should do so with restraint.<sup>185</sup>

These inherent powers appear to extend even further than the powers allowed under civil sanction statutes and provides the court with authority to respond uniquely to the cases before it and provide solutions that best meet the needs of the litigants. Though, if courts feel uncomfortable using the sanction statutes, then they are likely to feel similarly here. Again, the challenge will be getting the court to utilize those tools already available to them.

### ***C. Tort Remedies: Abuse of Process and Malicious Prosecution***

It has been suggested that a woman being abused by a batterer in the court system should file a tort claim--specifically either an abuse of process or malicious prosecution claim--to curb the batterer's abusive tactics.<sup>186</sup> These two remedies suggested are meant to directly respond to the failure of sanctions, fees, and fines to adequately compensate the victims of abusive litigation. By filing an abuse of process or malicious prosecution claim, the victim is compensated for the expense and burden suffered from unjustified and spiteful litigation, and the courts are protected from time-consuming

and expensive misallocation of their resources.<sup>187</sup> A further benefit is that these tort remedies are tools that an abused mother can utilize to empower herself in these situations. The mother does not have to rely solely on the court to save her; instead, she can proactively assert herself into a position of relative control in relation to her abuser.

While tort remedies allow courts to compensate victims rather than simply deter abuse, they fail to acknowledge that domestic violence victims being pursued relentlessly through the courts may not want to obtain money as their first choice. Rather, they might simply want to stop the abuse and find a way to quickly resolve the dispute. Additionally, and perhaps more importantly, tort remedies place the mother in a situation that she is seeking to escape: prolonged contact with the batterer. The threat of bringing a tort \*1091 suit may be enough to deter the batterer, but assuming the case has to be litigated, the parties might end up in court for several more years. This is not an outcome that is often desirable to abuse survivors who want distance from the batterer--not more face time in an adversarial dispute that is likely to be contentious, given the claim(s) she is bringing.

Another problem with tort remedies is that they fail to recognize the financial limitations most abuse victims face in custody battles. Finding the money to litigate the custody dispute alone can be hard enough, but having to find additional money for an entirely separate case is not a realistic solution for many victims, unless she can find an attorney willing to represent her on a contingency-fee basis.<sup>188</sup>

## VII. POTENTIAL SOLUTIONS: MAKING USE OF AVAILABLE REMEDIES AND SUGGESTING ADDITIONAL REMEDIES

*Making dramatic structural changes is a significant undertaking, and decision-makers and the public have to be persuaded that the results will be worth the effort. Under present conditions, structural reform of the family courts does not seem likely to pass the test. It is hard to imagine decision makers or the public authorizing funding that would dramatically increase basic ... resources enough.*<sup>189</sup>

Big, expensive solutions are, sadly, unrealistic, particularly given the current state of the economy. An ideal world would provide an attorney for every unrepresented party and a mental health professional with domestic violence expertise advising the court. Although this article does not necessarily need to stay within the confines of real, workable solutions, doing so may provide the courts, domestic violence advocates, and abuse survivors with solutions they can implement immediately. The following is a proposal for several small but integral solutions that would ensure an improved and safer system for survivors and their children.

### \*1092 A. *Recognition and Utilization of Already Available Remedies*

To start with, no matter what solutions are implemented, recognition of the problem--that batterers can and do use the courts to continue their abuse--is the first step. Courts' failure to even acknowledge the problem, despite training, is inexcusable. If the court suspects a history of domestic violence, a thorough examination of the case should be made to guarantee adequate precautions are taken and, more importantly, to ensure that the court is alert to the possibility for future problems, including the use of abusive tactics by the batterer.

Although this seems to be implicit in the second suggestion below regarding increased education, it seems important to point out that we are no longer in the dark ages of domestic violence and may want to stop acting as though judges do not understand--they get it, at some level. Society knows of its existence; judges acknowledge its importance every day, but

somehow domestic violence remains a hurdle for women seeking justice. If the women in these awful situations and their advocates throw up their hands in surrender, claiming the system is stacked against them, it will undoubtedly remain so. Trying to break down the systemic barriers facing them may be the only way for survivors and their advocates to take steps towards addressing these abusive tactics. As with addressing any systemic problem, women and their advocates cannot make these changes alone; they will need the help of the judges, the legislatures, and others outside the legal system in order to be truly effective.

Once a batterer's abusive tactics are recognized, courts do not necessarily require new tools or remedies; they have tools available already. Under their inherent authority or the guidelines set out in state civil sanction statutes, as discussed above, courts already have the ability to punish or restrict the batterers' abusive behavior in a number of ways. The National Council of Juvenile and Family Court Judges has provided a thorough list of low-cost, and fairly simple, but effective, remedies for courts to use when responding **\*1093** to a parent who engages in abusive litigation tactics.<sup>190</sup> Some of the remedies include:

- payment of mother's attorney fees and costs related to responding to excess motions;
  
- reimbursement of mother's lost wages and other similar expenses;
  
- prohibition of any discovery directly involving the children;
  
- ensuring that the abusive parent does not manipulate discovery by requiring relevancy determinations for depositions and other potentially harassing discovery requests;
  
- prohibition of contact between the parties, particularly during visitation exchanges;
  
- prohibition of court appearances without prior court approval.<sup>191</sup>

Similarly, the court may excuse or institute unique options for an abused mother by:

- excusing her from appearing at hearings, unless deemed emergent or necessary or, alternatively, allow appearance by telephone;
  
- ensuring protection of abused family members by providing security or orders limiting the presence of the abusive parent at hearings and depositions.

If the court is made aware of abusive measures being taken by a batterer, it does not need to wait for a request from the mother or for a new rule to be enacted by the legislature, because it has many of the remedies it needs to effectively address this devastating problem.

Certainly though, there is no reason to limit this discussion to addressing the abusive litigation tactics of batterers through existing mechanisms alone. There is always room for improvement and always ways to revitalize \*1094 a system that has become complacent or ineffective at addressing the problem on its own.

### ***B. Increased Education for Courts and Attorneys***

As of 2000, only sixteen states had enacted legislation to authorize or mandate domestic violence education for judges and/or court personnel.<sup>192</sup> Education is imperative. If judges are not educated, if guardian ad litem are not educated, and if domestic violence continues to be deemed either irrelevant or a “private matter,” women and children will continue to suffer. The effects of poor education have been discussed above, but they warrant additional attention here.

Solutions should start with increased education and training for judges and court personnel.<sup>193</sup> Education will help judges and court personnel identify abusive behavior and can effectively reverse the current trend of courts to discredit battered women's stories by minimizing their claims or exculpating batterers through a finding of mutual blame of both parties. “Only by understanding the dynamics of domestic violence, and by stringently examining any psychological evidence offered to minimize or negate the effects of abuse, can a court feel confident that its decision is both fair and safe.”<sup>194</sup>

The Washington Domestic Violence Manual for Judges provides an excellent example of the scope of materials to be included in any training or educational guide.<sup>195</sup> This comprehensive guide provides, among other things, a description of what domestic violence looks like, how it operates, and who it affects; a summary of criminal and civil laws; evidentiary issues that arise; and its effect on all levels of family related disputes including child abuse and neglect claims, dissolution, and custody.<sup>196</sup> Every state should create a similar manual and mandate domestic violence training for its judges--sixteen states is not nearly enough.

### ***\*1095 C. Mental Health Specialist***

Educating those parties already involved will go a long way at reversing the myths and misconceptions that still exist both inside and outside the courtroom. However, even educated individuals may be ill-equipped to deal with the more severe cases of domestic violence. If there is an abnormally extensive or complex history of domestic violence, the courts may consider assigning a mental health specialist to those cases. Again, this might not be economically possible for all cases, but the benefits to both the litigants and the court would be worth it in the more unique cases. Though an expensive option, it is one worth considering.<sup>197</sup>

### ***D. Increased Coordination and Communication***



Communication among judges, connection between databases, and coordination between agencies can help to identify this manipulation when it exists and respond to it quickly and effectively. For example, a database that provides any court with a protection order history could help law enforcement initially determine who the primary aggressor is in a domestic violence incident, which in turn would help reduce the dual arrests and victim arrests common today *and* have the added benefit of providing family court judges with a more accurate and complete history of the domestic violence incidents recorded by the police.<sup>198</sup>

Along those same lines, any improved, streamlined communication between district, superior, or other local courts and family courts through a similar database or other mechanism would ensure more effective handling of abuse cases and allow courts and other state actors to respond promptly to batterers' abusive litigation strategies.<sup>199</sup> As technology improves and the justice system begins implementing more advanced databases across all legal areas, these improvements may become even more viable.

**\*1096 E. Enacting "Leave" Statutes and Improving Those Already Enacted**

Outside of the courtroom, states that do not already have such statutes should enact family leave statutes that allow parents to have a reasonable amount of time off work to address these issues. As discussed earlier, the time it takes to go to court and work out solutions for visitation or parenting plans can be demanding and difficult for working women, particularly those who are acting pro se and, therefore, do not have an attorney to go in their place. Many employers may be supportive and understanding in these situations, but those who are not could retaliate in a number of harmful ways--the worst of which would be firing the mother. Already, a handful of states allow women to take off time to address the effects of domestic violence, but a handful of states is not enough. Parents should be allowed a reasonable amount of time off from work to attend mandatory court hearings, file documents, and address these issues without being punished.

**CONCLUSION**

There is no single solution that will address this problem. Batterers will continue to use the family court setting as a new battleground, a forum where their abuse can continue. However, courts are capable of recognizing the behaviors that abusers might exhibit, and they are capable of trying to determine whether the underlying cause of the abuser's actions is legitimate or not. More importantly, courts have the ability to recognize problems and address them before the women in these situations become further victimized. During child custody disputes and visitation hearings, litigants look to the courts for help in making the best decisions for their families, and if the courts are unable to provide a safe and just environment for those families, then the women and children who have suffered in homes plagued by domestic violence will continue to be placed at unnecessary risk.

While there is no simple, perfect solution to this complex, difficult problem facing our society and the courts, it seems logical that awareness and recognition will go a long way towards ensuring that existing and \*1097 available remedies are applied by the justice system and that new remedies are found, to help ensure that the battered women and children who come to the doors of our courts expecting protection and fairness will not leave in a worse condition than when they entered.

Footnotes

<sup>1</sup> A sincere thank you to David Ward of Legal Voice for bringing this problem to my attention and for staying involved throughout the publication process. I would also like to thank Jane Stoeber at Seattle University School of Law for her

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2 BATTERED MOTHERS' TESTIMONY PROJECT AT THE WELLESLEY CENTERS FOR WOMEN, BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 59 (2002) [hereinafter BMTP].

3 *Id.*; see also Susan L. Miller & Nicole L. Smolter, "Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking, 17 VIOLENCE AGAINST WOMEN 637 (2011) ("Using data from in-depth interviews with women who have exited violent relationships, attorneys, and practitioners/policy specialists, this research note explores the continuation of control as women encounter 'paper abuse' ... [t]he barrage of men's frivolous lawsuits, false reports of child abuse and other system-related manipulations.").

4 BMTP, *supra* note 2, at 22.

5 *Id.*

6 *Id.*

7 Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 148 (2003) (citing the ABA Network, ABA Commission on Domestic Violence, Statistics, available at <http://www.abanet.org/domviol/stats.html>).

8 Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES' J. 38, 39 (1997); "About 75 [percent] of the calls to law enforcement for intervention and assistance in domestic violence occur after separation from batterers. One study revealed that half of the homicides of female spouses and partners were committed by men after separation from batterers." *Domestic Violence Statistics*, AARDVARC (An Abuse, Rape, and Domestic Violence Aid and Resource Collection), <http://www.aardvarc.org/dv/statistics.shtml> (last visited Feb. 25, 2011).

9 Regarding noun and pronoun usage in this article, I have specifically chosen to use gender-specific nouns and pronouns. When I discuss those who have been victims of domestic violence or who have survived domestic violence, I use female nouns and pronouns; when I refer to those who are abusers, batterers, or perpetrators of domestic violence, I use male nouns and pronouns. These genders-specific nouns and pronouns may include "mother" and "father" because the scope of this article revolves around custody disputes and, therefore, those terms are more applicable. My decision to do so is not meant to detract from those cases where the victim is male or the perpetrator is female. This usage reflects the fact that the majority of domestic violence victims are female, and the substantial majority of perpetrators are male. As of 2001, the US Department of Justice reported that of all nonfatal intimate partner violence, 85 percent of victims are women. CALLIE M. RENNISON, U.S. DEPT. OF JUSTICE, INMATE PARTNER VIOLENCE 2 (Feb. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>. In addition to the statistical reasons, this field of study (domestic violence and family courts) tends to be dominated by research focusing on mothers as victims/survivors and fathers as the abusers/batterers.

10 Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1679-87 (2004) (Some women in the Battered Women's Advocacy Movement argue that certain policies for which they fought to be put in place are now revictimizing the women they are meant to protect. In particular, mandatory arrest and no-drop policies currently in place may deter women from seeking help from law enforcement out of fear that doing so may escalate the violence from the abuser because the victims will have no choice once the police officer or prosecutor become involved. These critics also find that these policies may disempower victims by taking power and control over the arrest away from them--a problem that can be analogized to the power imbalance inherent in the domestic violence relationship itself.).

- 11 Smith & Coukos, *supra* note 8, at 39.
- 12 *Id.* at 40; Ver Steegh, *supra* note 7, at 149.
- 13 AARDVARC, *supra* note 8.
- 14 Smith & Coukos, *supra* note 8, at 40. “Family Court” refers to any court handling custody, visitation, and/or child support cases.
- 15 Leora N. Rosen & Chris S. O’Sullivan, *Outcomes of Custody and Visitation When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts*, 11 VIOLENCE AGAINST WOMEN 1054, 1057, 1073 (Aug. 2005). Several authors have also described the government’s mixed messages sent to abused women. Women are encouraged by police and welfare agencies to protect themselves and their children by leaving the abuser, but when they do make those necessary changes, family courts--guided by state statutes--encourage women to negotiate joint custody and visitation plans to keep these abusive men in both their and their children’s lives. Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1369 (Nov. 2005); *see also* BMTP, *supra* note 2, at 22 (Sonia’s story indicates that courts, even when confronted with hard evidence that the father has a violent and abusive history, may chose to ignore evidence of abuse and allow sole custody to be granted to the abuser.).
- 16 Smith & Coukos, *supra* note 8, at 40.
- 17 *Id.*
- 18 *Id.*
- 19 Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 627-28 (1997) (“[A]ny restriction on full access to the courts in a divorce action is presumably invalid.”).
- 20 Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1126 (2009).
- 21 Janet R. Johnston, *High-Conflict Divorce*, 4 FUTURE CHILD 165, 165 (1994).
- 22 *See infra* Part IV(B).
- 23 *See* Ver Steegh, *supra* note 7, at 149 (discussed in the Introduction at n.9); Smith & Coukos, *supra* note 8, at 40.
- 24 Johnson, *supra* note 20, at 1116.
- 25 *Id.*
- 26 *Id.* at 1122.
- 27 “Two-thirds of the states limit civil protective order remedies to those who are subjected to physical violence or other criminal acts under state law. This narrow view of actionable domestic violence deprives women ... of a remedy.” *Id.*
- 28 *Id.* at 1123.
- 29 Leah J. Pollema, Note, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1110 (2007).
- 30 Even some physical violence is not considered severe enough to warrant a woman’s protection under criminal laws. Johnson, *supra* note 20, at 1112.
- 31 *Id.* at 1161.

32 See *infra* Part V(A).

33 WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES 2006, at 2-3 (2007) [hereinafter WA DOMESTIC VIOLENCE MANUAL].

34 *Id.*

35 *Id.*

36 Smith & Coukos, *supra* note 8, at 40 (citing the AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996)); see also LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS, at x (2002) (describing judges and lawyers as the agents of batterers).

37 Smith & Coukos, *supra* note 8, at 40.

38 BMTP, *supra* note 2, app. at 84. The study, entitled the *Battered Mothers' Testimony Project*, was a “multi-year, four-phase study using a variety of research approaches in which human rights fact finding was complimented by qualitative and quantitative social science research methodologies.” *Id.* And, importantly, the study was limited to only forty participants.

39 See *infra* part V(B).

40 Johnson, *supra* note 20, at 1119.

41 Pollema, *supra* note 29, at 1110.

42 BANCROFT & SILVERMAN, *supra* note 36, at 114.

43 *Id.*

44 Rosen & O'Sullivan, *supra* note 15, at 1069 (study indicated that when mothers sought orders of protection (OP), if the OP was granted, fathers dismissed their custody petitions in 81 percent of the cases, and *even* when the OP was dismissed, 58 percent of fathers still dismissed their custody petitions.).

45 *Id.*

46 BMTP, *supra* note 2, at 60; Rosen & O'Sullivan, *supra* note 15, at 1069 (“There is certainly much anecdotal evidence that abusive husbands use the threat of loss of child custody as a way of exerting control over their victims ... [or] to retaliate against the mother for an arrest or for an order to provide financial support.”).

47 Rosen & O'Sullivan, *supra* note 15, at 1069.

48 Ver Steegh, *supra* note 7, at 166.

49 *Id.*

50 *Id.* at 169-70.

51 Marsha Garrison, *Equitable Distribution in New York: Results and Reform*, 57 BROOK. L. REV. 621, 720 tbl.55 (1991).

52 Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 TEX. J. WOMEN & L. 135, 137 (1998).

53 Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 137-38 (2007).

54 BANCROFT & SILVERMAN, *supra* note 36, at 117.

55 Ver Steegh, *supra* note 7, at 167.

56 *Id.*

57 *Id.* at 166.

58 BANCROFT & SILVERMAN, *supra* note 36, at 117.

59 Pollema, *supra* note 29, at 1108.

60 *Id.* at 1117-18.

61 *Id.* at 1118.

62 *Id.* A child's best interest determination in New York, "requires the consideration of factors 'such as maintaining stability for the child, the child's wishes, the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall wellbeing, and the willingness of each parent to foster a relationship with the other parent.'" *Miller v. Murray*, 878 N.Y.S.2d 478, 479 (N.Y. App. Div. 2009). Each state has a statutory scheme for making "best interest" determinations. See Child Welfare Information Gateway, *Determining the Best Interests of the Child* (Mar. 2010), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interestall.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interestall.pdf) (contains a thorough summary of what factors particular states find most important or ones that are common among the most states).

63 Megan Clark, Note, *A Proposal to End Jurisdictional Competition in Parent/Non-Parent Interstate Child Custody Cases*, 28 IND. L. REV. 65, 75-76 (1994) (citing HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 460 (1988)).

64 *Piwowar v. Glosek*, 862 N.Y.S.2d 672, 673 (N.Y. App. Div. 2008).

65 *Id.* Certainly, being incarcerated or committing previous acts of domestic violence does not necessarily mean that an individual should not be allowed contact with his/her children. However, this case and the discussion surrounding it is meant to emphasize that *even* when the children indicated they did not wish to visit their father, *and* the father had brutally killed the mother and been violent with both the mother and children in the past, a father can still drag a family back into court despite that history.

66 BANCROFT & SILVERMAN, *supra* note 36, at 122.

67 *Id.*

68 *Id.*

69 See *supra* Part II(A).

70 BANCROFT & SILVERMAN, *supra* note 36, at 116-17 (describing one incident where a three-year-old boy told a custody evaluator to "Give my dad a chance," and further questioning revealed that the boy did not know the meaning of the expression.).

71 *Id.* at 116 (emphasis added).

72 *Id.*

73 *Id.*

74 *Id.*

75 Rosenthal, *supra* note 53, at 137.



- 76 BANCROFT & SILVERMAN, *supra* note 36, at 122-23.
- 77 Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 690 (2003).
- 78 *Id.*
- 79 *Id.* at 691-92.
- 80 BANCROFT & SILVERMAN, *supra* note 36, at 123.
- 81 *Id.*
- 82 *Id.*
- 83 *Id.*
- 84 Interview with David Ward, Legal and Legislative Counsel, Legal Voice, in Seattle, Wash. (May 25, 2011).
- 85 See generally Shelley L. Bilbrey, *Dancing Nancy: The Harmful and Illogical Dance Among Alabama Courts Over Supervised Visitation Between Gay Parents and Their Children*, 26 L. & PSYCH. REV. 177 (2002).
- 86 BMTP, *supra* note 2, at 60.
- 87 *Id.*
- 88 Smith & Coukos, *supra* note 8, at 41. While PAS theoretically can involve either gender as the perpetrator, Gardner presents PAS as an “overwhelmingly female problem” and finds that “mothers are the perpetrators in 90 percent of the cases” he deems as involving PAS. *Id.*
- 89 *Id.*
- 90 *Palazzolo v. Mire*, 10 So.3d 748, 771-75 (La. Ct. App. 2009) (admitting that, although controversial, evidence regarding PAS & alienation syndrome is relevant to custody determinations); *Goetsche v. Goetsch*, 990 So.2d 403, 410 (Ala. Civ. App. 2008) (allowing psychological evaluation that assessed the child's behavior as possibly PAS related); *In re Marriage of Bates*, 819 N.E.2d 714, 730-31 (Ill. 2004) (holding that trial court's use of PAS was not an abuse of discretion); *McCoy v. State*, 886 P.2d 252, 257-58 (Wyo. 1994). But see *People v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000) (holding that the defendant failed to establish the general acceptance of PAS in the scientific community and in the courts); Smith & Coukos, *supra* note 8, at 39-40.
- 91 Smith & Coukos, *supra* note 8, at 41.
- 92 *Id.* at 41, 42.
- 93 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-48.
- 94 BANCROFT & SILVERMAN, *supra* note 36, at 125.
- 95 BMTP, *supra* note 2, at 59.
- 96 *Id.* Though employers may be sympathetic and allow for time off, not all employers will provide such support. Additionally, if the abuser continues to harass the woman by filing countless motions, an employer's patience may run out.
- 97 Smith & Coukos, *supra* note 8, at 40.
- 98 BMTP, *supra* note 2, at 61.

- 99 *Id.*
- 100 *Id.*
- 101 *Id.*
- 102 *Id.*
- 103 *Id.* at 66. As described by one mother in the report, “I couldn't fight anymore. I couldn't continue because I just didn't have any money left.”
- 104 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-48-49.
- 105 *Id.*
- 106 *Id.*
- 107 Sack, *supra* note 10, at 1666.
- 108 *Id.* at 1666-76 (emphasizing the improved access to protective orders for victims of domestic violence, the changes made by police departments to treat abused women more consistently regardless of whether the abuser was an intimate or a stranger, the changes in police department arrest policies that permitted warrantless arrests for DV misdemeanor offenses or instituted mandatory arrest policies, an increase and aggressiveness related to prosecuting DV cases, and the eventual cooperation between the criminal justice system and battered women's advocates). *See also* ALBERT R. ROBERTS ED., HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICES, PROGRAMS, AND LEGAL REMEDIES, 127-44 (2002).
- 109 Meier, *supra* note 77, at 671.
- 110 BMTP, *supra* note 2, at 36-39.
- 111 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-15.
- 112 Johnson, *supra* note 20, at 1131-32.
- 113 Ver Steegh, *supra* note 7, at 150. *See also* Lucy Salcido Carter, et al., *Domestic Violence and Children: Analysis and Recommendations*, 9 THE FUTURE OF CHILD. 4 (1999), available at [http://futureofchildren.org/futureofchildren/publications/docs/09\\_03\\_Analysis.pdf](http://futureofchildren.org/futureofchildren/publications/docs/09_03_Analysis.pdf).
- 114 Ver Steegh, *supra* note 7, at 169; *see also* Allison C. Morrill, et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1078 (2005); Meier, *supra* note 77, at 667; Smith & Coukos, *supra* note 8, at 40.
- 115 As of 2004, the District of Columbia and forty-nine states had statutes requiring consideration of domestic violence in custody decisions (known as the “factor approach”). *See* Rosen & O'Sullivan, *supra* note 15, at 1074. Also, despite the Model Code's recommendation--established by the national Council of Juvenile and Family Court Judges--that state laws create a presumption against giving custody to perpetrators of domestic violence and the fact that it seems the most sensible thing for courts to do, as of 2005 only twenty-four states have taken this other approach creating “rebuttable presumption” laws. *Id.* at 1055; Morrill, et al., *supra* note 114, at 1079. Certainly, even those states that limit themselves to considering domestic violence as a “factor” in its custody determination is a step up from the antiquated view that domestic violence is irrelevant; however, leaving domestic violence as only a factor places a great deal of discretion in the judges and court personnel's hands. *Id.* at 1071. And, there is evidence that even those states using a “rebuttable presumption” approach may have competing statutes that lead to inconsistent results, particularly where there is a competing statute favoring joint custody. For a more thorough case study regarding the effect of competing statutes, *see generally id.*

- 116 Ver Steegh, *supra* note 7, at 150.
- 117 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-44.
- 118 *See infra* Part V(B); *see also* Ver Steegh, *supra* note 7, at 150.
- 119 Meier, *supra* note 77, at 692.
- 120 *Id.* at 693.
- 121 *Id.* at 695-96.
- 122 *Id.*
- 123 *Id.* at 696.
- 124 *Id.*
- 125 Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary. Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U.J. GENDER SOC. POL'Y & L. 567, 577 (2003).
- 126 *Id.* at 577-80, 582-83.
- 127 *Id.* at 580.
- 128 *Id.* at 581.
- 129 *Id.* at 568.
- 130 Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mother's Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 739 (2005) [hereinafter Goodmark, *Telling Stories*].
- 131 Meier, *supra* note 77, at 687.
- 132 *See supra* Part III(C).
- 133 Meier, *supra* note 77, at 689.
- 134 *Id.*
- 135 *Id.* at 689-90.
- 136 Goodmark, *Telling Stories*, *supra* note 130, at 740.
- 137 Morrill, et al., *supra* note 114, at 1078.
- 138 Goodmark, *Telling Stories*, *supra* note 130, at 740 (quoting Linell A. Letendre, Comment, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 981 (2000)).
- 139 Sack, *supra* note 10, at 1659.
- 140 *Id.* at 1660.
- 141 *Id.* at 1699, 1702, 1739; Goodmark, *Telling Stories*, *supra* note 130, at 744-45.
- 142 Sack, *supra* note 10, at 1700.

- 143 Michael Flood, *What's Wrong with Father's Rights*, in MEN SPEAK OUT: VIEWS ON GENDER, SEX, AND POWER 212 (Shira Tarrant, ed., 2008).
- 144 See generally *id.*; Leora N. Rosen, et al., *Fathers' Rights Groups: Demographic Correlates and Impact on Custody Policy*, 15 VIOLENCE AGAINST WOMEN 513 (2009).
- 145 BANCROFT & SILVERMAN, *supra* note 36, at xii.
- 146 See generally MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK (2d ed. 2008); MARIANNE HESTER, ET AL., MAKING AN IMPACT: CHILDREN AND DOMESTIC VIOLENCE, A READER (2d ed. 2007); Lucy Salcido Carter, et al., *Domestic Violence and Children: Analysis & Recommendations*, 9 FUTURE OF CHILDREN 4 (1999); Cecillia Martinez-Torteya, et al., *Resilience Among Children Exposed to Domestic Violence: The Role of Risk & Protective Factors*, 80 CHILD DEV. 562 (2009).
- 147 JERRY J. BOWLES ET AL., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 22 (2008), available at <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/judicial%20guide.pdf> (last visited Mar. 8, 2011) [hereinafter JUDICIAL GUIDE TO CHILD SAFETY].
- 148 Ver Steegh, *supra* note 7, at 185.
- 149 Sack, *supra* note 10, at 1734.
- 150 *Id.*
- 151 MICHELE WELDON, I CLOSED MY EYES: REVELATIONS OF A BATTERED WOMAN 138 (Hazelden Publishing, 1999).
- 152 Rosenthal, *supra* note 53, at 137.
- 153 JUDICIAL GUIDE TO CHILD SAFETY, *supra* note 147, at 22.
- 154 See generally *State Family and Medical Leave Laws that Are More Expansive than the Federal FMLA*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968> (last visited Mar. 8, 2011).
- 155 Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, 39 JUDGES' J. 21, 22 (2000) [hereinafter Goodmark, *Alternative Dispute Resolution*].
- 156 BANCROFT & SILVERMAN, *supra* note 36, at 129.
- 157 *Id.* at 62.
- 158 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-44.
- 159 Studies show that more often than not abusive relationships involve children. "Slightly more than half of female victims of intimate violence live in households with children under the age of 12." LAWRENCE A. GREENFIELD ET AL., U.S. DEPT OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSE, BOYFRIENDS, AND GIRLFRIENDS 40 (1998), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=694>.
- 160 Ver Steegh, *supra* note 7, at 149; Smith & Coukos, *supra* note 8, at 40.
- 161 Ver Steegh, *supra* note 7, at 150.
- 162 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-15-21.

- 163 Smith & Coukos, *supra* note 8, at 40.
- 164 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-39.
- 165 NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, DIVISION ON WOMEN, *available at* [www.abanet.org/domviol/statistics.html#prevalence](http://www.abanet.org/domviol/statistics.html#prevalence).
- 166 BANCROFT & SILVERMAN, *supra* note 36, at 48.
- 167 *Id.*
- 168 *Id.*
- 169 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33, at 2-39.
- 170 *Id.*
- 171 *Id.*
- 172 Freedman, *supra* note 125, at 601.
- 173 FED. R. CIV. P. 11.
- 174 FED. R. CIV. P. 11(c)(4) states that “A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”; *see also* [Biggs v. Vail](#), 876 P.2d 448, 451 (Wash. 1994) (Rule 11 is “not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.”).
- 175 FED. R. CIV. P. 11(c)(4).
- 176 Kenneth Lasson, *Lawyering Askew: Excess in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 757 (1994) (citing FED. R. CIV. P. 11 advisory committee notes).
- 177 Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanction Provisions*, 21 PEPP. L. REV. 1067, 1094 (1994). Mr. Keeling provides an excellent summary of the differences between the different state sanction models--what the standards are and how those standards effect implementation and deterrence.
- 178 *Id.* at 1100-01.
- 179 *Id.* at 1095-1111.
- 180 *Id.* at 1095.
- 181 David Ward, Presentation at the 30th Anniversary Domestic Violence Symposium: Are We There Yet? Commemorating the Past, Celebrating the Future (Sept. 12-13, 2009) (powerpoint available with author).
- 182 *Id.*
- 183 *Id.*
- 184 *See* John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 471 (1986). The Supreme Court has “clearly established the position that the federal courts have inherent power to impose sanctions on both a party and his attorney who files and pursues a frivolous action ... or one who uses certain procedural actions, including pleadings and motions, to accomplish an improper ulterior purpose.” *Id.* (referring to [Chambers v. NASCO](#), 501 U.S. 32, 44-51 (1991)).





- 185 *Chambers*, 501 U.S. at 44-51.
- 186 Pollema, *supra* note 29, at 1107.
- 187 *Id.* at 1117.
- 188 *See supra* Part 11(C) regarding the limitations of pro se litigants.
- 189 Freedman, *supra* note 125, at 602.
- 190 JUDICIAL GUIDE TO CHILD SAFETY, *supra* note 147, at 22-24.
- 191 *Id.*
- 192 Morrill, et al., *supra* note 114, at 1081.
- 193 Goodmark, *Telling Stories*, *supra* note 130, at 719; *see also* Smith & Coukos, *supra* note 8, at 54.
- 194 Smith & Coukos, *supra* note 8, at 39.
- 195 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33. The WA Domestic Violence Manual provides, among other things, a description of what domestic violence looks like, how it operates, and who it affects; a summary of criminal and civil laws; evidentiary issues that arise; and its effect on all levels of family related disputes including child abuse and neglect claims, dissolution, and custody. *See also* Johnston, *supra* note 21, at 179 (regarding principles courts may consider when domestic violence is present in custody cases); Ver Steegh, *supra* note 7, at 198-203 (suggests certain mediation techniques that can be utilized in domestic violence cases).
- 196 WA DOMESTIC VIOLENCE MANUAL, *supra* note 33.
- 197 *See* Johnston, *supra* note 21, at 178 (noting that no known studies have evaluated the effectiveness of these kinds of approaches).
- 198 Sack, *supra* note 10, at 1731-32.
- 199 BMTP, *supra* note 2, at 62.

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