
EDITORIAL

Child Protection and Child Custody: Domestic Violence, Abuse, and Other Issues of Child Protection

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ABSTRACT. A child's need for safety should trump any and all other considerations in family law. Child-service agencies cannot be expected to both promote reunification and child protection simultaneously. The author asserts that legislatures need to change the laws such that it is clear to the court that children come first and that safety is paramount. Although visitation between child and parent is considered to be a fundamental right, this right can and should be abrogated when initial evidence

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shows that such contact poses a risk of danger to the emotional or physical health and safety of the child. A new and specially trained court dealing only with issues of family violence and abuse may need to be considered. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2004 by The Haworth Press, Inc. All rights reserved.]*

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Courts should employ a child-centered, protective strategy in child custody cases involving allegations of child maltreatment and domestic violence, and such a strategy must be grounded in a complete understanding of the impact of violence on children. Issues of child physical, sexual, or emotional abuse and domestic violence frequently arise and remain during the pendency of custody and visitation litigation. Courts are confronted with having to make temporary awards of custody and orders regarding visitation, often on little evidence, long before either party puts on its complete case. Parents' constitutionally protected rights to due process and to parent one's children may compete with the welfare of the children and the need to balance the potential harms of erroneous decisions. The policy mandate for reunification of the family outlined in various statutes and employed by both the courts and child protective service agencies foster a system that does not serve to protect children. These public policies and statutes should be reviewed and revamped as they relate to child protection regardless of whether custody is an issue before a court.

Recent public incidents, as exemplified in Newark, New Jersey with the death of Faheem Williams at the hands of his caregiver (and abuse of others in the family), and even more recently in Woodbridge, New Jersey with the death of 3-year old Amir Beeks by a minor, underscores that the child protective system is not working. In each of these cases, child protective services was involved but the system failed. Child protection policy needs to be examined as a public health concern and cannot be repaired in a piecemeal fashion. Numerous statutes make clear their intention to safeguard the emotional and physical welfare of its youngest citizens so that children's welfare is fully protected. Also, a state may make it possible for individuals with knowledge or information indicating that a child may be abused or neglected to file complaints for child protection.

Courts entrusted with overseeing the welfare of children can and should provide protection in the form of limited, supervised contact, or no contact on a temporary basis while allegations are investigated, even prior to a preliminary hearing in child custody/visitation cases. Thus, public policy considerations for preservation of the emotional and physical health of the child may fore-

close a parent from co-parenting or having any contact with the potentially offending parent or guardian. States would then be affording child victims the identical relief from the perpetrator that is often given to adult victims of family violence under domestic violence statutes.

Prevention of domestic violence laws throughout the country recognize that violence is a serious crime against society. Many have policies recognizing a correlation between adult family violence and child abuse. It is well understood that children, even when they are not physically assaulted, suffer serious emotional effects from exposure to family violence. Domestic violence statutes often permit the granting of temporary relief to adults, without notice to the offending adult, because of the great risk understood to be involved where there is domestic violence. Thus, to give children this identical relief is appropriate.

There are also laws that recognize the dangers posed to children by the potential for recidivism by sex offenders and other offenders who commit predatory acts against children. Sex offender registry systems have been created to assist the protection of children. These acts recognize the significant devastating effects on children when perpetrators of sexual violence are parents of the child. All states make it a crime if a parent causes or permits a child to engage in a prohibited sexual act or other sexually prohibited and offensive acts. Thus, whoever the state charges with child protection must act in concert with all statutes designed to protect children and ensure their best interests are preserved.

Issues of abuse arise in several ways. They may arise in the context of domestic violence and custody/visitation disputes, and/or they may be brought to the attention of the courts by an abuse complaint through an agency designed to protect children. Parents or other persons interested in the child may originate an abuse and neglect case on behalf of a minor child. That is, schools, state agencies, mental health professionals, and other individuals may bring abuse/neglect of children to the attention of the agency.

In stark contrast to the aforementioned policies and laws is the policy often enunciated by custody laws and requirements for judicial decision-making in child custody cases. These considerations often require a court to ensure frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and express public interest to encourage parents to share the rights and responsibilities of child rearing. This is so even where adult violence has been recognized and adjudicated.

Although the safety of the child or parent from the physical abuse of the other parent, history of domestic violence (if any), and parental fitness are often among the factors that must be considered by trial courts in making a custody determination, the paramount concern for safety of the child is conspicuously absent and may even appear to be overwritten in the requirements as it regards custody and visitation decisions. There is a fundamental legal principle that requires that laws be construed so as to not conflict with each

other. To enforce this policy would require courts to apply the protective public policies to child custody and visitation cases. Thus, when a parent's right to have access to his or her child is in conflict with the child's need for safety from that parent, the child's need for safety should take precedence. Until policy is altered to make clear that protection of children in all contexts from abuse, violence, and neglect is critical to promote their best interests, and policy and laws are set forth to make clear that the safety of children is the mandate of child protective services and the court, the system fails our youngest citizens and compromises their welfare.

Viewing the notion of best interests for children should change from balancing the parents' interests to a view through the eyes of a child. Children as citizens should be afforded rights that are guaranteed under the U.S. Constitution: The very first sentence of the Fourteenth Amendment makes clear that a person's age is not relevant as all persons born or naturalized in the United States are citizens of the United States, and the states are not permitted to pass any laws that abridge their privileges nor are the states allowed to deprive them of life or liberty without due process, nor deny them equal protection.

Children, having no power of their own, must rely on the state in its role as *parens patriae* to secure those rights and afford them those protections and safeguard their welfare. To give meaning to the notions of prevention from abuse, the right of children to be safe and secure in their homes should be given more weight than the weight of a parent's right to raise them. However, the underlying premise in many statutes is that the child's best interests lie in his return to his home. Perhaps the underlying question should be what the agency can do to secure a child's rights to be safe and secure, and to prevent that child from suffering future physical and/or emotional abuse.

Parents who allege victimization of themselves or their children before or during custody or visitation litigation frequently run into a wall of disbelief from the child protection system, legal system, and even their own attorneys. Many victims of domestic violence will not disclose their experiences or their fears for their children out of concerns for retaliation by the batterer, shame, or a belief that they will not be believed and might even lose their children. Trial courts must determine the custody/visitation plan that serves the best interests of the child by considering a number of factors. The trial court may also consider any other facts or conditions determined to be relevant to the unique facts of the individual case. Upon the initial raising of child abuse or maltreatment allegations to the trial court in a custody/visitation matter, numerous protections afforded victims and children of parents who are victims of domestic violence are not reiterated in all custody statutes.

Even where statutes do not provide specific procedures for the court to follow when allegations of child maltreatment are alleged in a divorce action, procedures for abuse should be followed. The court has the authority to make findings as to the occurrence of child maltreatment by a parent and can make

such findings at preliminary stages of a custody proceeding in order to ensure the safety of the child.

There is no reason for a court to treat allegations of child maltreatment or domestic violence raised in a custody case differently from those brought before it by an agency of child protection. The risks of harm to a child whose abusive parent continues to have access are known and are no less severe because they are raised in the context of a custody dispute. If similar sworn-to allegations made by a parent or guardian would warrant the court's removal of a child from a parent pursuant to child protective laws, the identical remedy should be afforded the child and imposed by the trial court in the context of a custody/visitation action. The child's safety should be no less guaranteed. By construing the custody statute in light of the principles and procedures outlined in child welfare laws and domestic violence statutes, children will be assured more protection and their best interest more certain.

Under custody statutes, proof of the occurrence of child maltreatment or domestic violence is generally a subsidiary fact that contributes to the court's conclusions about factors such as parental fitness. These factors themselves are subsidiary findings that form the basis for the trial court's determination of the ultimate issue—the best interests of the child. To ensure best interests of a child, the fact of abuse and its impact on the child is what is critically relevant.

Concerns of child abuse and domestic violence are not less likely to be unfounded when first raised in the context of custody/visitation. Protections against domestic violence should not end because someone is in a custody or visitation dispute. In fact, in some states domestic violence restraining orders, once granted, cannot be removed by motion of an abuser without going before the court and demonstrating good cause for dissolving the order. It is irrelevant to child protection whether domestic violence is raised before, during, or after a divorce. Whenever domestic violence is found, a court can never lose sight of the fact that each time the parties are before it, there is a perpetrator and a victim. The right to due process does not alter the basic fact that a victim and perpetrator are before the court, even long after a restraining order has been granted. In some states harassment is given equal effect as violence; for example, in New Jersey it is the public policy for the court to give maximum protection to all victims of domestic violence. Yet children are not given the same protections as adults despite the recognition of the severe and long lasting impact of violence on children.

It is incompatible for a court to consider a parent's ability to communicate and cooperate in matters relating to the child where there has been family violence or child abuse. We would no more require a victim of stranger violence to communicate after an attack than we would require a child victim of sexual assault by a stranger to face his molester again. The society would express outrage if known public victims such as Elizabeth Smart were required to meet with her alleged abductor because the trauma is clear. To protect these victims, no direct communication between a victim and his/her abuser is appropriate

and should not be required. Likewise, it is no more appropriate just because the perpetrator is a family member.

Domestic-violence-sensitive knowledge and language by the court is imperative, not just at a domestic violence hearing but even years later, as these matters may continue to be before the courts. For example, while it may be ordinary for a judge in a custody/visitation dispute to attribute wrongdoing equally for engaging in divorce litigation, it is an error to do so where there has been a finding of domestic violence. When equal blame is attributed in the face of domestic violence, the motivation of perpetrators to use child custody litigation as yet another way to control and intimidate their victims is reinforced and unwittingly sanctioned by the court. No victim of stranger violence would be required to schedule visitation or expected to speak with that individual to work out anything at any time. Yet, picture a scenario where an abuser has threatened to kill a domestic violence victim or her children, and the victim is later seen as recalcitrant if she resists working out visitation issues during a divorce. While judges wonder why a victim is still saying she is frightened when there has been no incident of violence in a long time, scenarios such as this are a daily occurrence in family courts.

The constitutionally protected right of citizens to parent their children is recognized by states and interpreted under the First and Fourth Amendments to the United States Constitution. This right, though not specified, is derived from the court's judicial gloss placed on the privacy rights implicit in the First Amendment (religion, free exercise, speech); the Fourth Amendment (right to be secure in their persons and houses); the Fifth Amendment (no deprivation of life or liberty without due process); and the Ninth and Tenth Amendments (enumeration of certain rights, no denial of other rights retained by the people, and powers not delegated . . . are reserved to . . . the people), all of which are secured through the Fourteenth Amendment, which places restriction on state action.

The Legislature can modify language to try to make a child's safety a serious concern, but so long as a child protective service agency is intertwined with maintaining parents' rights, it cannot unravel the inexorable problem: the conflicting nature of its dual mandate. As they stand now, these agencies tend to be responsible for monitoring themselves. Their function is to try to keep a family together and to reunify the family after its members have been separated as well as assisting in plans for future child placement where a child is removed from the home. Ultimately, despite obligations to reunify the family, these same agencies may be designated as responsible for the care, custody, guardianship, maintenance, and protection of children.

Unfortunately, the clear message is that safety is merely a concern to be considered, and this allows children to be placed at risk. Child service agencies cannot be expected to both promote reunification and child protection simultaneously any more than a prosecutor could be expected to defend someone he is prosecuting. Moreover, legislation does not have specific standards to ensure

prevention of further injury while facilitating the goal of maintaining the familial relationship. It is axiomatic that the best predictor of future behavior is past events. If a parent harmed a child, he is at risk of harm with that parent in the future.

In 2002, the Division of Youth and Family Services (DYFS), closed the case in Woodbridge of one child who killed another child. DYFS, New Jersey's child protective service agency, had provided services and counseling to this family. Clearly it was not enough. Did they see the abuse in the family? Was a child mimicking a parent? Did the child really need to die? The dichotomy is clear: Children are not truly paramount and risk of harm is tolerated.

The language often used by judges flows naturally from the requirements of our custody statute regarding equal access and other provisions. It may also result from a bias that because violence has occurred in a family setting, its impact is less severe or less traumatic. When a court does this it is actually placing the setting of the family ahead of the presenting issue. For example, when a victim of domestic violence or a protective parent hears admonishments by the court regarding failure to communicate with her abuser about a child or her unwillingness to cooperate with visitation plans she believes are dangerous to herself and to the child, the victims hears the message that her victimization and that of her child is not believed or not worthy of the court's concern. Under these circumstances, a victim may be inhibited and intimidated, and may fail to present her concerns to the court. The perpetrator hears the same admonishments to the victim, and may feel empowered. The sum effect is to neutralize and disregard the victims' very real experiences of violence and the effect of such violence on their functioning, leaving victims at risk for further harm. Instead, the court should be mindful of the potential that a perpetrator may use custody/visitation as a continuing means of control against his victim.

We sometimes hear divorcing parties in litigation over custody referred to as warring parties. No criminal court would think of a victim and her assailant as warring parties when in court, regardless of how many years before the assault had occurred. A teller who robbed a bank would never be told not to rob again and be allowed to go back to work as a teller. Yet every day judges permit batterers to return to work as parents, requiring child victims to visit with a parent who perpetrated domestic violence on their mothers. A victim of harassment or assault by a stranger would never be expected to have an ongoing relationship with her perpetrator. The suggestion would be seen as absurd in the context of stranger violence. It is just as unthinkable to require parents to agree and cooperate, or to ensure frequent and continuing contact with both parents, when there has been domestic violence; however, courts too often do not make that distinction. Every day, parents who are victims of violence are required to send their children to be with their abuser.

A victim of violence in family court may be sanctioned if she fails to send a child who witnessed this assault to visit with the perpetrator. This is true even

if the child does not want to go. In part, this happens because the court has not integrated the language of conflicting public policies, and in part because a parent's right to parent is protected. Frequently, judges express more outrage at the impact of a child not seeing a parent than they do to the impact of the abuse. Evaluators sometimes accuse these parents of non-existent syndromes and judges rely on their assertions prior to trial, sometime expounding that the mere separation between parent and child causes serious damage to the parent child relationship, all the while ignoring the damage done to the child by the abuse. All too frequently, the protective parent is accused and blamed by the courts for creating a rift between the abusive parent and the child witness or victim of violence. Little or no attention or blame is placed on the offending parent because their parental rights are at stake. In doing this, the child's rights and need for protection may get lost.

More than sensitive language is required. Competent risk assessments should be mandated. Family court judges have the authority to order risk assessments. Well-trained professionals should only do these assessments with adequate knowledge of family violence and its impact, and should make recommendations without regard of the welfare of anyone but the child being assessed. Such risk assessments should be routinely ordered when domestic violence is raised. In addition, a similar approach should be used when the allegations concern child maltreatment of any type, since ongoing visitation between the perpetrator of child abuse and the child victim can result in ongoing victimization and intensified trauma. Continuing use of risk assessments during custody/visitation litigation, even long after a violent act, would be another way for a court to convey to parties its recognition of the long-term impact of domestic violence and child maltreatment.

Proof of parental unfitness may require not only establishing that the parent engages in violent or threatening behaviors or cannot parent because of a mental illness or substance abuse problems, but also that the parent's conduct has a substantial adverse effect on the child. Statutory provisions that remove discretion by the judge should be promulgated by legislatures to ensure that knowledge of the impact of such abuse on a child with the public policy of child safety is the court's chief concern. Accordingly, if the standard of proof is met, then the proof itself should be sufficient to assume adverse effect. To do otherwise makes a mockery of the clear and stated public policies.

More than 80% of victimized children were victimized by their parent or parents, yet much child maltreatment goes unreported and undetected. All forms of child maltreatment—physical abuse, sexual abuse, neglect, and psychological maltreatment—harm children, and may do so permanently. For these reasons, it is critical that courts take actions to minimize the risk of harm to children who come before them caught in custody disputes. The first step is to give the benefit of the doubt to the alleged victims and to take actions to protect vulnerable children.

Although visitation between a child and parent is considered to be a fundamental right, this right can be and should be abrogated when initial evidence shows that such contact poses a danger or a risk of danger to the emotional or physical health and safety of the child. There is no known psychological profile of a parent who causes physical injury to a child, and abusive parents are in every culture and social strata of our society. Regardless of the background of the particular perpetrator, procedures in place by the child protective and domestic violence statutes should be required to be followed in custody/visitation matters whenever these issues are raised by a parent.

Sometimes child abuse is part of a pattern of family violence in a home. Victims must initially be believed and supported by the court with adequate protections imposed. If child protective measures imposed by child protective statutes were required to be used by courts, then financial disequilibrium of the family would be less relevant and the others issues in the family circumstance could be acknowledged without putting the children at further risk.

While much has been made in recent years of the supposed high frequency of allegations of sexual abuse in child custody cases, survey research has demonstrated that such allegations are raised in a very small percentage of contested custody cases; however, these cases frequently garner a disproportionate share of attention and resources. In addition, false allegations occur at a similar rate in these custody cases than in cases of sexual abuse in general. In New Jersey, for the purpose of Family Court cases, sexual abuse of a child renders the child an "abused child" when the abuse is committed by or allowed to be committed by a parent, guardian, or other person having custody and control of the child. Unlike other forms of child maltreatment, the perpetrator of sexual abuse may already have a relationship of trust and acquiescence with the victim.

Because there is no way to predict which children will suffer to what degree, and because the use by an adult of his or her inherently more powerful position to exploit a child is wrong and a crime, prompt and complete protection must be afforded to these victims. Protective parents should not have to fear that a court will be skeptical because issues of sexual abuse arise during litigation. The court in a custody/visitation matter should integrate all of the protective policies available whether or not a parent files a specific and separate abuse complaint.

Visitation between a child and parent is considered to be a fundamental right that can be abrogated only when such contact poses a real danger to the emotional or physical health and safety of the child. Given the broad discretion of the court that hears a child custody matter, a wide array of potential actions are available, including court-ordered risk assessments, supervised visitation, no-contact orders, appointment of counsel for the child, and so on. All of these actions are consonant with child protection of child victims. When courts further integrate this public policy stance with state of the information concerning the debilitating effects of exposure to violence and maltreatment, the rationale

for limited, supervised contact or no contact between a perpetrator and his or her child victim becomes obvious.

The detrimental nature of contact where a child has been emotionally, physically, or sexually injured by a parent, at least until the child is healed and feels fully protected and safe, should be assumed by the court no differently than it would be with stranger violence. It is only with the actual implementation of all policies designed to protect children, together with the vast knowledge available to our courts, that children's best interests will be protected in the context of custody and visitation disputes.

Unfortunately, even if child protection came before parental rights, a child may still go unprotected. Consider the case where an agency is involved but does not substantiate abuse or does not seek court intervention. Assume further that for any number of reasons, an investigation is improperly done. Investigatory and decision-making powers of child protective agencies are broad and are also sealed from public review. Thus, there is no ongoing public accountability.

One must wonder whom this policy is protecting. The most fundamental rights of due process are at issue when a protective parent disputes a finding of "not substantiated," which then is relied upon by the court and the case is subsequently dropped. The adversary system requires opposing positions to have information and to be able to challenge available information. Cross-examination is said to be the searchlight for the truth. In the case where a complaint of abuse is actually filed, law guardians rely often on agency investigations. So they too go unchecked. As long as these investigations are not subject to public or private scrutiny, flaws are less likely to be found and challenged and the adversary system of justice is aborted. No death can be prevented until agencies are required to undergo public scrutiny and required to have competent and knowledgeable professionals charged with assisting to recognize and understand the early impact of psychological and physical abuse of children.

A critical issue in the most recent publicized cases is the inability to ascertain that these children were at risk or abused. The knowledge and training of people able to substantiate abuse where there are no physical findings is paramount. In both of the aforementioned cases, it is all too clear that abuse preceded a death. Legislatures have the capacity to require use of trained professionals who are able to substantiate abuse based on known psychological data and what is known about family violence. Each of these cases is about family violence, yet violence went unchecked.

The Woodbridge case was failure-to-protect, in part, caused by a case-worker not having the requisite knowledge and training. Was it policy or was it incompetence? There is an implicit reluctance to accept the word of a child, or to minimize a child's report when it is juxtaposed with a denial by a parent. This is true despite the vast amount of knowledge that domestic violence is a private crime and that children do not generally lie about abuse, even in the context of divorce. Further, it is well known that perpetrators use custody and

visitation as a continuing means of control and that it is psychologically detrimental to children. While failure to protect may be a part of a larger complex social problem, it cannot be corrected by avoidance.

Sometimes the system may fail because of a lack of knowledge and expertise. Take the New Jersey case of *Gubernat v. Deremer*.¹ In *Gubernat*, the Supreme Court held that the child's last name should not be based on a historical bias toward the father's surname. Rather, the best interest of the child should be examined. The child's mother, who was the custodial parent and primary caregiver, won the right to the child's surname, but the father killed the child and himself just days later. This child need not have died had someone understood, recognized, and appropriately dealt with the father's abuse.

In New Jersey, the Domestic Violence Act² has mandated *ex parte* relief for victims of domestic violence with the policy being maximum protection for victims. This statute recognizes that even when they are not directly victims of abuse, children suffer long lasting effects from living in a home where domestic violence exists. That statute also recognizes a positive correlation between spousal abuse and child abuse.

Nevertheless, the Legislature has fallen short of providing children the same protections afforded the adult by way of relief from contact with that parent. To enjoin a parent from contact with a child should be no more or less stringent. In seeking restraining orders a party must establish: (a) the likelihood of irreparable harm; (b) that the applicable law is well-settled; (c) that the material facts are not substantially disputed; (d) that she will likely prevail on the merits; and (e) that the hardship on the non-movant does not outweigh the benefit to the movant. However, when a child is in need of injunctive relief for his/her safety and well-being, the same standards do not apply. Rather, the state's strong public policy and mandate to preserve and foster the family unit requires the child to meet a much higher standard. To stop contact between a parent who may have abused a spouse or a child in that context contradicts the state policy assumption that contact between a child and his parent promotes the welfare and growth of that child. Nevertheless, suspension of contact between a child and a parent to prevent abuse and neglect should not undergo a more rigorous test than would be required to enter any injunction under the Domestic Violence Act. But no such law exists to protect children and provide restraining orders for children.

How can one agency operate under two directives? How can the agency designed to re-unite families be the same agency that is supposed to be there to protect children? Might not such an agency's directives conflict at times? And when it does, does children's safety become second fiddle to re-unification of the family?

The protection of children in New Jersey's statutory schemes derived in the context of parents' rights should be the primary consideration. The Supreme

Court can provide administrative directives, but an agency designed solely to afford protection to children must be separately constructed by the Legislature. A new and specially trained court dealing only with issues of family violence and abuse may need to be considered.

NOTES

1. 140 N.J. 120 (1995).
2. N.J. Stat. Ann. tit. 2C, § 25-18 (1991).

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