

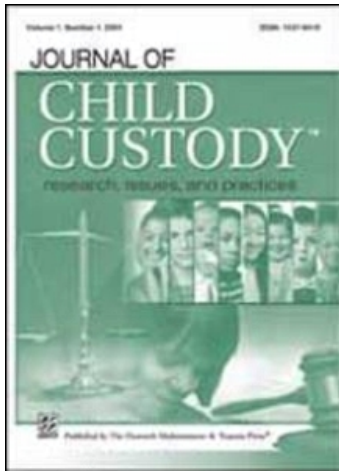
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### On Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge's Guide

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<sup>a</sup> Domestic Violence Report & Sexual Assault Report, Washington, DC

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## ***On Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge's Guide***

JOAN ZORZA

*Domestic Violence Report & Sexual Assault Report, Washington, DC*

*In 2006, the National Council of Juvenile and Family Court Judges issued a revised and improved edition of Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide, which now focuses on safety for victims and their children. This new edition explains the dynamics of domestic violence, that parental alienation syndrome and parental alienation have been discredited, and why psychological tests are largely useless and unreliable in domestic violence cases. The guide, however, is still too optimistic about the success of batterer programs. The guide is sometimes misleading and gender biased as it uses gender neutral language and because what men and women do differs and usually affects them differently.*

**KEYWORDS** *child abuse, Conflict Tactics Scales, credibility, custody, custody evaluations, domestic violence, family systems theory, gender bias, incest, parental alienation, psychological tests*

### ON NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE

The Family Violence Department of the National Council of Juvenile and Family Court Judges (NCJFCJ) received funding from the State Justice Institute to write a practical guide for family and juvenile court judges who hear custody disputes between parents in cases that involve allegations of

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Domestic Violence (DV). The guide was intended to assist them determine when custody evaluations are appropriate, who is qualified to do them, what should be ordered, and ultimately how to interpret the evaluation reports. Custody disputes can arise in divorces, paternity cases, and less often in other family law matters. Depending on the state, the court or courts that can hear these types of cases varies (e.g., circuit court, probate and family court, supreme court, juvenile court), but the guide is intended for all of them regardless of what the court is called.

The first version of the guide was issued in 2004 and was widely distributed for free to judges who hear custody cases throughout the country; it was also put up on the NCJFCJ's Web site. The 2004 issue of the guide received criticism, first from this author (Zorza, 2005a; Zorza, 2005b) and later through the NCJFCJ's own solicitation for feedback from others, resulting in its being withdrawn and replaced in 2006 by a markedly new and considerably improved version of the tool. This article will examine both versions of the guide, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* authored by C. Dalton, L. M. Drozd, and F. Q. F. Wong (Navigating Custody, 2004; Navigating Custody, 2006). The first section of this article will examine Navigating Custody, 2004, the first version of the guide, discussing its positive aspects. The second section will discuss some of the problems with the 2004 version of the guide. In the third section, the article will explain why the initial tool was criticized and how it resulted in the withdrawal of Navigating Custody, 2004 and the guide being rewritten. The fourth section of this article will examine the second version, Navigating Custody, 2006, discussing what improvements were made. The fifth and concluding section will examine some problems that still remain after the revised and vastly improved 2006 version of the tool was issued.

### Different Ways of Defining DV

Before beginning it should be noted that DV lawyers and mental health practitioners (MHPs) have markedly different perceptions of what DV is. DV lawyers define it as it is used in courts, a definition that, for example, excludes any act done in self-defense. Court usage of DV usually applies to intentional activity, causing fear and likelihood of repetition in a protected victim. By contrast, MHPs define DV based on instruments like the Conflict Tactics Scales (CTS), which define DV by the existence of various behaviors against a protected individual, irrespective of intent or result. The CTS instruments have been criticized as looking only for actions arising during arguments (whereas battered women tell us that half of assaults happen without any words being used), and ignoring the intent, severity, or whether they cause fear in the recipient. As such,

these instruments are over- and under-inclusive in what they measure (Walker, 2000), and often produce misleading or inaccurate results. They assume a hierarchy of abuse severity, with pushing and shoving considered the least severe, although being pushed or shoved into a stove or down a flight of stairs may well result in fractures and concussions. These instruments are under-inclusive in part because they primarily focus on certain acts of physical violence and not the coercive control, stalking, and sexual abuse that most victims describe as far worse. Particularly in civil courts, where injunctive relief is sought, lawyers for battered women focus more on what MHPs have come to call intimate terrorism and coercive control actions that create terror and fear in victims, as opposed to common or situational couple violence or violent resistance done in self-defense (Johnson, 2008; Stark, 2007), neither of which meet the court's definition of DV. These concepts are oversimplifications. Sadistic violence need not be coercive but can be lethal. In addition, as Stark shows, much of the most coercive abuse can involve emotional abuse that does not involve physical violence. Furthermore, some supposedly situational couple violence identified by Johnson has never been prospectively studied, making the speculative assumption that it will not escalate over time or become coercive, particularly when we know that some violence only begins after couples split up. This article, about contested custody cases, will primarily examine DV as the civil courts and DV lawyers define it, and not common couple violence or self-defensive behaviors.

#### POSITIVES IN NAVIGATING CUSTODY & VISITATION EVALUATIONS, 2004—THE FIRST VERSION

In 2004, the NCJFCJ issued a 27-page tool with bench cards summarizing the material in the manual meant for judges hearing custody and visitation disputes in cases where there is DV. The guide, entitled, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* and authored by Clare Dalton, Leslie M. Drozd and Frances Q.F. Wong (Navigating Custody, 2004), had many praiseworthy aspects. One such noteworthy aspect was listing many of the risk factors for DV (p. 13),<sup>1</sup> including, for example, the fact that after separation, DV commonly escalates and becomes more likely to affect the children and result in lethal outcomes (p. 9). It also explained that children might feel safer identifying with the abuser than the abused parent (p. 19). The guide also discussed how most batterers deny and minimize their abusive behavior (p. 8), are often inattentive to their children's needs (p. 12), commonly undermine their partner's parental authority and sabotage their relationships with the children (p. 19), and often accuse their victims of alienating the children (pp. 12 & 19).

## Exposed Misconceptions About Psychology

The guide also admirably exposed many common misconceptions about psychology and psychologists in the custody/DV context, including that:

- Basic training on DV does not make a mental health practitioner an expert or even competent on DV matters (p. 16);
- Psychological tests used in custody evaluations are not valid to show whether someone is an abuser or victim of domestic violence or child sexual abuse, and, even worse, often incorrectly label DV victims as having a personality disorder or psychopathology (p. 18); and
- Parental Alienation Syndrome (PAS) has been discredited by the scientific community and is thus inadmissible in evidence (p. 19).

### PROBLEMS WITH NAVIGATING CUSTODY, 2004—THE FIRST GUIDE

Some of the information and tone in the 2004 edition of the tool included incorrect and biased information, some of which could even endanger DV victims. Perhaps the biggest problem is that the 2004 tool assumed that custody evaluations are needed in virtually every case involving DV (p. 11), implying (without using gender-specific language) that women's allegations of abuse should be treated with suspicion, particularly when raised during custody disputes. Refuting the myth that women often make false allegations and do so primarily during custody cases for tactical advantage, incest allegations are rare during child custody disputes. Such allegations are substantiated as often during custody litigation as at other times (Dallam & Silberg, 2006), and men are actually 16 times as likely as women to make false incest allegations (21% vs. 1.3% of their claims) (Bala & Schuman, 1999), showing that such skepticism of women is unfair gender bias. Yet these were not the only problems with the 2004 guide.

### Risk Factors

Although *Navigating Custody, 2004* mentioned many risk factors for DV, it failed to note that DV and even DV homicides can happen without any prior risk factor or prior history of abuse (APA, 1996; Campbell & Fishwick, 1993; Jaffe, Lemon, & Poisson, 2003), so that the absence of DV history does not prove that there is no risk. Furthermore, several risk factors listed are over-simplified, or cast in a light more favorable to the abuser. For example, while *Navigating Custody, 2004* notes that the batterer's unemployment is "the most significant socio-demographic risk factor" (p. 13), it fails to note that often the failure to work is part of the abuser's deliberate strategy of emotional and economic violence against the family. In addition, the guide's

claim that drug but not alcohol abuse is a risk factor for DV (pp. 12 & 13) fails to note that only the amphetamines have been shown to cause violent behavior (Gelles & Cavanaugh, 2005), although the tool correctly notes that abusers with drug or alcohol abuse problems need treatment for their substance abuse as well as for their DV problems. The tool probably incorrectly states that mental illness causes DV, again a great oversimplification since most mentally ill people do not abuse their families, and only a small proportion of abusers have mental illness. It does correctly state that mental illness can be the result of exposure to DV (pp. 12 & 14), but does not clarify or footnote those statements to point out that often pathology is misdiagnosed by those not familiar with correctly assessing cases where there is DV (Erickson, 2005).

### Family Dynamic Theory Inappropriate

The guide is based on a family dynamic theory, which tends to minimize the seriousness of DV. Instead, it perceives the problem as “a dynamic between parents” (p. 8) who “are entangled in an abusive relationship” (p. 12), blaming both parties for the behavior, and ignoring the laws of every state where DV is criminal behavior. As such, it must be seen as behavior that one person perpetrates against their intimate partner or other family or household member. (Exactly who is protected under state DV laws varies by state, but every state covers spouses and those having children in common, and most states also include other intimate partners, including dating partners, and often other relatives and sometimes all the people now or recently living in the same home.) Like all criminal behavior, the law sees DV as a choice, unless done in self-defense, by one person against another protected individual, and not a family dynamic. Yet the tool never uses the criminal descriptions in the definitions of DV common to most states, nor does it note that child physical abuse is also a crime. Furthermore, the 2004 tool uses a very minimal definition of DV used in states, largely limiting it to physical violence, although DV can include many other types of abuse. Consistent with this minimal definition of abuse, the guide barely notes that DV and child physical abuse often overlap in the same families. It states ambiguously that it does so in cases when the violence is lethal (p. 9; footnote 5) and implies that in such cases either parent could be the child abuser (p. 12). Although true, it ignores that the studies cited for the data showed that men who abuse their female partners are highly likely to be abusing the children, and that men who abuse their children often abuse their female partners (APA, 1996; Jaffe, Lemon, & Poisson, 2003; Bancroft & Silverman, 2002).

In keeping with the family systems dynamic approach, the 2004 version of the guide focused only on DV within the immediate family. It never explicitly mentioned sexual violence against either the abused parent or a child, discussed the implications for a child born of a marital or intimate partner

rape, or even of a stranger rape (even though the perpetrator may seek custody or visitation). There is a very high rate of incest against children by batterers, and other forms of family abuse are also quite high (Bancroft & Silverman, 2002). In addition, the first guide never mentioned that many abusers often abuse outside of their immediate family and that such a history (whether with siblings, parents, former partners, current other partners, friends, co-workers or even strangers) helps to substantiate abuse within the family, and is explicitly a factor that judges must consider in many states in making abuse, custody, visitation, and relocation determinations, and in fashioning protective remedies for their partners and children.

### Sex Differences

By using gender-neutral language, the tool incorrectly implied that women's abuse is as frequent as men's are, as dangerous as men's are, and done for the same reasons. In fact, women use all forms of abuse against their partners far less often than do men (Stark, 2007; Dutton & Goodman, 2005). "Sexual assault by intimate partners occurs 25 times as often to women as to men, stalking, . . . 8 times as often to women as to men, and injuries from physical or sexual assaults by intimates requiring medical attention more than 7 times as often to women as to men" (Bancroft & Silverman, 2002, p. 4). Most of women's physical abuse is done in self-defense or to get the attention of their partners, and very little of women's violence, unless perpetrated with weapons, causes much damage or fear in their targets, compared to men's violence (Ventura & Davis, 2005; Bancroft & Silverman, 2002; Websdale, 1999; Campbell & Fishwick, 1993; APA, 1996; Stark & Flitcraft, 1996). The gender neutral language in the guide also implied that male and female abuse is equal (Stark, 2007; Dutton & Goodman), thereby falsely suggesting, for example, that women also deliberately kill their partners most often following separation, when in fact they kill far less often and seldom after separation, and usually kill in self-defense (Klein, 2004; Campbell & Fishwick, 1993; Jaffe, Lemon, & Poisson, 2003). Klein observes that there are major differences in how men and women act with their intimate partners, that male victims of assault are seldom seriously hurt and "do not suffer the same level of entrapment and susceptibility to control and abuse as women victims" (p. 59), that only men are likely to kill more than one family member (including sometimes themselves after they kill their partners and possibly their children), that only women abuse and kill in self-defense or in trying to escape, and that women do not kill their victims after they had left or were attempting to leave as men do (unless done in self-defense when attacked by the man). Furthermore, men and women have very different motivations. While 85% of male batterers who killed their female partners claimed it was because she was having an affair (a factor recognized in many if not most police reports when men kill their female partners), women rarely

cite this as a reason when they kill their male partners (police report it as motivation in only 18% of their reports on these homicides). Furthermore, in many cases where homicidal men alleged jealousy and extramarital affairs as the reason they killed their partners, police never find any indication that the claim was real (Wilson & Daly, 1993). In a study of 28 Dayton, OH homicides of women by their male past- or present-intimate partners, not one of the 18 (or 64%) male killers who claimed they did so out of jealousy had any proof that his killed partner had a lover. By contrast, only male homicides of female intimate partners often involve sadism and are far more likely to show excessive use of force (Campbell, 1993; Websdale, 1999). Many convicted killers also admit they knew their claim that she was having an affair was false (Adams, 2007). Another difference is that men often use the children as hostages to prevent women from leaving (Radford & Hester, 2006).

Navigating Custody, 2004 fails to mention that very little is actually known about female batterers or their effects on their male victims, so that it cannot be assumed that the dynamics of male battering apply to those few females who are batterers, or vice versa (APA, 1996), making the gender neutral language further misleading and sometimes gender biased. (Yet, this is not to deny that there are some women who perpetrate DV offensively or to claim that the law should treat their offensive violence differently from that of men.)

### Pathologizing and Diagnosis Issues

Although Navigating Custody, 2004 discredits Parental Alienation Syndrome (PAS), it goes on to reinvent it as Parental Alienation (PA) and does so without ever noting many batterer alienating behaviors are forms of domestic violence (i.e., failing to contribute to the family while living together, failing to pay child support after separation, failing to legitimate their alien spouse's immigration status when able to so). These batterer behaviors, which are sure to cause financial and emotional hardship to the family, are not even recognized in the tool—or other discussions of PAS, PA or friendly parent provisions. These will be discussed in the fifth section of this paper as alienating behaviors.

### Credibility

The 2004 guide also implied that women lack credibility by stating that an evaluation is needed in all but the most egregious of cases (p. 11) to obtain collaboration of the abuse from other people or records, and that without such documentation that their allegations are not real (p. 17). This ignores that studies find women seldom lie about DV (Jaffe, Lemon, & Poisson, 2003); and, that even when they raise DV or incest allegations, it does not result in any tactical advantage for them (Zorza & Rosen, 2005; Myers,

1997); or that much, if not most, domestic violence will not have collaborating evidence (Jaffe, Lemon, & Poisson, 2003). Even *Navigating Custody*, 2004 notes that no psychological tests can prove that abuse did or did not occur or whether someone is a perpetrator (p. 18) and that judges routinely make credibility determinations about evidence. (See also Fields, 2008, 2006). In asking for evaluations and huge amounts of evidence, the tool feeds the myths and biases against women that assume they falsely accuse their partners, and do so for tactical gain. In essence the tool tells custody evaluators to reopen even orders of protection granted after hearing and final judgments to see if the allegations were false, something prohibited by *res judicata*, collateral estoppel, or issue preclusion, legal doctrines that forbid relitigating matters that have already been decided.

At the same time, although the tool did note that most batterers deny or minimize their violence (p. 8), it failed to note that many male abusers make false allegations about abuse against their female intimate partners (Jaffe, Lemon, & Poisson, 2003) and that fathers are 16 times as likely to make false child sexual abuse allegations as are mothers (21% of accusations by fathers, but only 1.3% of those by mothers) (Bala & Schuman, 1999). Also not discussed in the guide (and perhaps some of the reason that women are treated with more skepticism although it is not warranted), is the fact that men are far more likely to physically attack judges, custody investigators, and custody evaluators whom they perceive to be hostile (e.g., the revengeful homicide of a child protection investigator by a father who lost custody [Weber, 2004]). The fact that judges are far more suspicious of mothers is also consistent with the preliminary findings of an ongoing court watch of custody cases in five states. The findings of the court files reviewed to-date show that when judges appointed custody investigators, evaluators, or law guardians, they did so far more often when a mother was the petitioner (94.7%) than when fathers were the petitioners (60.0%). Custody was disputed in every one of the cases examined (Beeker, 2007). The assumption in *Navigating Custody*, 2004, is that custody evaluations or investigations are needed in every case. Ironically, this might have been justified had it been directed only at cases where men make abuse allegations since men are overwhelmingly more likely than women to make false allegations, and because abusers have a tendency to deny their own abusiveness and blame their victims (Bancroft & Silverman, 2002; APA, 1996). They probably do so most often when they themselves are the abusive party.

## Treatment Issues

While the tool wisely stated that appropriate treatment for the abuser “should always include treatment specifically targeting domestic violence, rather than . . . anger management, . . . as well as treatment for [any] substance abuse and mental health issues,” it dangerously implied that the batterer is fit to visit

the child upon completion of the treatment (p. 23). Unfortunately, a plethora of studies are increasingly showing that batterer treatment programs do not stop abusers from abusing (although many men change their tactics and use more psychological, financial, and monitoring types of abuse after being mandated into batterer programs, knowing that they are less likely to be charged with offenses that do not involve physical violence) (see, e.g., Auchter, 2008; Berman & Feinblatt, 2005; Feder & Wilson, 2005; Keeping the Promise, 2005; Klein, 2004). Although nobody can predict which program-completers will reoffend or harm their children, it is true that program-completers are less likely to reoffend than are noncompleters (Jaffe, Lemon, & Poisson, 2003), and that the research ostensibly showing that programs “work” did so by comparing completers with noncompleters. But there is no justification for any presumption that even the successful completers have stopped or will cease their abusive behaviors and should, therefore, be permitted freer access to their children.

The bottom line is that while well-intentioned, *Navigating Custody, 2004* contained much information that was inaccurate, minimized the violence, and implied that women lacked credibility, thereby exacerbating the very problems it was meant to prevent.

#### WHY THE FIRST EDITION WAS CRITICIZED AND A SECOND EDITION WRITTEN

Health and Human Services largely funds the Family Violence Department of the NCJFCJ, which produced *Navigating Custody, 2004*, under the Violence Against Women Act. Specifically, its focus is on child custody and child protection, and, as such, it is expected by the domestic violence and sexual assault community to be a valuable and up-to-date resource on child custody and domestic violence. *Navigating Custody, 2004* was frankly a disappointment. Accordingly, this author, expecting more from the NCJFCJ's Family Violence Department, published an article critical of the *Navigating Custody, 2004* in two newsletters that she edits and often contributes to: *Sexual Assault Report* (Zorza, 2005a) and *Domestic Violence Report* (Zorza, 2005b). The topic was considered important for *Sexual Assault Report* because DV perpetrators are 6 to 19 times as likely to commit incest against their female children as other fathers (Bancroft & Silverman, 2002), and men who commit incest are extremely likely to abuse their female partners (Bancroft & Silverman; APA, 1996; Myers, 1997). In addition, whereas it was clear that *Navigating Custody, 2004* would be widely relied upon by judges hearing child custody cases, the domestic and sexual violence community knew it would be widely relied upon by the custody evaluators and lawyers handling these cases. A seriously defective resource could harm many of their clients.

Copies of this author's criticism were sent to both the NCJFCJ and the tool's funder, State Justice Institute. She informed them that unless the tool was going to be withdrawn, she would be publishing a criticism of the 2004 guide in the two newsletters that she edits. Before even the first newsletter was published, the NCJFCJ agreed it would reexamine the tool, a fact noted at the end of the articles criticizing the publication. (Zorza, 2005a; Zorza, 2005b). Moreover, the State Justice Institute informed this author that it agreed that many of the article's criticisms were valid, and, that as a result, the NCJFCJ would be soliciting additional feedback of *Navigating Custody*, 2004. However, State Justice Institute and the NCJFCJ also warned that it would be extremely difficult to make many changes, but that they could make minor ones, giving as an example that they would stop urging custody evaluations in virtually every case involving domestic violence, as the tool had done in the 2004 edition. Later, this author was informed that much of the feedback that NCJFCJ received backed up her criticism. Other than that, this author was not given any further opportunity to comment on any revisions or see other people's criticisms, despite a request to be involved.

While initially the NCJFCJ hoped it could make just a few revisions, it ultimately issued a considerably revised and longer edition of the guide in 2006 under the same title, "*Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*" (*Navigating Custody*, 2006), which is markedly better, but still imperfect.

Unfortunately, the NCJFCJ never made any attempt to tell the nation's family and juvenile court judges to whom it had mailed copies of the 2004 guide that it had withdrawn that version, that the old versions should be tossed out, and that they should be replaced by the 2006 version. It even kept the old, 2004 version on its web site long after the NCJFCJ had agreed it needed to be revised.

The next section will discuss how the 2006 revised edition is a vast improvement over the 2004 first edition.

#### IMPROVEMENTS IN THE 2006 REVISED EDITION OF NAVIGATING CUSTODY

*Navigating Custody*, 2006 was not released quickly, but when it was, it actually included far more revisions than had been predicted, thereby making most of the more pressing improvements that its critics had sought. The new tool's focus is much more on safety, as graphically seen by the greater use of a symbol of a held up hand to alert readers to safety concerns for victims of domestic violence and their children. The new version of the manual also makes greater use of the asterisks on the bench cards to remind judges that it would be helpful for them to read the corresponding section of the text. The revised edition makes many other substantive improvements.

## Definition of Abuse Expanded

The Navigating Custody, 2006 uses a much-expanded definition of DV, defining it now “as a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—that perpetrators use against their intimate partners. The pattern of behaviors is neither impulsive nor ‘out of control,’ but is purposeful and instrumental in order to gain compliance from or control over the victim” (p. 8).<sup>2</sup> The tool goes on to note that “[t]he presence of domestic violence, as well as any violent or abusive behavior that does not fit this description, will always be relevant to the question of what custody or visitation arrangement will serve the best interests of any children shared by the adult parties” (p. 8). Thus the tool uses a definition that is in keeping with the one used by DV lawyers and advocates, as well as legislatures in statutes concerning DV.

## Relocation Issues

A paragraph on relocation (which was under the subheading “Other Cases” in the first manual) (Navigating Custody, 2004, p. 13), is strengthened and given more prominence by putting it under the subheading “Relocation Cases” in Navigating Custody, 2006 (p. 15), also making it much easier to find. The 2006 version footnotes to the NCJFCJ’s Model Code §§ 402(2) and 403, which respectively: (a) prohibit penalizing a parent’s absence or relocation caused by or as the result of DV in a custody decision, and (b) state that it is in the best interest of the child to reside with the non-abusive parent. The 2006 guide tells judges that if DV may be involved, a request to relocate should explore if the victim is motivated by either self-protection or to protect the children.

## Moderating Use of Evaluations and Cost Considerations

A box at the very top of the first substantive page sets an improved tone by noting that “[n]ot every case will require or need an evaluation” (p. 7). Given that at least 26% of battered mothers in contested custody disputes are driven into bankruptcy as a result of being forced to pay out an average of \$90,506.77 in fees for lawyers, mediators, custody evaluators, and parent coordinators (Stahly, 2007), the box also wisely reminds judges that often “neither the parties nor the court can afford an evaluation or investigation,” but that the tool can still help “judges to form partial solutions” (p. 7). The financial concern for children after separation is well founded, as the standard of living goes down dramatically after divorce for custodial mothers. The amounts of child support that courts order (averaging a mere \$2,840 per child per year, of which little will be paid) only cover half of their child rearing expenses. It takes 2.11 times as much income for one parent and two

children to have the same standard of living as one adult living alone (Kurz, 1995). This living standard did not factor in the expenses that incur as a result of litigation. Furthermore, compared to other fathers, batterer fathers are ordered to pay lower child support amounts, are far less likely to pay child support (Bancroft & Silverman, 2002), and are more likely to drive up litigation expenses in an effort to emotionally and financially exhaust their victims (Fields, 2008; Jaffe, Lemon, & Poisson, 2003). This results in battered mothers who are far more adversely impacted than other divorcing mothers by a declining standard of living after a custody case, a factor even used by some judges to award custody to their abusers. Stahly (2007) found that the median cost that battered mothers paid for psychological evaluations in contested custody cases (some of which are paid by the county or state or even the batterers) was \$4,600. Stahly also found that cases with custody evaluators take three times as long to resolve as those without them, increasing lawyer costs, time off from work, and child care costs for custodial parents to see lawyers, evaluators, and go to court. Besides being very expensive, protracted custody cases are also extremely stressful and detrimental to both the children and their mothers (Bancroft & Silverman, 2002).

Navigating Custody, 2006 reminds judges that often an investigation by someone who will be free or much less expensive can provide all of the information that a court needs (pp. 1 & 16), and the courts' assumptions that psychological tests are needed and helpful are frequently incorrect (pp. 20–21).

### Investigating Abuse

The very first sentence of the introduction is: "It is more likely than not that judges presiding over contested custody cases . . . will have to grapple with . . . whether one parent has been physically violent or otherwise abusive to the other, and if so, how that . . . should affect the court's decisions about ongoing custody and visitation arrangements" (p. 7). This beginning, with its accompanying footnote 3, explains that custody and visitation disputes arise more often when there is DV, and sets the tone that DV allegations are most likely real. Likewise, the list of what the tool will do to assist judges omits the prior focus on skepticism of the abuse allegation. Instead it focuses on whether the case requires an evaluation, and if so, what the judge needs, the content of an evaluation, who should do the evaluation, and how the judge should critique it and determine if it is responsive and reliable.

The tool correctly separates the functions of investigations, evaluations, and recommendations. It tells the reader that many types of lay witnesses can perform the information gathering or investigative function and report back about what they found, and often can do these investigative functions better and more cheaply (p. 16). The tool suggests utilizing "child protection workers, law enforcement officers, probation officers, domestic violence

advocates” and lawyers, and depending on what is sought, noting that each type of these professionals have different abilities and knowledge of systems and data to be found (p. 16). Whoever is selected must have competence in DV, which requires both training and experience in DV cases (pp. 17–18). Certification in DV and prior certification as an expert in or competence in DV by courts is a criterion. The judge, however, still needs to know what the actual certification required and if it included non-basic, bona fide course(s) of study or practice, and over what time and to what extent it actually focused on DV (p. 18). In addition, the guide reminds readers that “[t]he custody evaluator who is unaware of the frequency with which abusers seek custody as a means to continue their control over the abused parent may inappropriately assume that an abusive parent is instead seeking custody because he or she is caring and concerned” (p. 19, footnote 34), and not because it is for tactical gain in property and support considerations, or to emotionally hurt their victims (Bancroft & Silverman, 2002).

### Collateral Contacts

The guide suggests a number of likely helpful collateral sources who should be contacted by the investigator or evaluator, such as “other family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners . . . ; professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors; professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family” and lists many pertinent records to explore and questions to ask (p. 19). Collateral contacts can be made by either an investigator or expert.

### Evaluation by Experts

The tool, however, cautions that an evaluative process, rather than just an investigative one, is needed when expert testimony is sought (p. 16), and that increasingly states forbid experts from making a best interests recommendation, leaving such fact finding to the exclusive purview of the court (p. 17). While both lawyers and mental health professionals are generally competent to interview adults and children, often a “mental health clinician with expertise in child development and up-to-date training on appropriate interviewing techniques will be better qualified” to interview a young child and be able to understand the limits of the reliability of the information obtained (p. 16). Only a mental health professional is qualified to diagnose a party’s or child’s mental health status, including whether the person suffers from depression or post-traumatic stress disorder (pp. 16–17). The tool warns that the validity of the report will be undermined if the DV is minimized (p. 17). While MHPs have greatly improved in their ability to identify DV, few of

them know its significance or impact, or that safety issues must take precedence over access and treatment ones (Dudley, McCloskey & Kustron, 2008).

Much of the emphasis shifts to what the court should be doing to protect the abused parent and the children, warning that often the abuse will have never been disclosed to anyone before (pp. 9 & s19), and neither “the absence of convictions . . . or violations of restraining orders,” nor the lack of any “witnesses to the violence or its aftermath . . . conclusively prove[s] that it did not take place” (p. 9).

Furthermore, the revised tool explicitly observes that DV and child sexual abuse often occur in the same cases (e.g., pp. 9 & 14, and n. 10), a clear attempt to counter the much believed myth that allegations of both probably indicate that neither is true. Particularly in DV cases, “not all the experts on whom courts rely have the training and experience needed” to conduct child custody and visitation investigations or evaluations in cases where there is DV (p. 7). Furthermore, “an evaluation that reaches conclusions based on the ‘he said/she said’ of conflicting accounts without recourse to other corroborating sources may be inherently unreliable” (p. 19).

Excessive jealousy may be another reason to order an evaluation (p. 13), as may be a lop-sided agreement, which may suggest that the result is not in the children’s best interests and was the result of violence or coercive and controlling behaviors by the abusive parent (p. 14). An evaluation can also help refute or limit an abuser’s request for visitation by “determine[ing] (a) the motivation for the request; (b) the impact ongoing contact will have on the children or on their relationship with the abused parent; and (c) whether visitation should occur and, if so, how it might be structured to assure the safety of the children and abused parent, sometimes limiting access to strictly supervised visitation” (p. 13). The guide warns that it is necessary to separately evaluate the impact of the DV on each child independently (p. 18). The very final sentence of the guide reminds judges that sometimes the only way to protect the children is by denying the abusive parent any future contact with the children (p. 27), a reminder that ideally should have been conveyed as well in the language just quoted from p. 13.

### Primary Perpetrator Determinations

The tool also explains that an evaluation can be helpful in distinguishing whether a parent is a primary perpetrator of DV or using violence defensively (p. 13), although it incorrectly implies that civil and criminal DV cases cannot consider defensive acts of violence. However, self-defense is always an admissible defense, although in practice, particularly unrepresented parties seldom raise defenses and justifications in DV cases or when cross allegations are made without sufficient time to provide notice to prepare a defense.<sup>3</sup> The tool points out that a custody court can make primary perpetrator

determinations, particularly where both parents have a record of violence, by “look[ing] more broadly at the dynamics within the family, and . . . whether one partner is abusing the other as a means of coercive control and what the implications of that abuse are for each member of the family” (p. 13).

### Cultural, Linguistic, and Other Competence

Navigating Custody 2006 reminds judges that in addition to knowledge of DV and that abuse is likely to escalate after separation (p. 10), the investigator or expert needs to be able to converse with and relate to the parties and children and others, and as a result might need specific linguistic or cultural expertise. Other cases may raise other issues requiring other expertise, for example, substance abuse (p. 17).

### Psychological Testing is Seldom Relevant or Needed

The subsections on psychological testing are further improved and clarified from the first version. The tool specifically begins by noting it is “the rare case in which [psychological testing] is a relevant and necessary aspect of an evaluation” (p. 20). The guide further warns that “psychological tests . . . should be administered and interpreted by a psychologist who has expertise in the use of psychological testing in the context contested child custody cases with allegations or evidence of domestic violence.” This warning again emphasizes that such testing is generally not appropriate when there is DV, and it “may misdiagnose the non-abusive parent’s normal response to the abuse or violence as demonstrating mental illness, effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent” (p. 20). Like the first tool, the revised one reiterates that “there are no psychological tests that have been validated to assess parenting directly,” or that “can determine whether or not a person has been an abuser or abused,” and that there is no single profile of a victim or perpetrator of abuse” (p. 20).

Footnoting to Shuman (2002), the guide warns that the tests developed in the past decade to address custody issues, including “the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been evaluated with enough rigor to establish their validity or reliability . . . [and] do not provide answers” (pp. 20–21), at most raising hypotheses to be otherwise validated or invalidated by alternate means. Navigating Custody, 2006 states that “standard psychological tests measuring personality, psychopathology, intelligence or achievement, including the Multiphasic Personality Inventory (MMPI-2), Million Clinical Multiaxial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children’s Appreciation Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence

Scales (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most children, or parents' child-rearing attitudes and capacities" (p. 21). The guide also warns that specific tests to assess trauma, including the Trauma Symptom Inventory (TSI) and Draw-a-Person Test (DAP), cannot "determine whether traumatic incident(s) occurred," but "may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children" (p. 21).

No empirical literature exists supporting "that current interview protocols, traditional psychological tests, or custody-specific tests are in any way able to reliably predict child adjustment to different access plans," the guide plainly states (p. 20, footnote 40), quoting Tippins and Wittman (2005, p. 194).

The guide further warns that "[s]ome of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology" (p. 21), also urging courts and evaluators not to prematurely attach damaging labels on victims whose parenting has been negatively impacted by trauma when that parent's "functioning may improve dramatically once she or he is safe, the acute stress has been alleviated, and the trauma treated" (p. 21).

Consistent with all of this, one retired judge observes she was never reversed for refusing to appoint a custody evaluator in DV contested custody cases not having mental illness allegations (Fields, 2006).

### Safety, Confidentiality, and Conflicts of Interest Regarding Information Gathering

An entire section in the guide warns that adult and child victims of violence, including children exposed to the trauma, "are unlikely to talk openly about it if they are fearful that the perpetrator will have opportunities for retaliation, or if they are too ashamed to disclose the violence or abuse" (p. 21). While noting that there is no confidentiality in the evaluation process, the tool observes that "[w]ith care, the evaluator will be able to shield the parties from any contact or unsafe communication with one another during the evaluation process" (p. 21). The tool goes on to suggest that the evaluator avoid revealing sources when making collateral contacts. When this is not possible, the evaluator should warn the abused party, preferably in advance, so that the party can take "whatever safety precautions are warranted and available," including assisting the victim in making a safety plan or referring the victim to a shelter or DV program. (p. 22). The guide also explicitly says that any "evaluator who does not respect the safety-driven procedures listed on the card and accompanying these materials is not qualified to conduct an evaluation in a domestic violence case" and their resulting evaluation "will not yield reliable information or opinions and may be dangerous" (p. 22). Evaluators

competent to focus on safety can provide the court with valuable information when warranted.

Evaluators are directly told that if parties are represented, it is the responsibility of their lawyers, and particularly if they are unrepresented, the responsibility of the evaluator “to ensure that the parties fully understand the implications of both choosing and declining to waive a privilege, and are able to make an informed decision” (p. 22). The tool also reminds the reader that this similarly applies to children, adding that in some jurisdictions, only the child’s representative or therapist can waive the child’s privilege, and that in others the parent may be able to do so. (p. 22). The tool reminds judges and evaluators that “[a]ny party who fears that the disclosure of information will place him or her at risk of retaliation or who believes that vital privacy interests may be compromised by the investigation should be able to inform the court of his or her concerns *before* communicating the information” (p. 22).

Custody evaluators are urged that even after the case is officially “closed,” they should not have any subsequent professional contact with any of the parties since it produces a conflict of interest, and no custody case is ever closed until the children reach the age of majority, as the case may come back to court. Even in small communities, at a minimum there should be a “clear ‘waiting period’ to discourage the creation of a conflict at least during the period when re-litigation is more likely” (p. 23).

### Reading the Report

The final section of *Navigating Custody*, 2006 on reading the evaluator’s report begins by reminding judges to first determine if “the report identifies risks that should be promptly addressed,” including by disclosure to the parties (p. 24; see also discussion of HIPPA implications below). In assessing the validity and reliability of the report and whether to admit it into evidence, the guide reminds that “qualifications alone do not provide any guarantees that expert opinions are based on reliable methods and procedures” (pp. 24–25, including footnote 51, quoting Shuman [2002, p. 160]).

### Scientific Evidence, PAS, and Confirmatory Bias

*Navigating Custody*, 2006 then discusses that PAS has been discredited under the standards set forth by the court decisions in *Frye v. U.S.* (D.C. Cir. 1923), *Daubert v. Merrell Dow Pharmaceuticals* (1993), and *Kumho Tire v. Carmichael* (1997), the three cases that have established the tests courts should use in admitting evidence, including in the “soft sciences” (p. 24). The guide adds that not only is a “diagnosis” of PAS (or PA allegation) scientifically invalid, so that evidence of it should be stricken, but PAS and PA “inappropriately asks the court to assume that the children’s behaviors and

attitudes toward the parent who claims to be 'alienated' have no grounding in reality . . . also divert[ing] attention away from the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children's other parent" (p. 24). Courts must distinguish between these two situations, recognizing that it is legitimate for children to criticize or fear a parent who has perpetrated DV (p. 24). These feelings are no less legitimate even though their abused parent seeks to protect them by voicing concerns, and it is appropriate for abused parents to protect themselves and their children, including by limiting the abusers' contact with the children (p. 25).

The tool also observes that abusive parents "commonly sabotage their respective partner's parental authority over, and relationship with, the children . . . [and] rarely take responsibility for the consequences of their behaviors, but instead blame their partners for turning the children against them (p. 25). Children in abusive homes "may feel safer identifying with the abusive and more powerful parent" and the abused parent "may appear antagonistic, unhelpful, or mentally unstable, [and] . . . not fostering a positive relationship with the abusive parent, particularly to an evaluator who minimizes the impact of the violence or pathologizes the victim's responses" (p. 25). The evaluator's report will be accurate and relevant only by carefully listening to the children's concerns, investigating to ensure their concerns are factually grounded, and not "applying the 'PAS' label" (p. 25).

Judges should also check for "confirmatory bias" in the report, which appears early in the case when the evaluator develops a hypothesis or opinion, and should judges find some supporting data fails, test it against other theories and data that might refute it. Judges should test for "confirmatory bias" by seeing if the report is suspiciously one-sided, which is often apparent if the evaluator made use of available documentation and collateral sources and has produced all of the relevant data gleaned but did not make other contacts or collect other data that might have led to alternate conclusions and recommendations (pp. 25–26). Judges should also see if the evaluator uses myths and stereotypes about DV, "such as assuming that an angry mistrustful parent is most likely making a false allegation to leverage in the custody case or assuming that a child would not be happy to see the abusive parent at a supervised or unsupervised visitation" (p. 26).

As a final check, the judge should see if the evaluator's recommendations span the full range of protective alternatives available for the abused parent and children, such as:

- granting sole physical and legal custody to the victim;
- restraining the abuser from communicating with or being in the presence of the victim;
- postponing visitation until the victim and children have healed;

- restricting the abuser from having any visitation or by restricting it as necessary, including by having no overnight visitation, exchanging children through an intermediary or using family or a program to supervise the visitation;
- prohibiting the abuser from using substances and ordering treatment for any drug and alcohol problems; allowing the victim to relocate with the children to a confidential address;
- keeping secret addresses secure; and
- insuring that couples counseling, pastoral counseling and parenting programs are not utilized.

The abuser should be required to complete a batterer intervention program, ideally one that meets the state's certification or guidelines, and not be sent to anger management counseling (pp. 26–27). The tool wisely warns that “completing a batterers intervention program does not guarantee that the abusive parent will change his or her behavior” and also cites Aldarondo & Mederos, 2002 to note that no studies have explored the safety of women when couples counseling is used in DV cases (p. 26).

#### PROBLEMS WITH NAVIGATING CUSTODY, 2006 STILL TO BE FIXED

Despite the enormous improvements made in the revised 2006 edition of *Navigating Custody*, several problems remain. These primarily fall under the two inter-related issues that arise because men's and women's behaviors and credibility are different, and by the well-intentioned use of gender neutral language, which further obfuscates these differences. In addition, DV cases are meant to be expedited, and the manual does not explain this or discuss how to do so. Finally, in the best of worlds, the manual would have raised some of the newer and more successful efforts to promote safety, such as by mobilizing community support. This section will discuss these issues.

#### DV Cases Need to be Expedited

Cases involving child custody and DV need to be expedited. Some arise in DV civil protection order proceedings, which were specifically designed for speedy relief, often within a few days and usually less than a month, and some jurisdictions provide 24 hour access to the courts to file for protection from DV (Hart, 1992). Often, the increasing use of investigators and evaluators to hear what are usually factual and sometimes legal issues defeats the entire purpose of court laws that were enacted to expedite these cases. Courts and evaluators, rather than deciding the veracity of the DV allegations and the scope of the relief the court should grant, often expand the scope of inquiries, thereby delaying often for months and even years what should

have been expedited relief. There is virtually no discussion of the detrimental effects on the children or the effective parenting of the victim from prolonged litigation and the litigation delays and expenses that are often exacerbated when a custody evaluator is involved in the case (Bancroft & Silverman, 2002).

It is quite possible for courts to handle these cases expeditiously. When this author practiced in the Massachusetts courts (admittedly in the 1980s and early 1990s before courts made much use of investigators or evaluators in cases seeking orders of protection), it was unusual for trial courts not to reach a final judgment in these types of cases within 10 days after the case was filed. In a few cases, this author even obtained a final judgment from an interlocutory appeal before the end of the next week. This was particularly true in jurisdictional disputes when more than one state was involved. Neither the original guide or the revised manual deals with the legislative mandate to expedite the granting of protective relief in DV cases and how to insure that investigators and evaluators will not delay this process. Not expediting cases is even more problematic when higher standards of proof are required for mothers, which will be discussed in a later subsection.

### Sex Differences and Credibility

Another significant problem remaining with *Navigating Custody*, 2006 is that the manual still fails to discuss the differences in men's violence and women's violence and credibility, and specifically that abusive men often make false accusations against their victims and misuse the court process to carry on their abuse (Radford & Hester, 2006; Klein, 2004; Bancroft & Silverman, 2002; Zorza, 1998). Some male batterers set up their intimate partners to be considered by the courts and custody evaluators as abusive, "unfriendly," or alienating parents by deliberately provoking or forcing their partners to attack them physically or verbally, or forcing them to flee with the children (Zorza, 2005c; Dore, 2004; Zorza, 1998). Police and courts that fail to protect battered women often leave them no alternative but to defend themselves, setting them up to be arrested or charged by the police, prosecutors, or their abusers as perpetrators, and reinforcing the myths that most violence is mutual or that women are as abusive as men (Zorza, 2005c, 2008).

While most of the negative implications about women's credibility are eliminated, the manual only uses the word "credible." *Navigating Custody*, 2006 (Card I, Side 1) talks about "credible allegations of child abuse," reinforcing the stereotypes and gender bias, suggesting that judges and custody evaluators should be skeptical of such allegations even when there are prior findings of child physical or sexual abuse. Indeed, while the tool does note that PAS and PA are not admissible in evidence (p. 24), it still suggests that an emergency/interim assessment is needed when there are "allegations that a parent is turning the children against the other parent" (Card I, Side 2); thereby, effectively telling courts to consider PA anyway.

Likewise, the tool does not discuss “friendly parent” provisions directly, which are now in the custody statutes of at least 34 states (Tucker, 2004; and New Hampshire, which has enacted them since Tucker’s findings) encouraging courts to grant custody to the other parent when one parent is using “unfriendly” or alienating behaviors, particularly discouraging visitation. Although the guide does discuss legitimate reasons why a parent would be advocating for safety for themselves or their children (e.g., by restricting unsupervised or overnight visitation) or why a child might be fearful or critical of an abusive parent (pp. 24–25), ideally the tool should have explained that some legislatures and courts have explicitly rejected the friendly parent concept because it is punitive and hurts children, and hence is not in the best interests of children (see e.g., Dore, 2004). Friendly parent provisions operate much the same as PA, and like joint custody presumptions give even the 68% of fathers who do not want custody an overwhelming advantage in custody disputes, enabling them to barter for much lower child support and to gain other financial advantages (Mason, 1999; Kurz, 1995).

Regarding the data on the 30–60% concurrence of DV and child abuse, *Navigating Custody*, 2006 now correctly notes that studies show it is the mothers who are being abused by the fathers and that fathers who beat their female partners are 6.51 times as likely to sexually abuse their daughters. But it still fails to note that these studies were largely documenting that it is the battering fathers who were physically assaulting the children (p. 14), and that the women, even when they are battered by their partners, “were six times more likely than men to report being afraid for their children” (Jaffe, Lemon, & Poisson, 2003, p. 30, citing [Johnson & Bunge, 2001]). Nor does the tool refute the common misperception that it is mothers who primarily report child sexual abuse, when, in fact, children make two-thirds of the reports, roughly 2.5 times more than the approximately one-quarter of reports that mothers make (Stahly, 2007). Consistent with skepticism of mother’s claims, an ongoing court watch project in five states found that courts appointed custody investigators, evaluators, and law guardians far more often in custody disputes when mothers were the petitioners (94.7%) than when fathers were petitioners (60.0%) (Beeker, 2007).

### Requiring Higher Standard of Proof

*Navigating Custody*, 2006 still incorrectly implies that judges must meet higher standards than the preponderance of evidence required in virtually all civil cases involving DV (Hart, 2002). Although the guide clearly states that there may be no record of abuse and that nobody except the parties may have witnessed it, it adds that “an absence of convictions for domestic violence or violations of restraining/protective orders does not mean that a parent is not abusive” (p. 9), implying that only criminal convictions and not the issuance of a protective order or factual findings in a civil case should

be considered evidence that the abuse actually happened. Indeed, such civil orders or findings probably make it improper for a civil court to relitigate the previously decided matter.

### Guide Effectively Discounts Many State Custody Laws

The guide should have spent less time putting the burden on the court or victim to prove that an abuser is not dangerous to the children, as every state has already enacted statutes requiring consideration of DV in custody disputes, because legislatures have already made this determination (Tucker, 2004). Connecticut was the last state to do so (Zorza & Rosen, 2005). It is only because courts are still skeptical of women's allegations about DV and child abuse that *Navigating Custody, 2006* still assumes that the victim has the burden to restrict custody or unsupervised access by the abuser, the very aim of the custody laws meant to enable a court to protect the children on its own.

### Not All Claims Need Collateral Validation

Related to the problem of requiring a higher standard of proof, the tool often suggests that an investigation or evaluation is needed in situations when it is not. For example, the tool tells judges that their "fundamental task is to determine specifically how and to what extent each child has been affected by what has gone on inside the family" (p. 9); how the DV impacts "[e]ach parent's capacity to meet the children emotional needs"; and whether a child who is estranged from the abuser has legitimate reasons for their anger, mistrust, or fear (p. 14). Although this may be true, approximately half of the states have statutes that presume that the abuser should not be given custody when there is DV, and require that visitation, if granted, should presumptively be supervised (Tucker, 2004). This fact means that where the judge believes the victim's allegations, unless the victim is seeking more protection than is statutorily permitted or the abuser is credibly contesting the presumption, there may be no reason for the court to investigate further. However, a court may legitimately investigate how DV is affecting the children or whether the relief that the abused parent is seeking is adequate to protect the victim and children. A court may also appoint a MHP to determine if either party has post traumatic stress disorder or to shed more insight in cases where there are mutual abuse allegations, although in general a forensic nurse, police detective, or possibly a DV advocate or batterer treatment provider may be more helpful in sorting through mutual abuse allegations or whether injuries were inflicted in self-defense.

In discussing emergency/interim assessments, although the tool correctly directs courts to only use an expert "with specific expertise and experience in domestic violence and risk assessment" (p. 12), the guide incorrectly implies an

assessment is always needed before any protective relief can be put in place. By next discussing the risk of homicides, the guide suggests that homicide is the main or only concern. Card I, Side 1 again suggests that an emergency/interim evaluation is needed when there is evidence of “possession of or access to, or threats to use firearms . . . stalking; . . . suicide threats or threats of self-harm, . . . threats of abduction of children, . . . a prior record of restraining/protection orders, . . . assaultive and coercive behaviors . . . and/or evidence of violations of prior or existing restraining/protection orders,” even though many of these do not require investigation but rather immediately imposing protective relief, even if an emergency/interim evaluation is ordered. The 2006 tool lists one area of inquiry for an assessment as “whether there is a child in the home who is not the abusive partner’s biological child” (p. 13). This is rarely in dispute and the court does not footnote or explain that male abusers are far more likely to kill their female intimate partners and their children when the man thinks the woman has a child by someone else (Wilson & Daly, 1993). Again, this is an area where there is no gender equality, since only men do this, and do it even when their belief that they are not the father is completely irrational or they partnered with or married a woman already knowing that she previously had children by another man. Men also are more likely to feel excessively jealous when they believe that their partner has a new lover and to kill her and possibly her new partner in revenge (Wilson & Daly).

### Missing Data to be Explored

Although the guide lists records that a judge might want explored for evidence of DV, employment and military records are missing from the list (p. 19), even though they often contain indications of abuse, harassment, or stalking. Family judges may also not think to explore warrants, probation and parole records, or even guardianship, adoption, eviction, bankruptcy, or other types of civil cases, particularly those not involving both parties. Navigating Custody, 2006 implies that only court files involving the same parties or talking to collateral sources who know the family are relevant (p. 19), again ignoring that many abusers are abusive in many other contexts (Klein, 2004).

### HIPPA Considerations

Another consideration supporting far less use of custody evaluators was not even mentioned in either guide. The Federal Health Insurance Portability and Accountability Act (HIPAA) law and Department of Health and Human Services Regulations enables an evaluated party to access the custody evaluation report performed by mental health practitioners, notwithstanding contrary state law, court rules, or even judicial orders. A well-intentioned safety provision on p. 24 implicitly suggests that judges may want to consider restricting

access to the report to the parties if doing so could create a safety risk. However, this is probably contrary to both HIPPA and the due process rights of parties involved in litigation, that is, having access to what evidence the court holds against them.

### Missed Opportunities

The bench cards, being summaries of the material in the manuals (both editions) obviously cannot adequately cover all of the material as fully. Whereas a bolded comment in the Introductory section of *Navigating Custody, 2006* suggests that readers “should read the cards first or read the supplemental text alongside the cards” (p. 8), it would have been helpful if the page number(s) of accompanying text were provided. Perhaps even more helpful, since some matters are dealt with in more than one place, would have been if the guide had an index to locate topics and to cross reference the cards with the relevant text as the Table of Contents is too summary to perform this function well.

Although *Navigating Custody, 2006* discusses that judges and evaluators may report and may be mandated to report child abuse, the guide does not suggest judicial referrals to prosecutors in other cases involving DV, child abuse, and stalking. Likewise, the guide does not discuss referrals to the police or the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) for confiscation of firearms nor even provide a referral to the Federal and state laws (see e.g., Sorenson, 2006; especially Frattaroli & Vernick, 2006; and Vigdor & Mercy, 2006). Firearm restriction laws have been shown to reduce intimate partner homicides, including homicides not involving the use of firearms, and these laws are more effective when they are mandatory, cover all firearms and ammunition (not just those used in the offense), cover both purchase and possession, and are strongly enforced (Vigdor & Mercy). These are issues over which judges may have some influence in their crafting of protective orders and in asking police or ATF for assistance in seizing weapons and enforcing their orders.

Unfortunately, the guide also fails to discuss investigations of firearms, who might perform them, and what should be ordered in such a request (probably both the ability to investigate and to seize any firearms or ammunition found). It does suggest, however, that having firearms, having used them, or made threats with them may be grounds for an emergency/interim assessment (p. 12). In addition, the tool does not specifically list firearm restriction or confiscation as relief that evaluators should include in their recommendations (pp. 26–27), although it does include securing each child's passport, which is also relief with Federal implications (p. 27).

It would have been helpful if *Navigating Custody* actually provided some sample copies of orders for assigning various types of custody experts, possibly referring to some on-line URL or including a disc, so that the court

could literally copy and supplement relevant parts as needed. Indeed, providing sample copies of relief orders generally would have been helpful.

Ideally, *Navigating Custody*, 2006 should also have devoted more space to what promotes resilience and healing for victims and their children, two critical factors that courts and custody evaluators should be encouraging. Assumptions about the effectiveness of supervised visitation and batterer intervention or treatment programs has often been exaggerated, with research producing little if any evidence that batterer programs make any difference in stopping the violence of men who abuse their intimate partners (Auchter, 2008; Berman & Feinblatt, 2005; Feder & Wilson, 2005; *Keeping the Promise*, 2005; Klein, 2004). In contrast, the only study that examined the safety of supervised visitation found that supervision, whether done by family members or supervised visitation programs, better reduced the physical violence than when visitation was unsupervised, although neither type of supervision made any difference in reducing the threats and severe psychological abuse (O'Sullivan, King, Levin-Russell, & Horowitz, 2006). These types of abuse are far more devastating to its victims (Stark, 2007; Dutton & Goodman, 2005). Whereas supervised visitation does enhance physical safety of victims, it is unrealistic to offer such programs as solutions as the guide does (p. 26), on the assumption that they can guarantee victim safety.

At the same time, it is unclear just why there is so much emphasis on lethal DV, when, fortunately, DV homicides are relatively rare even in severe cases of abuse, and it is not these cases which are still resulting in custody disputes between the parents, the subject of *Navigating Custody*. (Of course, fatality cases are often real embarrassments to judges who have failed to adequately protect the victim, leading sometimes to their being sanctioned, dismissed, or forced to retire early; (see e.g., Castaneda, 2006).

Finally, *Navigating Custody*, 2006 does not suggest appointing someone for the victim with community expertise in supporting a willing victim in order to mobilize the community into helping her. This could be an immigration attorney knowledgeable in immigration law and how it can be used to legitimate a DV victim's immigration status, thereby removing a tool that many abusers use against their victims. It could also be a shelter advocate who would work with the victim's employer, church, neighbors, and the children's schools to help alert the police whenever the abuser is violating the order, stalking, or harassing the victim. Lastly, it could be a police officer to better insure enforcement of any protective order. Some of these might be appointed as ongoing post-judgmental relief.

## CONCLUSION

Although *Navigating Custody*, 2006 is a good guide for judges, lawyers, and custody investigators and evaluators, and it is a vast improvement over the

earlier 2004 edition, it still has considerable room for improvement. One major problem, which is not adequately resolved by the guide, is that courts cannot assure victim safety. It has been found that victim safety has not increased even though an abuser has successfully completed a batterer intervention or treatment program. In addition, the use of supervised visitation whether done by families or visitation centers has been found to decrease but not eliminate physical violence, making no difference in reducing abusers' threats against victims.

Another problem is that the tool is silent about the differences between how men and women use, and are affected by DV, a problem exacerbated by the gender-neutral language used throughout the guide. Despite these problems, and some omission in the tool, it is hoped that Navigating Custody, 2006 will be widely used and that it will vastly improve the handling of contested custody cases involving domestic abuse.

## NOTES

1. All page references without further explanation in the first and second sections of this article are to Navigating Custody, 2004. All page references without further explanation in the fourth and fifth sections about Navigating Custody, 2006 are to the second version of the guide.

2. From here to the end of this article all page references without further explanation are to Navigating Custody, 2006.

3. This was Congress' rationale for mandating that states honor and enforce the orders of protection granted by other states and tribes, except for those issued without reasonable notice and opportunity to be heard or for mutual orders when no pleading was filed or no finding of abuse was made. See 18 U.S.C. §§ 2265–2266.

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