



## **Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations<sup>1</sup>**

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## I. Introduction

This report summarizes the findings and recommendations from a text analysis of custody evaluation reports produced in family law cases in which domestic violence had been identified. The text analysis was part of a national child custody project funded by the Office of Violence Against Women of the U.S. Department of Justice designed to help family court systems better identify, understand and account for the nature and implications of domestic violence in child custody determinations. The text analysis was conducted by a team of national experts under the guidance of Institutional Ethnographer Dorothy Smith. This document focuses on the results of a two-day examination of 18 domestic violence-related custody evaluation reports.

## II. Methodology

We selected a method of investigation known as the Institutional Analysis. The Institutional Analysis, which has its roots in the field of institutional ethnography,<sup>2</sup> was developed by Ellen Pence “to examine how the various legal processes into which battered women are drawn account for the violence they experience.”<sup>3</sup> One aspect of the Institutional Analysis is to identify and describe how texts (i.e., documents and other written materials) are used to coordinate institutional work:<sup>4</sup>

The [Institutional Analysis] is concerned with texts as they enter into, organize, and coordinate practitioners’ work. This means analysts ask practical questions of the text: Who reads this? For what purpose? How does the writer establish the authority to comment? How is the information used? What other texts and sources of information were used to produce this text? It does not mean that analysts engage in some kind of discourse analysis speculating as to the meaning of the text. The analysis is focused on how the text is entering into a sequence of actions, drawing from what has gone before and creating a framework for subsequent interveners to act.<sup>5</sup>

Examining texts is central to the Institutional Analysis because of the ways texts transmit the discourse that governs the case; coordinate how workers think and talk about the case; guide how practitioners act on a case; and capture those experiences that are important to the institution and treat them in institutionally authorized ways (which may or may not reflect what is actually going on in the real world).<sup>6</sup>

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<sup>2</sup> Institutional ethnography is a form of sociology that produces accounts of institutional practices that describe in detail how individual workers are organized and coordinated to act (or not act) on institutionally constructed cases. See, Dorothy Smith, THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY, Northeastern University Press (1987).

<sup>3</sup> Ellen Pence, *The Institutional Analysis: Matching What Institutions Do with What Works for People*, Praxis International, p. 4 (2011).

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 21-22.

<sup>6</sup> *Id.* at 22.

As their name implies, custody evaluation reports are “evaluative” texts. Evaluative texts are important because they demonstrate how professional discourse “enters into and shapes the actions in cases.”<sup>7</sup>

The Institutional Analysis holds these reports up against what is known about the actual experiences of the family and asks, “Is this a match?” For example, a psychological report is the object of inquiry in many kinds of legal cases. The analysts ask for a detailed description of the work that went into producing the report. They want to know how the psychologist made the observations incorporated into the final product, asking, “What was the basis...used in making these claims about the parent or child or defendant? What was the basis for selecting some aspects of the situation for commentary? What was the connection between the tests administered and the issues in the case? What was the basis of using one frame as opposed to another to link what was learned about the family to the portrait the [professional] has drawn?” And always they ask: Can we see how this report is acting to portray to the court – accurately or inaccurately – the person at the heart of the case.<sup>8</sup>

Thus, the concern of the text analysis is not whether the subject of the case was satisfied with the outcome of the case, but *whether the institutional actions adequately accounted for what was actually going on in the subject's life.*<sup>9</sup>

In this focused look at how family court evaluators approached domestic violence in contested child custody cases, we looked exclusively at cases in which one party explicitly alleged domestic violence or where both parties affirmatively acknowledged it. As analysts, we did not adopt or impose an operational definition of domestic violence to the cases we reviewed. Rather, we were interested in learning how evaluators treated the behaviors that the parties perceived to constitute domestic violence, however they defined it. Consequently, the task of the evaluators in these cases was not so much to identify whether domestic violence was an issue in the case, but rather to determine how domestic violence factored into parenting recommendations and decision-making once it had been raised as an issue in the case.

Our analysis focused on three main areas; specifically: (1) how those making the reports conducted their evaluations and documented the presence of domestic violence; (2) how family courts ordered and used these evaluations; and (3) how the evaluations influenced the court. To obtain a range of reports to review, we solicited copies of reports from sources around the country known to the project’s working group, including courts, custody evaluators, attorneys, and professional associations. Of the 50 reports gathered, 18 were selected for intensive review because that was considered to be a manageable number of reports to analyze over a two-day time period. An effort was made to select reports from several different jurisdictions (5 states and 7 counties) and prepared by

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<sup>7</sup> *Id.* at 23.

<sup>8</sup> *Id.* at 23-24.

<sup>9</sup> *Id.* at 24.

different practitioners, including forensic psychologists, social workers, attorneys, and court-appointed-special-advocates. There were no other criteria for inclusion. We made no effort to pre-judge the quality of the reports or to select "particularly good" or "egregiously bad" reports for inclusion. Since the Institutional Analysis does not attempt to report on frequencies or predict causal correlations, it does not rely on the use of randomized samples, control groups, dependant and independent variables, or statistical measures. Our inquiry was limited to discerning how the evaluative reports portrayed to the court the parties' real life experience of domestic violence.

The analysis was conducted during a two-day meeting held in the spring of 2010 at which 19 experts in the field<sup>10</sup> collectively read the 18 evaluative reports and combined an analysis of those reports with what BWJP and Praxis had learned about the workings of family court processes in domestic violence-related cases through their other project activities.<sup>11</sup> The meeting was facilitated by Dorothy Smith, an institutional ethnographer from the University of Toronto.

Each analyst was given all 18 reports to read through before the meeting and assigned two reports to read in depth. We analyzed two reports (Case 4 and Case 14) as a large group and then broke into small work groups to analyze four additional reports per group. Cases were reviewed by asking two analysts from each group to present their assigned cases to their assigned work group. We did not establish a format for presenting cases. After each presentation, a small group facilitator asked for a go-around in the group to raise questions about the case and then identify issues the case presented for them. The facilitator selected issues raised to start a more in-depth discussion. Facilitators were trained to keep the group focused on what it was that we could say about how the worker was organized to talk about and act on the case, as opposed to commenting on the skills, attitudes, and beliefs of the evaluator. This often proved difficult.

Following the two-day meeting, we identified more general groupings of problems in the way the family court is organized to understand and respond to the presence of domestic violence in these cases. We use these broad categories to report on the analysis of the group as a whole.

### III. Observations

Our principle observations fall into the following four broad categories: (1) identifying the nature and context of the violence; (2) linking the dynamics of the violence to the capacity of the parties to parent their children and co-parent with each other; (3) accounting for the implications of the violence on parenting and co-parenting in recommendations to the court; and (4) examining the capacity of custody evaluators to perform these critical functions.

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<sup>10</sup> See Attachment A for a list of meeting participants.

<sup>11</sup> These other activities included a safety and accountability audit of a family court system in rural Northwest Ohio, interviews with researchers and expert practitioners from around the world, and focus groups with battered women, attorneys, guardians ad litem, court-appointed-special advocates, and judicial officers.

## A. Identifying the Nature and Context of the Violence

We observed that evaluators did not consistently describe and explain the nature and context of the violence occurring in these cases. It was often very difficult to discern from the reports who was doing what to whom and to what effect. As a result, the reports provided very little information about what was actually going on in the lives of the people whose cases were being processed through the family court system.

Virtually every state now requires the family court to take domestic violence into account in determining the best interests of the child. It is one of several statutory factors that the court must consider when developing a parenting plan.<sup>12</sup> Increasingly, family court practitioners recognize that the presence of domestic violence is relevant to alternative dispute resolution processes, like mediation and early neutral evaluation.<sup>13</sup> While practitioners generally agree that they have a responsibility to address domestic violence, few are given specific direction about how to identify domestic violence or determine its intent, meaning and effect.<sup>14</sup>

As discussed earlier, research and experience show that domestic violence is not a monolithic experience, but varies greatly depending upon the dynamics at work.<sup>15</sup> There is general agreement in the field that family court practitioners must get a full picture of the characteristics of domestic violence in each case in order to respond effectively.<sup>16</sup> According to a report of the 2007 Wingspread Conference on Domestic Violence and Family Courts:

There was consensus...that each domestic violence situation must be closely examined to determine the potential for lethality, the risk of future violence, and the presence of other forms of intimidation. Critical variables identified...included: the frequency, intensity, and recency of the violence; the presence of sexual coercion or abuse; the existence of nonphysical coercive strategies including verbal abuse, threats, isolation, and financial control; the presence of an established history of violence, criminal activity, substance abuse, or mental health issues; the determination of "who is afraid of what"; the needs, interests and well-being of children; any history of child maltreatment; and the extent to which the violence is consistent with a recognized pattern with proven implications for ongoing risk or the utility or

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<sup>12</sup> See, e.g., Minn. Stat. §518.17(1)(a) ("...'the best interests of the child' means all relevant factors to be considered and evaluated by the court including...the effect on the child of the actions of an abuser, if related to domestic violence..., that has occurred between the parents....").

<sup>13</sup> Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L. Q. 659, 662-664 (2008).

<sup>14</sup> Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523 (2008).

<sup>15</sup> *Id.* at 524.

<sup>16</sup> Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454 (2008).

impact of particular interventions or determinations. Family strengths and protective factors should also be taken into account and supported.<sup>17</sup>

Rather than highlighting for the court the nature and context of the violence occurring in these cases, the reports we examined did just the opposite – they obscured the violence. This was most apparent where evaluators: (1) did not receive clear direction from the court about what they were supposed to evaluate; (2) adopted a narrow, incident-specific focus on domestic violence; (3) restricted their reporting to physical violence alone; (4) subjectively decided what information was important and what was not; (5) subsumed the violence under alternative frameworks, such as *high conflict*, *mental illness* or *parental alienation*; or (6) substituted their own personal assumptions, values and ideologies for “fact” in a case.

### 1. Lack of Clear Direction from the Court

One source of the problem seemed to be that courts did not always tell evaluators what they wanted to know about domestic violence. In most of the cases we analyzed, courts gave very little direction or guidance to the evaluators about the purpose and scope of the evaluation. In Case 9, for instance, the evaluator summarized his charge as follows:

The question for the court and for this evaluator is to try to help determine the best interests of [the child] and to identify the parenting capabilities of both parents.

In Case 16, the court’s instruction to the evaluator was to:

Perform a “full physical custody and parenting time evaluation,” including the [adult] psychological evaluations completed as part of the Early Neutral Evaluation program.

In Case 1, the evaluator saw his role as helping the court resolve the following broad question:

...in whose custody the two minor children...should be awarded and what visitation arrangements should be allowed the non-custodial parent.

In Case 2, the evaluator characterized his job as follows:

The parties were referred by court order and by mutual agreement for an impartial and comprehensive Evaluation of Issues Related to Custody and Visitation of their children...for the purpose of developing recommendations in their best interests.

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<sup>17</sup> *Id.* at 457.

Similarly, the purpose of the evaluation in Case 5 was to conduct “an assessment about the best interests of the two children of this marriage.”

In none of these cases was the evaluator instructed to report on: (1) the nature or context of the violence; (2) the role that domestic violence had played in the lives of the children and adult victims; (3) the risk or likelihood of that abuse continuing into the future; or (4) the implications of the violence on the decisions before the court, including how the abuse relates to the best interests of the children and the parenting capacities of the parties.

By and large, we saw very little indication in any of the cases we examined that the court expected the evaluators to possess any degree of competence in domestic violence nor that they comply with any standards of professional practice related to domestic violence in conducting their evaluations.<sup>18</sup> In fact, we found only one case in which a judge confronted an evaluator for sidestepping all of the domestic violence issues and applying psychological theories with very little justification. Absent clear direction from the court about the relevance of domestic violence to the evaluation, it is not surprising that domestic violence was not a central consideration in the cases we examined.

## 2. Narrow, Incident-Specific Focus

In several cases, domestic violence was only mentioned in the most cursory way. In Case 15, for instance, the evaluator’s entire treatment of documented domestic violence was encapsulated in the following two sentences:

The parties both report that there has [sic] been instances of domestic abuse; however they agree that the children were not present during these exchanges and that they have not been affected by these occurrences. I have not observed any apparent effects of domestic violence on the children.

In Case 18, the evaluator summed up the relevance of domestic violence, in which the father reportedly punched the mother in the face with his fist while she was holding their 3-month old daughter, as follows:

Domestic violence has occurred between the parents. Currently, [the mother] has an Order of Protection against [the father]. The domestic abuse incident for which [the father] was arrested occurred prior to [the youngest daughter] being born, when the twin girls were approximately three months old. It is fairly unlikely that the children have been affected by this incident.

Not only did the evaluators in these cases limit their consideration of domestic violence to one or two discrete incidents, but they did not describe what happened during those incidents. In Case 14, for instance, the evaluator noted that “the Court...found domestic

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<sup>18</sup> See, e.g. AFCC Model Standards of Practice for Custody Evaluation (2006); APA Guidelines for Child Custody Evaluations in Family Law Proceedings (2009); AACAP Outline of Practice Parameters for Child Custody Evaluation (1997).

abuse occurred by [the father] against [the mother] in the presence of [the child]," but he neglected to give any details about the domestic abuse, which included the father's sexual assault of the mother while the child was "sleeping inches away" in the same bed.

There is very little indication in these cases that the evaluators appreciated or seriously considered that a sexual assault or a punch to the face could have been part of a larger pattern, or that more information about the nature and context of the violence would have been helpful to the court. Reporting the violence as an isolated event, without explaining what happened or considering whether it is part of a larger pattern of coercive control, fails to explicate for the court how the domestic violence might affect: (1) the current and future health, safety and wellbeing of the children and the abused parent; (2) the parenting capacities of the parties; or (3) the ability of the parents to successfully share parenting responsibilities. The evaluators did not seem to recognize how a deeper understanding of domestic violence might shed light on what was actually happening in the day-to-day lives of the parties or explain why the parties behaved the way they did and took the positions they took with respect to the custody of their children.

### 3. Concentration on Physical Violence Alone

As the preceding examples demonstrate, the custody evaluation reports we reviewed often focused exclusively on physical violence without regard to other features and characteristics of abuse, such as coercive controlling abuse (with or without physical violence), sexual coercion, psychological abuse and economic control. Recent research shows the importance of screening for and examining non-physically violent forms of abuse, and suggests that "coercive control may be a more accurate measure of conflict, distress, and danger to victims than is the presence of physical abuse."<sup>19</sup>

... [O]btaining a snapshot of physical abuse, without regard to coercive control and sexual coercion, may misrepresent what are severe and less severe forms of intimate abuse. The findings of this study support the argument that coercive control is an efficient and accurate signal of relationship distress for women in a mediation sample. Using combined moderate and high coercive groups, we were able to capture information on physically forced sex, threats to life, and escalated physical violence in up to two thirds of women. In contrast, the physical abuse index missed the majority of women who reported severe distress.<sup>20</sup>

In Case 16, the evaluator discounted the mother's reports of coercive control. He observed that:

To her therapist, [the mother] reported [the father] as 'verbally and emotionally abusive.' [She] failed to list this as a concern during interviews.

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<sup>19</sup> Connie J.A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555 (2010).

<sup>20</sup> *Id.* at 562.

She did have her attorney leave me a telephone message that [the father] is prone to ‘rage’ and has a history of beating up other people...These report discrepancies are seen in the context of [the mother’s] psycho-social functioning and not as indications of domestic violence between the parties.

Significantly, the report focused more on the nature and timing of the mother’s disclosures than on the nature and context of the abuse that had been disclosed. The report also glossed over other problematic behaviors of the father, including relocation with the children without notice to the mother, prior domestic violence charges, a prior DWI charge, and a propensity to violence and rage. Without further examination of these behaviors, the evaluator recommended that the father receive sole physical and legal custody, noting that:

[The mother] is quick to complain that [the father] threatens and manipulates her into thinking she is “crazy” or a bad parent....[The mother’s] pattern of behavior is seen as based in personality characteristics and not amenable to change without [her] personal commitment to the change process over a long period of time.

Case 17 provides a similar example of the way evaluators often minimized the significance of coercive control. In that case, the evaluator did not explore the mother’s allegations of coercive control, but speculated that she “has convinced herself that [the father] has these problems and it has become an obsession that is harming [their daughter].” Although the evaluator expressed concern that father “becomes angry with [the daughter], yells at her and makes fun of her for crying,” he concluded that “I do not believe that [the father] intentionally intimidates [his daughter], but with his personality style, demeanor and voice, unfortunately that is sometimes the result.” In the end, the evaluator determined that the mother’s reports of coercive control were more damaging to her daughter than the father’s pattern of domestic violence and his actual intimidation and ridicule of the child.

#### 4. Subjective Weighting of Information

As evidenced in the foregoing case, another recurring issue was the widespread practice among evaluators of deciding what “counts” when it comes to domestic violence, without a thorough exploration of the circumstances and without regard to established research on risk factors associated with abuse.<sup>21</sup> In Case 17, for instance, the evaluator discounted information supplied by the daughter’s current, long-term therapist, who expressed deep apprehension about the child’s emotional safety with the father,<sup>22</sup> as well as reports from several collateral sources who “collectively expressed concern for [the father’s] anger

<sup>21</sup> See, e.g., Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 92-98, 93 fig. 5.2 (Jacquelyn C. Campbell ed., 2d ed. 2007). See The Danger Assessment at <http://www.dangerassessment.org/about.aspx> (last visited November 27, 2011).

<sup>22</sup> The child’s licensed psychologist noted that the daughter “appears to have significant problems with her anger particularly as related to transitions to and from her father’s home regarding visitations with him...[and] voices concerns about her father hurting her again if he were to get angry with her for any reason.”

problems, verbal and emotional abuse of [the daughter], and chemical abuse." Instead, he credited: (1) an old report from a guardian ad litem produced 6 years earlier that found "no concrete evidence" of a threat of harm to the daughter; (2) a parenting time coordinator who was disappointed that the mother "cannot resolve her strong negative feelings" about the father; (3) notes from a psychiatrist who conducted a parenting time assessment some 6 or 7 years earlier indicating that the father "did not have a criminal record;" and (4) the father's collateral sources who believed that the mother was "abusing the court system by making these allegations."

In that case, the evaluator gave more weight to the opinion of a parenting time coordinator who did not have a clinical relationship with the daughter than to that of the daughter's long term therapist, who was a licensed psychologist. The evaluator also overlooked the fact that the father had multiple orders of protection against him and a documented history of violating those orders.

Inevitably, custody evaluators must decide what information to include in their reports and how much weight to accord conflicting information. The process by which they perform this task, however, is often hidden from the reader. In other words, one cannot often tell by reading a report what information the evaluator considered, what information the evaluator rejected, what weight the evaluator gave to conflicting information (and why), and what information was missing altogether.

The AFCC Model Standards of Practice for Child Custody Evaluations ("Model Standards") instructs evaluators to "explain how different sources and different types of information were considered and weighted in the formulation of their opinions."<sup>23</sup> The Model Standards further direct evaluators to:

"...explain the relationship between information gathered, their data interpretations, and opinions expressed concerning the issues in dispute. There shall be a clear correspondence between opinions offered and the data contained in both the forensic report and the case file."<sup>24</sup>

In addition, the Model Standards encourage evaluators to "disclose incomplete, unreliable or missing" information.<sup>25</sup>

Collectively, these standards help ensure that evaluators not only get a full, complete and accurate picture of what is going on in the lives of the people they are evaluating, but they also guard against the tendency to make arbitrary, subjective decisions about "what counts" when it comes to issues in dispute. We saw widespread deviation from these standards in the cases we reviewed.

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<sup>23</sup> AFCC Model Standards of Practice for Child Custody Evaluations §11.4 (2006).

<sup>24</sup> *Id.* at §12.2.

<sup>25</sup> *Id.* at §5.12.

## 5. Violence Subsumed Under Alternative Frameworks

Many of the reports we examined considered the issue of domestic violence through the lens of some alternative framework, such as high conflict, mental illness, or parental alienation. When this happened, the presence of domestic violence became obscured and distorted. In these cases, the reports rarely explored the nature or context of the violence, leaving the court with very little information about what was actually going on in the lives of the people whose cases were being decided.

### a. High Conflict

We observed several examples in which domestic violence was only briefly described and then packaged up by the evaluator as a communication problem or a case of mutual parental conflict. In Case 12, for instance, the evaluator characterized the history of abuse, which included physical assaults against the mother and children, as well as efforts to financially ruin the mother and bully her through harassing litigation, as “mistakes” within the context of “intractable marital conflict.”

In Case 14, the evaluator described the documented domestic violence as follows:

At a hearing on April 8, 2008, the Court...found domestic abuse occurred by [the father] against [the mother] in the presence of [the child]. The Court did not find domestic abuse by [the father] against [the daughter] and ordered an [order of protection] protecting [the mother] but not one protecting [the daughter]. There is no direct evidence of the impact of this domestic abuse on [the daughter] who was present at the time.

The evaluator did not inform the court about the details of the domestic abuse, which included sexual assault in the presence of the child. Notwithstanding the history of abuse, the evaluator recommended joint custody, noting that “these intelligent, highly educated parents can work together for the benefit of their daughter if given the opportunity outside this litigation.” The evaluator did not offer any suggestions as to how a woman who was raped by her husband in front of their child was supposed to “work together” for the benefit of the child, or how a man who raped his wife in front of their child was expected to recognize, let alone respect, the needs and interests of either the mother or the daughter.

A similar thing happened in Case 17. There, the evaluator glossed over a history of documented domestic violence and simply admonished the parties to “be aware of how much their ongoing conflict has affected [their daughter].” The evaluator further encouraged the mother to stop “bringing up these issues” of domestic violence because it is “only hurting [her daughter].” Again, the reader is left with the impression that raising allegations of abuse is more damaging to a child than actually abusing the mother or child.

In all of these cases, domestic violence was absorbed under a framework of marital conflict. As a result, the true nature and context of the violence was neither fully described for the court nor thoroughly evaluated.

### b. Mental Illness

In many cases, the nature and context of domestic violence was hidden when evaluators' observations were subsumed under a mental health framework. We reviewed several cases in which a parent or child's reaction to domestic violence was framed as evidence of mental illness or pathology without apparent justification or consideration of alternative explanations.

In Case 16, for instance, the evaluator concluded that "there is clinical evidence over many years that [the mother] suffers from a complicated mental health profile<sup>26</sup> that has negatively impacted her ability to hold a job, function independently and to consistently parent the children." The evaluator based that supposition on the following notations in his report:

- (1) The mother witnessed "significant verbal abuse between her parents and...couldn't stand living there."
- (2) Six years earlier, "after a long series of reportedly bizarre behaviors caused [the husband] to be concerned about [their 2-year old daughter's] well-being while left alone with [the mother], she agreed to see a mental health professional as a walk-in client...[The mother] reported feeling [the father] had forced her and manipulated her into going. She was diagnosed with an adjustment disorder and encouraged to seek individual counseling...She did not do so at the time."
- (3) The mother "was administered the MMPI-2 and her answers, while falling short of a clinical diagnosis of a paranoid disorder, nonetheless indicated...several elements in a paranoid personality disorder. These symptoms can include a pervasive distrust and suspiciousness of others....Furthermore, [the mother] was seen as displaying a reluctance to confide in others because of her unwarranted fear the information will be used maliciously against her. She was observed...as sometimes being rational and unemotional but more often as sarcastic and suspicious. I observed [the mother], despite several statements to the contrary, to be overly fearful that she would

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<sup>26</sup> A mental health profile is not the same thing as a clinical diagnosis.

be labeled as schizophrenic or that her children would be taken away from her.<sup>27</sup>

- (4) The “available information suggests that [the mother] has a Thought Disorder....[The father’s] concerns about [the mother’s] judgment and emotional functioning throughout their marriage is consistent with a thought disorder and the fact that [the mother] is extremely reluctant to obtain mental health counseling or to appear ‘schizophrenic’ is also evidence of a thought disorder.”
- (5) The mother was given a professional diagnosis of “Dysthymia and Anxiety Disorder Not Otherwise Specified (NOS)” and was prescribed Prozac. The doctor anticipates seeing [the mother] “every one to two months. [The mother] is looking into therapy options.”<sup>28</sup>
- (6) Another therapist diagnosed the mother with Dysthymia “but had a ‘rule out’ on Axis II of Avoidant Personality Disorder and Borderline Personality Disorder....”

The evaluator observed that the mother “presents either as eager and willing to seek help or as being ‘coerced and manipulated’ into getting help....” He concluded that the mother’s:

mental/emotional health has, in my opinion, contributed to her poor parenting decisions such as: removing [the infant daughter] from intensive care against medical advice...and fail[ing] to consistently get [her other daughter] to school on time...These types of behaviors have serious implications for [the mother’s] ability to provide consistent, adequate parenting to [her daughters]. Much more clinical data over a much longer period of time needs to be reviewed to be able to determine how much of an influence [the mother] should have in the children’s lives in the future.

Without entertaining the possibility that the mother was actually being “coerced and manipulated” by the father, and without exploring the circumstances surrounding the younger child’s hospitalization or the older child’s attendance problems, the evaluator appeared to rely exclusively on the mother’s mental health profile, which was admittedly based on incomplete clinical data, to form an opinion that the father should receive sole legal and physical custody of the children, despite indications of coercive controlling abuse.

Similarly, in Case 15, the evaluator recommended that the father, a confirmed alcoholic with a history of domestic violence, be granted sole legal and physical custody of the 3 and

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<sup>27</sup> In the end, the evaluator determined that the father should receive sole legal and physical custody because of the mother’s perceived mental health status. Consequently, the mother’s fear turned out to be entirely warranted.

<sup>28</sup> The evaluator discussed and described “generalized anxiety disorder” in the report, but noted that the mother’s doctor “appears to have found anxiety in [the mother], but less than the required additional symptoms to qualify for the diagnosis of GAD.”

5-year old children, with limited supervised visitation for the mother. That recommendation seemed to be based exclusively on the mother's mental health:

[The mother] has had recent mental issues including a suicide attempt in January 2009. She is on medication and has not established a history of mental health stability.

Significantly, the mother's mental health issues were not extensively described in the report, except for a reference to "a psychotic episode" that occurred 2½ years earlier when the parties separated, at which time the mother "was removed from the home by the police and placed in a shelter" (as opposed to a hospital or crisis intervention facility). The only evidence in the report of the mother's mental health status was the father's claim that the mother was disturbed and the mother's own statement that she had been diagnosed with severe depression, fibromyalgia, migraine headaches, bipolar disorder and high cholesterol. The evaluator noted that he reviewed a "summary of counseling sessions," "information regarding [the mother's] medication evaluation," and "neurology records," but did not reference any specific parts of those records in his report. Not only is the reader left with very little sense of the mother's actual mental health status, but there is nothing in the report that describes the nature and context of the father's documented history of domestic violence with any specificity whatsoever.

We saw evidence that many evaluators administered psychological tests in the context of custody evaluations that were not designed to detect domestic violence or identify its impact on family members. Below is a list of some of the more common psychometric tests evaluators utilized in the reports we reviewed. These instruments can give the evaluator information that could be helpful, but none of them is designed or validated to account for domestic violence or coercive control.

MMPI-2  
Parenting Stress Index  
Millon Clinical Multi-Axial Inventory  
Substance Abuse Subtle Screening Inventory  
Rorschach  
Bricklin Perceptual Scales  
Perception of Relationships Test  
Wide Range Achievement Test – Reading Section

We saw several examples of the questionable use of psychological tests to make future predictions about the parents. For instance, in Case 4, the evaluator noted that, while the mother didn't drink at all, had never had an issue with alcoholism, and whose screening for drugs and alcohol "does not support the idea of any dependence,...her personality type is similar to individuals who might develop an addictive disorder sometime in the future."

Similarly, in Case 11, the evaluator indicated that, "The MMPI-2 describes [the mother] as positive about life and as being 'quite outgoing and sociable.' The MMPI-2 profile is within

normal limits but is so defensive that it is not possible to determine whether she has any diagnosable disorders." The evaluator went on to say that:

On the Millon taken in this office, her score on the Disclosure Scale, the degree to which you are actually willing to disclose things about yourself, was so extreme that the test was invalidated. This score suggests that [the mother] shows 'gross naivety regarding psychological matters, a marked lack of self knowledge, or an intense resistance to admitting personal shortcomings.' These test results are consistent with the clinical picture....

[The mother's] high level of defensiveness on the tests taken in this office as well as on the tests administered at the county is well beyond the degree expected in a custody study and indicates personality traits which are likely to be long standing in origin. They are traits which are likely to continue to be features of her personality and her approach to her interaction with others including [the father] and her daughter over the years ahead. [The mother's] level of defensiveness makes it difficult to know whether she may have a disorder which would merit a diagnosis. She stated that she has taken medications because of anxiety and depression.

Again, these kinds of pathologizing observations, based on invalidated test scores, tell us very little about the mother's actual mental health status. They tell us even less about how the mother's behaviors might be related to the abuse she experienced at the hands of the father. Worse yet, they distract us from learning about a central issue in the case, which is the nature and context of domestic violence and its impact on parenting.

### c. Parental Alienation

We saw numerous examples of documented abuse toward a parent or child obscured, discounted, or explained away altogether under the framework of parental alienation. Some evaluators seemed quick to assume that a child's attachments and/or aversions towards one parent were the product of manipulation, suggestion, or contempt by the other parent. Of course children are often influenced by, and frequently endorse, the values and beliefs of their parents. But by and large, children have their own opinions, comfort levels, and sense of wellbeing with a parent based on their own experiences and relationships with that parent. This is a context that was rarely explicated in the reports we read. We repeatedly saw examples of assumptions made by evaluators that the children's aversions to their fathers were a consequence of: (1) their mother's negativity towards their father; (2) the child being placed in a position of having to protect a parent (typically, a mother); or (3) the child being forced to choose between their parents.

In Case 7, for example, where the two teenage children adamantly resisted contact with their father, the evaluator, a reunification therapist, looked past a long history of domestic violence, which included physical assaults against the children by their father and an

attempted strangulation of the mother by the father in the children's presence, and concluded that, "The children are suffering from a severe form of parental alienation."

While the evaluator noted the past abuse and the father's acknowledgement of it, she reasoned that the children should put all of that behind them now and move forward. At no point did the evaluator attempt to describe or explain the children's experience of their father's abuse or consider the possibility that the children's antipathy towards their father might have been directly related to the abuse they suffered at his hands instead of their mother's negative influence.

Similarly, in Case 13, where the two pre-teen daughters protested visits with their father, the evaluator recognized the father's past intimidation of the entire family, as well as allegations of child sexual abuse (which actually prompted the evaluator himself to notify child protective services), but placed the responsibility for the daughters' strained relationship with their father squarely at the feet of their mother:

It is possible that [the daughter's] allegation, if false as I think likely, is the result of explicit coaching by her mother, or the result of suggestion implicit in her mother's fearfulness and fearful questions. It is also possible that it is a consciously constructed falsehood designed to deal with the danger she feels when under the influence of her mother's dread of being re-exposed to her father....

The evaluator opined that there were "considerable psychological risks" in leaving the daughters in the exclusive care of their mother, though the evaluator did not elaborate on what those risks might be. He concluded that the daughters should be placed in the "full time care of their father, uncomplicated by any access with their mother and maternal grandparents" for a period of three months, followed by graduated access over the next year. The evaluator explained his recommendation as follows:

The purpose of such an intervention would be to help [the daughters] see that the idea that their father is abusive and dangerous is their mother's unrealistic conviction and need not apply to their experience of him, so that they may be freed to resume and develop their relationship with him. Their experience would be of establishing an ordinary domestic and school life with their father and his partner....

The idea will likely be alarming to [the mother], and may initially be alarming to [the daughters]. There are also other possible complications for one or both of them in such a recommendation: they may fear for their mother, because they have a sense of her fragility, having been immersed in it for so many years. In addition, I think that they would miss her and their grandparents....

Despite his apparent certainty that the mother was responsible for alienating the children from their father, the evaluator qualified his recommendation as follows:

This recommendation is made on the basis of the observations and inferences I have discussed above which suggest that the allegations that [the father] is abusive are unlikely to be true. There would be changes in my formulation and recommendations if new information were to emerge demonstrating that [the father] had been abusive to [the daughters].

A notable feature in the foregoing cases is that the evaluators all described the children as exceptionally high achievers who were being very well-parented by their mothers, apart from the claims of alienation. The same was true of the other cases we reviewed where parental alienation was a central issue. In Case 12, for example, the evaluator observed:

It is not possible to see these children as badly parented [by the mother]. They are all delightful young people making their way in the world...[A]ll the boys are high achievers with no personal sense of victimhood.

Significantly, the reports in these cases did not explicate for the court how the perceived parental alienation negatively impacted the children, except to speculate that they may develop “an intolerance of conflict with authority,” or diminished “capacity for intimate relationships with men and possibly women as well” sometime down the road. The reports focused much more concretely on the harm to the “alienated” parent who, in each case, was alleged to have abused the children directly.

Finally, in Case 19, the two oldest teenage girls expressed serious misgivings about spending time with their father. The father’s friend engaged in some kind of inappropriate sexual contact with the older daughter, which was only vaguely reported. The daughter was upset by the way her father dealt with the sexual assault and by the fact that the father continued a close relationship with his friend even after the friend was convicted of sexually assaulting the daughter. The daughter’s primary issue with her father seemed to be related to this experience. Yet, the evaluator did not include anything in his report that would help the reader to: (1) know the nature of the abuse the daughter experienced; (2) appreciate what happened when the abuse was disclosed; or (3) understand whether the daughter is still afraid of being harmed by the father’s friend.

In this case, we do not know what the alleged inappropriate sexual behavior was. We do not know what the girl wanted her father to do. We do not know what the father may have done to protect his daughter or help her deal with the aftermath of the sexual assault, including how he related to his friend. We are uncertain about the level of intimidation the oldest daughter claims her father was using and who else in the family had seen this happen. The evaluator noted that the mother interceded in incidents where the father was becoming aggressive towards the daughter, which often resulted in the father’s assault of the mother. The evaluator seemed to conclude that the daughter somehow blindly aligned herself with the mother in the mother’s conflict with the father. If both the daughter and the mother were victims of the father’s aggression, a very different dynamic likely would have been present than the one described in the report. In this case, it would seem that the evaluator should have been obligated to thoroughly investigate and then comment on the

issues the girls raised about their sense of safety and about their strained relationship with their father. By portraying the girls as simply echoing their mother's concerns about their father's abuse, the evaluator missed a real opportunity to uncover what was actually going on in the home.

What was absent from all of the foregoing reports was any information that would have helped the court understand the nature of the children's hostility towards or aversion to visits with their fathers. The evaluators did not appear to dig deep enough, ask the obvious questions, or credit the limited information that they did have about the abuse. As a consequence, the reports failed to describe and adequately explain the nature and context of the violence that preceded the breakdown of the children's relationships with their fathers.

Assumptions about parental alienation were most often applied to mothers' seemingly obstructive behaviors. Those same assumptions were not applied to identical behaviors exhibited by fathers. In Case 15, for instance, the evaluator recommended that the father, a confirmed alcoholic with a history of domestic violence, be granted sole legal and physical custody of the 3 and 5-year old children, with limited supervised visitation for the mother, even though he concluded that:

In my opinion, [the father's] having authority over the children also carries some risk. While I believe that [the father] is capable of making decisions that would promote healthy stable lives for the children, I do not think he would support their relationships with their mother...[The mother] has also raised the issues of [the 5-year old son] calling her names relating to her mental health issues during their supervised visits. She asserts that [the father] is instilling negative views of her in the children. [The father] does not deny that the children could have possibly overheard him say negative statements *[sic]* he has made about her....There is a concern about the possibility of parent alienation.

Unlike the cases in which mothers were accused of parental alienation, the evaluators tended to give short shrift to claims of alienation when fathers interfered with children's relationships with their mothers. Significantly, all of the cases we reviewed that involved claims of alienation by the mother also involved allegations that the father had been abusive to the mother and often the children. Yet, the mothers' behaviors were not examined in the context of that abuse. Conversely, none of the cases we reviewed that involved claims of alienation by the father also involved allegations that the mother had been abusive. Aside from claims by the father that the mother was mentally ill, there was no other context in which the fathers' behaviors could be explained or understood.

In any event, application of the alienation framework often worked to mask the nature and context of the violence occurring in these cases.

## 6. Assumptions Treated as Fact

We observed that the nature and context of domestic violence were also hidden when the evaluators' assumptions and isolated observations stood in for the actual facts of the case. It was not uncommon for an evaluator to treat an inference, observation or opinion as a factual finding and then draw a conclusion that did not represent what was actually going on.

In Case 1, for instance, a criminal charge of child endangerment had been filed against the mother. The mother told the evaluator that, on the advice of counsel, she did not want to discuss the pending criminal case. She also told the evaluator that if he had questions about the criminal case, he should call her attorney. The evaluator characterized that exchange as follows:

[The mother] was charged with child endangerment in September of 2008. She purports that she was dropping the minor children off at the father's residence...and that 'somebody buzzed them into his place but he said he wasn't home. That's why we're in all this mess now.' [The mother] was remarkably unaware of the status of her criminal case. She was aware that she needed to appear in court in late May of 2009 but was unaware if she had entered a plea. She was unaware or unwilling to answer questions about whether this was a misdemeanor or felony offense. She could not recall the judge in her case and had to call her attorney to answer such questions....

Here, the evaluator reported that the mother was "remarkably unaware of the status of her criminal case," when, in fact, she appeared to be exercising her constitutionally protected right against self-incrimination.

In that same case, both the father and the guardian ad litem reported that the mother suffered from sleep apnea. The mother produced a medical record to show that she had tested negative for sleep apnea. The evaluator informed the court that, when asked about her physical health, the mother "failed to include sleep apnea (as mentioned by the father in this case as well as the Guardian ad Litem)." The evaluator concluded that the mother:

...was being less than truthful during the clinical interview...[and that her] self-report, especially with regard to her medical issues...was inconsistent with the Guardian Ad Litem's report. Most likely, [the mother] may be abusing pain medication but this could not be determined via this evaluation. She may be the victim of sleep apnea and evidencing some depression that may be associated with that disorder...This psychologist has concerns about [the mother's] ability to provide adequate care to children over time without adequate treatment.

The evaluator's treatment of domestic violence in that case consisted of the following notations:

[The mother] estimated eight different incidents of domestic violence by [the father], alleging that she was grabbed by the arm, fisted to the chest, and kicked. She purports that she called the police on two to three different occasions but “he would always leave.” She was unsure if [the father] had ever been charged with domestic violence....

[According to the father] he was on Probation for Carrying a Concealed Weapon/Domestic Violence charge due to the fact that he may have shot a pistol in the air. He was unsure if he was convicted on a Felony-4 charge or a Misdemeanor-1 charge or both....<sup>29</sup>

In this case, the evaluator concluded that “the clinical interview raised concerns” about the mother because she failed to mention a medical condition that she did not have and invoked her constitutional right to refuse to discuss a pending criminal matter, whereas it “raised no current concerns” about the father in spite of his documented history of domestic violence, which included discharging a firearm. The evaluator’s isolated observations during the clinical interviews, and his reliance upon similarly isolated observations by the guardian ad litem, not only distorted the mother’s true health status, but also masked the true nature and context of the father’s violence.

We found many similar problems in other reports. In Case 16, for instance, the evaluator formed an impression that the mother had serious mental health issues and reported that she was out of compliance with a mental health treatment plan that did not exist. Likewise, in Case 3, the evaluator assumed that the mother willfully refused to take her psychotropic medication when, in fact, no doctor had ever prescribed medication for her.

In these and other cases, the evaluators’ clinical impressions and assumptions about the parties stood in for the actual facts of the case and interfered with the task of identifying the nature and context of domestic violence. Ironically, the seeds of these mistaken assumptions were almost always sown by the very person whose abuse escaped scrutiny.

## B. Linking the Dynamics of Abuse to Parenting Capacity

We saw very little evidence in the reports we examined of any connection between the dynamics of domestic violence and the parents’ capacity to raise their children or co-parent with each other. We did not see a single report that explicated for the court how the experience of domestic violence shaped the parenting of either the abusive parent or the abused parent. Nor did we see much in the way of the impact of the violence on the children. In fact, the opposite was true. We saw many reports that noted, in conclusory fashion, that the violence simply had no impact on the children. Case 15 where the evaluator indicated that he had “not observed any apparent effects of domestic violence on the children,” and Case 18 where the evaluator noted that “It is fairly unlikely that the

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<sup>29</sup> Significantly, the evaluator did not conclude, as he did in the case of the mother, that the father was “remarkably unaware” of the circumstances surrounding his felony conviction.

children have been affected by this incident," provided two examples of this widespread problem.

## 1. Impact of Abuse on Children and Parenting

A substantial body of empirical research confirms that domestic violence has serious negative effects on children.<sup>30</sup> Numerous studies show an alarming co-occurrence of domestic violence and child physical and sexual abuse. The weight of the research demonstrates that 30% to 60% of children living in homes where domestic violence occurs are also physically or sexually maltreated.<sup>31</sup> It is beyond dispute that children who suffer from direct physical and/or sexual abuse often experience multiple emotional and behavioral problems,<sup>32</sup> as well as a variety of trauma symptoms, including nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development.<sup>33</sup> Significantly, studies show that children who are *exposed* to domestic violence,<sup>34</sup> but who have not been physically or sexually abused themselves, exhibit levels of emotional and behavioral problems, trauma symptoms, and compromised social and academic development comparable to children who are direct victims of physical and sexual abuse.<sup>35</sup> Consequently, domestic violence is known to have multiple, seriously detrimental effects on children even when children are not themselves the direct targets of parental aggression.

Most of the research on the connection between domestic violence and parenting focuses on fathers who batter and mothers who are abused. Very little research exists about mothers who batter or fathers who are abused. The existing research confirms that men who batter are likely to parent very differently from other fathers<sup>36</sup> and that mothers who are abused often experience specific parenting challenges, at least in the short-run.<sup>37</sup>

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<sup>30</sup> Wolfe, D.W., Crooks, C.V., Lee, V., McIntyre-Smith, A., & Jaffe, P.G. (2003). The Effects of Exposure to Domestic Violence on Children: A Meta-Analysis and Critique. *Clinical Child and Family Psychology Review*, 6:171-187.

<sup>31</sup> Edleson, J.L. (1999). The Overlap Between Child Maltreatment and Woman Battering, *Violence Against Women*, 5(2), 134-154; Appel, A.E., & Holden, G.W. (1998). The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal. *Journal of Family Psychology*, 12:578-599.

<sup>32</sup> Grych, J.H., Jouriles, E.N., Swank, P.R., McDonald, R., and Norwood, W.D. (2000). Patterns of Adjustment Among Children of Battered Women. *Journal of Consulting and Clinical Psychology*, 68:84-94.

<sup>33</sup> Graham-Bermann, S.A. & Levendosky, A.A. (1998). Traumatic Stress Symptoms in Children of Battered Women. *Journal of Interpersonal Violence*, 13:111-128.

<sup>34</sup> Exposure to domestic violence includes, among other things, seeing or hearing the violence itself, being forced to be a part of one or more violent episodes, and witnessing the after-effects of violence by seeing the abused parent physically harmed or the abusive parent being arrested or removed from the home. Edelson, J. (1999). Children's Witnessing of Adult Domestic Violence. *Journal of Interpersonal Violence*, 14(8):839-870.

<sup>35</sup> United Nations Children's Fund, *Behind Closed Doors: The Impact of Domestic Violence on Children*, 2006; Jaffe, P.G., Wolfe, D.A., & Wilson, S.K. (1990). *Children of Battered Women*. Newbury Park, CA: Sage Publications.

<sup>36</sup> Edleson, J.L., & Williams, O.J., eds. *PARENTING BY MEN WHO BATTER: NEW DIRECTIONS FOR ASSESSMENT AND INTERVENTION* (Oxford University Press, 2007).

<sup>37</sup> Jaffe, P.G., Johnston, J.R., Crooks, C.V., & Bala, N. (2008). Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans, *Family Court Review*, 46(3):500-522.

Violent fathers tend to be under-involved with their children and more likely to use negative parenting practices, such as spanking, shaming, and exhibiting anger towards their children.<sup>38</sup> Other parenting deficits common to violent fathers include systematically undermining and interfering with the other parent's authority, utilizing controlling and authoritative parenting styles, having unreasonable expectations of other family members, refusing to accept input from others, remaining inflexible, and elevating their own needs above those of their children.<sup>39</sup> In addition, violent fathers tend to be very poor role models, impeding their children's development of healthy relationships and conflict resolution skills.<sup>40</sup>

The parenting capacities of abused mothers can also be compromised. They are often preoccupied with their abuser, physically and emotionally exhausted, lacking in parental confidence, anxious, depressed, substance-abusing, or affected by post-traumatic stress.<sup>41</sup> In addition, they can be distant from, overly dependent upon, or incapable of protecting their children, among other things.<sup>42</sup>

We saw very few reports that considered the connection between domestic violence and parenting. While several reports noted children's behavioral problems or described problematic parenting, we did not find any reports that explicitly considered whether there was a link between the violence and the problems they noted with the children or in the parenting of the children.

## 2. Voices of the Parties Silenced

One practice that seemed to contribute to this problem was that the actual voices of the parties were often submerged in the text of the reports. The reader did not get a sense from the reports of how the evaluation was conducted, what the evaluator specifically asked, or what specific answers were given by the people who were being interviewed. Had that happened, the reader might have gained a better understanding of the situation and been able to draw his or her own conclusions about the connection between the violence and its impact on the children. Instead, the reader was given the evaluators' packaged perceptions about what was happening, with no way of knowing how well those perceptions reflected the actual experiences of the parties. The following excerpts typify this problematic practice:

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<sup>38</sup> Holden, G.W., & Ritchie, K.L. (1991). Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women. *Child Development*, 62(2):311-327; Holden, G.W., Stein, J.D., Ritchie, K.L., Harris, S.D., & Jouriles, E.N. (1998). Parenting Behaviors and Beliefs of Battered Women, in G.W. Holden, R. Geffner, & E.N. Jouriles (Eds.), *Children Exposed to Marital Violence: Theory, Research and Applied Issues* (pp. 185-222). Washington, DC:American Psychological Association.

<sup>39</sup> Bancroft, L., & Silverman, J. (2002). THE BATTERER AS PARENT, Thousand Oaks, CA:Sage Publications; Levendosky, A.A., & Graham-Bermann, S.A. (2000). Mothers' Perceptions of the Impact of Woman Abuse on their Parenting. *Violence Against Women*, 6(3):247-271.

<sup>40</sup> Jaffe, P.G., Crooks, C.V., & Bala, N. (2009). A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes. *Journal of Child Custody*, 6:169-188.

<sup>41</sup> Jaffe, P.G., Johnston, J.R., Crooks, C.V., & Bala, N., *supra* note 37 at 503.

<sup>42</sup> *Id.* at 503.

[The mother] feels victimized, she feels deceived, and she feels deception is multiplying in her environment. She feels that [the judge] is also a victim of this deception and that others are being taken in by it. Specifically, she feels that she and her son were the victims of abuse from her husband (the child's father) and that she has no control over it. She feels emotionally and physically abused and harassed by her husband. She is fearful that her husband is going to harm her child by his control. She does not feel that he will harm the child when he is in the presence of others, but behind closed doors danger lurks for the child...."

In this example, the reader is asked to accept the evaluator's observations wholesale, without the benefit of knowing: (1) whether the evaluator's observations matched the mother's experiences; (2) what the mother's actual experiences were; (3) what meaning to ascribe to the evaluator's observations; or (4) what these impressions have to do with the issues before the court. In other words, we could not tell from the language of the report whether the mother was clinically paranoid or whether her feelings were related in some way to the abuse that she and her son experienced at the hands of the father. Nor could we tell whether the child, or the mother's parenting, or the father's parenting was impacted in any way by what was going on.

While we found very few examples of the actual voices of the evaluator and the person s/he interviewed, we saw snippets of dialogue here and there, mostly during interviews with children. In Case 5, for instance, we observed the following short exchange between the evaluator and a teenage son:

I ask if he is afraid of being alone with either parent and he tells me, "I'm not comfortable when I'm with dad. I'm scared when they are together. More nervous and paranoid feeling. Some legitimate and some not. A lot of times the look on dad's face is, 'Oh, my God!' It's not a pleasant look if something would set him off."

Significantly, the evaluator did not explicitly probe the son's meaning or explore the child's deeper reflections. Consequently, the reader is left to wonder what made the son uncomfortable about being with his father and why the son was scared when his parents were together. The reader has no idea what the son meant when he said that it's "not a pleasant look if something would set [his father] off."

Case 4 presents a similar example. This is an excerpt from the evaluator's interview with a 10-year old boy:

I try to explore one of the episodes where there was some offense that [the children] talked about that dad made them use physical training or PT. [The son] describes it as, 'He made us Army call [*sic*] to the ditch and back, and we had an acre, and we did it from 4:00 until 6:00 in the evening. No breaks until supper or the bathroom. Then they had to go back out and do it until

9:30. I asked him what happened? He says he was ‘crying and his chest was bloody. [He] had a big scratch, and he was drooling down, and had blood.

Here, the evaluator blended direct quotes from the child with the evaluator’s own narrative, making it difficult to know where the child’s account began and ended. More importantly, perhaps, is the fact that the reader did not get a full picture of the child’s experience or what this military-style discipline was all about. We have no sense of why the child was crying, what it meant to be “drooling down,” how he was scratched, or how seriously he was bleeding. Nor does the reader have any idea about what the child did to warrant the kind of discipline he described or what was going on with the parents at the time.

We saw this pattern again in Case 1, where the evaluator summarized his interview of the 7-year old son as follows:

[The son] volunteered that he had been sent to the school office for stealing and described his father as “whooping” him for that theft. Otherwise, he described his father as “He likes computers. He likes the movies. He’s going to college. He likes to cook. He likes to play games.”

As in the previous cases, the report did not explicitly link the father’s history of domestic violence to the ways in which he parented his children. Although both children in this case referred to being “whooped” by their father, the evaluator did not explain what being “whooped” meant and did not describe what actually happened.<sup>43</sup> In reading the report, one could not tell if being “whooped” simply meant that the children had been disciplined or whether the father engaged in excessive discipline of the children. The evaluator also neglected to report any detail about what appeared to be more positive aspects of the father’s parenting. Consequently, the reader is left with very little sense of the connection, if any, between the violence and the father’s capacity to parent.

Case 12, perhaps, offered the most glaring example of the evaluator’s packaged perceptions standing in for the voices of the parties. According to his invoice, the evaluator, a psychiatrist and university professor, spent 4.5 hours interviewing the parents and their 17-year old son. The evaluator hired a social worker to conduct a 1-hour interview of the two younger sons, aged 14 and 11. The social worker also spent three hours interviewing collateral sources over the phone. The evaluator distilled 8½ hours of interviews into a three-page report, for which he charged the parties \$3,900. Here is how the evaluator described the central issue in the case:

Tolstoy wrote “All happy families resemble one another; every unhappy family is unhappy in its own fashion.” He might also have said that the unhappiness is cloaked in mystery especially as to cause. [The father] and [the mother] knew each other as adolescents and the closest thing to

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<sup>43</sup> There was information in the accompanying case file, including a photograph, which suggested that the father struck the child with a shoe leaving an impression of the sole of the shoe on the child’s upper thigh.

consensus among those with whom we spoke was that they were an improbable pair – poorly matched yet strangely drawn to each other. Both attractive personalities and intelligent yet [the mother], emotional and intense, some would say driven was a strange match for [the father], more contained, less demonstrative. The marriage seems to have been volatile from the beginning – there were separations and reunions, conflict over anything, much drama.

The reader was not given any detail about the “volatility” in the marriage. The evaluator never explained what the “separations and reunions,” “conflict” and “drama” were all about or how the three children were affected by them. There were only two paragraphs in the report that addressed the perceptions of the children. They are quoted below in their entirety:

When I spoke to [the 17-year old son] he was clearly hostile to his father. He described [his father] as neglectful, both financially and emotionally. It was clear that he could not be persuaded to consider an effort at reconciliation. He could not bring himself, even as an intellectual exercise to imagine his father’s feelings or position. I was impressed by his intelligence, industry and energy. Certainly a young man for a parent to be proud of.

With the younger two [ages 14 and 11], the affect was more one of disinterest than anger. Neither had room in their lives for him and they echoed the pervasive negativity towards him which more dramatically characterized the positions of [the] mother and older brother.

The evaluator provided no context for understanding the children’s perceptions. He did not explore or explain the older son’s “hostility” or experience of his father’s financial and emotional abuse. He did not explore or explain the younger sons’ disinterest in their father. He never got to the root of the children’s relationship with their parents or to their reactions to their father, except to say that they were echoing their mother’s “pervasive negativity,” which was not elaborated upon in the report, either.

The evaluator in this case gave only two clues to the court about the parties’ parenting. First, he noted that, “It is not possible to see the children as badly parented [by the mother]. Second, he said this about the father’s parenting:

While in a better world the children would have had a father to share their life with and would have been enriched by this experience. (We believe that [the father] was, and given a chance would be a good father).

These statements hint at something about the father’s involvement, but never explain what. More importantly, the evaluator offered no basis for his opinions, factual or otherwise. We simply do not know where the evaluator was coming from or how his impressions were related to the lived experiences of the people he was evaluating.

Finally, the evaluator made some vague and isolated references to the impact of the “volatility” on the children. Again, the information was oblique:

There are some scars – [the older son]’s anger and premature adulthood; and [the middle son]’s anxiety about provision for his basic needs may be exacerbating his leg pain. [The younger son] seems less affected – this may be due to his age or he may be better at removing himself from conflict. Never the less all the boys are high achievers with no personal sense of victimhood.

In this case, we never heard about what was troubling the children, how their “basic needs” were or were not met, what sort of “conflict” they were trying to avoid, what the source of the youngest son’s “leg pain” was, or what the children or their parents or the collateral sources actually said during 8½ hours of interviews.

We saw many, many examples of these kinds of bits and pieces of information and snippets of dialogue sprinkled throughout the evaluations, but hardly any attempt to gather a full narrative account of what was actually happening. Without the benefit of authentic voices, it is difficult to link the dynamics of domestic violence to the children’s experience and the parenting capacities of the parties.

### 3. Domestic Violence as a Thing of the Past

In several cases, evaluators viewed domestic violence as a thing of the past, with no connection to the current wellbeing of the children or the prospects for post-separation parenting. The evaluator in Case 17 put it this way:

Many of the issues [of domestic violence] raised by [the mother] in her motions are the same issues that have been raised before and dealt with by the Court in the past. To keep bringing these issues up repeatedly is only hurting [her daughter].

Similarly, in Case 7, the evaluator criticized the mother for undermining the reunification process by failing to abide by a plan to put the past behind her:

Due to the children focusing intensely on the episode of domestic violence that occurred between [the parents] prior to the dissolution of the marriage, both parents and I met...to practice talking to the children about the incident. [The father] agreed to state that he choked [the mother] even though he felt that was a mischaracterization and [the mother] agreed to declare in front of the children that she has forgiven [the father] and has moved along with regards to this incident. At a session in October [the father] described the incident, took responsibility and apologized to [the mother] in front of the children. [The mother] stared at him, stared at me and said, “I don’t remember what you want me to say.”

Notably, the report characterized the domestic violence as “an episode,” as opposed to a pattern of behaviors that included physical assaults against the children, as well as verbal, emotional and financial abuse. The report also sanitized a potentially lethal act of violence by referring to the father’s attempted strangulation of the mother as “domestic violence.” The report also characterized the domestic violence as having “occurred between [the parents]” when the attempted strangulation actually took place in the presence of the children, who essentially watched their father appear to try to kill their mother.

The evaluator never described what the father did to the mother or what the children saw. For instance, did the father have his hands around the mother’s neck, or did he use some sort of ligature? Was the father standing up or sitting down? Did he have the mother pinned against the wall, strapped to a chair, or held down upon the floor? Did the mother lose consciousness? Did the children try to intervene? What was the father saying as he attempted to strangle the mother? What was the mother saying? What were the children saying? How long did the attempted strangulation last? Did either parent suffer any injuries? Did anyone call an ambulance? Was any furniture knocked over or broken? What happened in the minutes and hours leading up to the attempted strangulation? What happened afterwards? Did the police intervene? Did the children have to make a statement? Was the father arrested? Where did everyone stay that night? The evaluator neglected to give any details about what actually happened that might explain why the children were so “intensely focused” on the violence.

Moreover, the report described a plan to address the children’s “intense focus” on the attempted strangulation in a way that did not appear to ring true to anyone’s experience, including the father’s. It presumed that everything would be fine as soon as the father acknowledged and apologized for what he had done and the mother expressed forgiveness. In short, no consideration was given to the direct impact of the violence on the children or to the implications of the violence for post-separation parenting.

We found one case in which the evaluator explicitly attempted to address the affect of the father’s sexual abuse of the mother and his consumption of pornography on his ability to parent his 6 and 8-year old daughters and co-parent with the mother. Here, we quote extensively from the evaluator’s report:

[The father] identified that sexuality, including an interest in pornography and pantyhose was an issue in his relationship with his wife...[The mother] described that she felt dehumanized, disconnected and objectified in their sexual relationship....

[The father] acknowledged that he would view pornography online...[and] that he would masturbate and had been “caught” by his wife. He indicated that the absence of their sexual relationship necessitated this release....

When asked about his interest in pornography and in its relationship to parenting girls, particularly as they entered puberty and adolescence, he

maintained that was a boundary that he could never cross. He indicated that his computer was secure and password-protected therefore not available to the girls. He adamantly asserted that his interests were in adult women and was not something that he acted on. He expressed emotionally that he loves his girls as their father and could not act in any way to harm them....

[The father] described that on occasion he has joined the girls in the bathtub, while wearing a bathing suit. He felt that his behaviors were appropriate to the children's needs and recognized, as they were getting older, that they would be more concerned about modesty, as well as bathing separately. He indicated that he expected the au pair would take over responsibility for the time being of supervising the girls' bathing.

[W]hile willing to address topics such as the "stocking fetish," [the father] appeared to minimize its significance and displaced responsibility for its effects on the marital relationship onto [the mother]'s rigidity, decline in attractiveness, and previous experience of sexual abuse....

At this time, the available information does not indicate a level of significant pathology that would interfere with his ability to appropriately parent and meet his children's needs. [The father] would benefit from psychotherapy focused on the issues of his insecurities and tendency to deny or avoid, as well as his sexual fetish/preference as they may affect future interpersonal relationships and parenting....<sup>44</sup>

Significantly, the evaluator did not connect the father's *behaviors or the values, beliefs and attitudes* he holds about women that support those behaviors to his capacity to parent the girls or co-parent with the mother. Instead, the evaluator concluded that since the "available information" did not "indicate a significant pathology," his "issues" were not likely to "interfere with his ability to appropriately parent and meet his children's needs." What the evaluator neglected to explain to the court is the meaning and impact of the father's conduct and beliefs on the children and their mother and how that might affect the father's relationship and interactions with them.

### C. Accounting for the Implications of Violence on Parenting

We saw many recommendations to the court that seemed to bear little to no relationship to the problems that domestic violence created for children and their abused parents. In Case 14, for instance, the evaluator conducted an extensive investigation, identified coercive

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<sup>44</sup> The evaluator noted a few other things about the father's parenting in the report, including that he played a secondary role in the children's upbringing, education and medical needs, having worked long hours as a salesman to support the family, and that his involvement consisted primarily of "reading stories and assisting with bedtime." Shortly after the separation, the father secured primary residential custody of the children and hired an au pair "in order to provide for his children's needs."

controlling violence, and then formed a recommendation that failed to account for the violence on the father's parenting:

[T]he Court...found domestic violence occurred by [the father] against [the mother] in the presence of [the child] ....The undersigned evaluator recommends that the parents share joint legal custody even though the application of the facts to the statutory joint custody factors suggests that joint legal custody is not appropriate and contrary to the statutory presumption against such joint custody based on the evidence in this case....

Similarly, in Case 8, the evaluator noted that the father had assaulted the mother during pregnancy, resulting in a four-day hospital stay. The evaluator indicated that criminal charges were filed against the father but subsequently dropped. The evaluator further observed that the court-appointed-special-advocate assigned to the case expressed concern that the father was: (1) inflexible and overly insistent; (2) had a need for control; (3) resisted enrolling his son in school; and (4) refused to change the visitation schedule, which had been established to accommodate his work schedule, even after he had been laid off from his employment. Finally, the evaluator made the following observations about the parties' post-separation parenting history:

It appears that both parents care about [their son]. They both want what is best for [him] as they perceive it. They disagree about how to parent and are not able to cooperate or support one another.

Mediation has been attempted several times. The result of mediation has usually been an agreement about parental rights and responsibilities, but the mediation agreements are soon ignored.

On the basis of that assessment, the evaluator recommended shared parenting and the appointment of a parenting coordinator to "facilitate and arbitrate decisions related to [the son's] parenting, physical and emotional well-being." The evaluator's recommendation did not appear to account for the father's ongoing coercive control of the mother or the fact that the parents had already tried and failed at co-parenting.

We found a similar situation in Case 11. There, after finding a long history of abuse and evidence of coercive control, the court, on the recommendation of a custody evaluator, ordered joint custody of the 3-year old child to the parents. The court instructed the parents to hire a parenting consultant to facilitate their joint decision-making responsibilities.

When their daughter reached school age and the father wanted to establish the daughter's school in the district in which he lived, which would have necessitated a modification of the parenting access schedule, the mother protested. A parenting consultant was appointed to facilitate a resolution of the parents' dispute. When the consultant's intervention failed to produce an agreement, the father filed a motion to modify the parenting arrangement. Three custody evaluations were conducted (one evaluator having been appointed by the

court and one evaluator having been hired by each of the parties). The reports of those evaluations, together with the report of the parenting consultant, were all submitted to the court. Each of the four reports recommended a completely different parenting arrangement, ranging from sole custody to the mother to sole custody to the father and joint custody in between. None of the recommendations adequately accounted for the implications of domestic violence occurring in the case.

Finally, in Case 2, the evaluator acknowledged the importance of accounting for the violence in her recommendation to the court. She specifically stated that:

The challenge...is to craft a ‘Parenting Plan’ that recognizes and addresses the intense increase in hostilities, the sensational and serious allegations [of sexual abuse], as well as the dramatic changes that have taken place for this family since separation. It is hoped the provision of appropriate services and cooperation between the parties in relation to any agreement or court order will result in a better sense of what is possible between the parents over time and provide a more accurate picture of their ability to appropriately, effectively, and mutually co-parent their children.

Yet, the evaluator’s recommendation was that the father, who had a history of sexually abusing his former wife (the children’s primary caregiver) and open use of pornography in the home, receive primary residential custody of the 6 and 8-year old girls; that the parents share joint legal custody of the children; that a parenting coordinator be assigned to “arbitrate any disagreements” between the parents; that the mother participate in individual psychotherapy to address “the anger and resentment” she feels towards the father; that the father participate in individual psychotherapy to address “issues in relation to his sexual preferences, self-esteem, as well as the issues leading to the dissolution of his marriage;” and that the children be monitored and treated “by a mental health professional with expertise in working with school age children, as well as issues of high conflict, divorce and sexual abuse.” While the recommendation went some distance in acknowledging the sexual abuse, it did not adequately account for the implications of the abuse on the current safety and wellbeing of the children or the real prospects for successful shared parenting in the shadow of sexual abuse.

In these four examples, as in many other cases, the evaluators’ recommendations seemed more tied to their own wishful thinking about the future than to the present realities of domestic violence. If, as the files suggest, these cases involved ongoing coercive controlling violence, then our observations are consistent with prevailing research, which shows that family court practitioners frequently fail to consider and adequately account for the implications of domestic violence and child abuse in child custody determinations, even where abuse is well-documented.<sup>45</sup>

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<sup>45</sup> James Bow, *Review of Empirical Research on Child Custody Practice*, 3 J. CHILD CUSTODY. 23 (2006) (“child abuse and DV were often documented in the court record but not addressed in the evaluation report); Colleen Varcoe & Lori G. Irwin, “*If I Killed You, I’d Get the Kids*: Women’s Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse, 27 QUALITATIVE SOC. 77 (2004) (“the dynamics of violence

## D. Capacity of Evaluators to assess Domestic Violence

It was very difficult to glean from reading the reports whether the evaluators had the resources and capacity to competently perform the critical functions of identifying the nature and context of domestic violence, linking the violence to parenting, or accounting for the implications of the violence in their recommendations to the court. We saw little to no evidence that the evaluators: (1) used or had access to standardized tools, protocols or benchmarks in their work; (2) had any specialized experience or training, or relied upon or consulted with experts, in the field of domestic violence; or (3) could make appropriate recommendations given the limited range of options available within the family court system.

### 1. Few Reliable Tools, Standards or Benchmarks

Recent research shows that while most custody evaluators always or almost always inquire about domestic violence during the course of their evaluations, they often do not utilize specialized instruments, questionnaires or protocols to detect the nature, severity and context of domestic violence.<sup>46</sup> As one commentator noted, “[c]hild custody evaluations involving DV and/or sexual abuse allegations generally require increased interview time, testing time, record review, and report length. Of major concern was the lack of use of specialized assessment instruments or protocols in these evaluations.”<sup>47</sup> This is important because impressionistic assessments that rely on the evaluator’s own gut feelings or character judgments are known to be highly unreliable.<sup>48</sup> Unfortunately, the fact remains that very few tested and validated screening instruments currently exist.<sup>49</sup>

Not only do we lack reliable screening mechanisms, but there is also a scarcity of guidelines and protocols to assess the impact of violence on children and parenting behaviors.<sup>50</sup> According to experts in the field, “other than clinical descriptive criteria, instruments to reliably differentiate between types of violence and how they might relate to parenting have yet to be developed.”<sup>51</sup>

It is not surprising, therefore, that we saw very few reports that documented a standardized or structured approach to identifying, contextualizing and accounting for the domestic violence that was occurring in these cases. In fact, all we saw were the kinds of

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and the relationship and safety needs of women and children were not taken into account in the provision of services and judgments of parenting.”).

<sup>46</sup> James Bow & Paul Boxer, *Assessing Allegations of Domestic Violence in Child Custody Evaluations*. 18 J. INTERPERSONAL VIOL. 1349 (2003).

<sup>47</sup> James Bow, *supra* note 45 at 45.

<sup>48</sup> Claire V. Crooks et al., *Factoring in the Effects of Children’s Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans*, DOMESTIC VIOLENCE, ABUSE AND CHILD CUSTODY (2010).

<sup>49</sup> Nancy Ver Steegh & Clare Dalton, *supra* note 16 at 461.

<sup>50</sup> Jeffrey Edleson et al., *Parenting in the Context of Domestic Violence*. Judicial Council of California, Administrative Office of the Courts (2003).

<sup>51</sup> Peter G. Jaffe et al., *supra* note 37 at 504.

“impressionistic assessments” that the research establishes to be “highly unreliable.” Therefore, we could not help but wonder whether the courts were unwittingly relying upon custody evaluators to make judgments that they simply lacked the capacity to make.

## 2. Little Specialized Training in Domestic Violence

Very few states require custody evaluators to have any specialized domestic violence training as a qualification for appointment in family law cases.<sup>52</sup> Consequently, most custody evaluators conduct investigations, assess allegations of domestic violence, and make recommendations to the court without any mandatory domestic violence training.<sup>53</sup> That is not to say that, on the whole, custody evaluators have not had any domestic violence training. It is merely to say that courts cannot assume that custody evaluators have had specialized training in domestic violence unless they specifically inquire.

We did not see any indication in the reports we reviewed or in the accompanying case files that the court sought domestic violence expertise in assigning the case, or that the evaluator possessed such training. In fact, we saw very little evidence in the language and discourse of the reports that the evaluators had a deep understanding of the nature, dynamics or implications of domestic violence. Again, we could not help but wonder whether the courts were relying on evaluators to make judgments that they did not have the demonstrated capacity to make.

## 3. Lack of Effective Services and Interventions

Lastly, we observed that evaluators’ recommendations were sometimes limited by a lack of guidance in the field about when alternative parenting options, such as joint custody or supervised visitation would be appropriate, or by the lack of availability of effective services or interventions to address the nature, context and implications of the violence that was occurring in these cases.

Case 14 was the only case where we observed that the evaluator articulated a clear statutory basis for a particular parenting option. There, due to a documented history of domestic violence and sexual assault, the evaluator noted that:

...the application of the facts to the statutory joint custody factors suggests that joint legal custody is not appropriate and contrary to the statutory presumption against such joint custody based on the evidence in this case....

Yet, the evaluator recommended joint custody all the same. In reaching his conclusion, the evaluator observed that:

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<sup>52</sup> Nancy K. Lemon, *Custody and Visitation Trends in the U.S. in Divorce Cases*. 3 J. AGGRESSION & MALTREATMENT 329 (2000).

<sup>53</sup> *Id.*

“[The daughter] is going to have both these parents for the rest of her life and they both need to be involved.”

The evaluator did not expressly ask whether, or explain why, joint custody would be appropriate given the documented history of domestic violence and sexual assault in this case. There is no indication from the report that the evaluator considered whether another parenting option could have achieved the dual goals of safety and parental involvement. The evaluator seemed to assume that parental involvement would only be possible if joint custody was established. In deviating from the statutory framework, the question of safety seemed to vanish from view.

Case 14 was just one of many cases we reviewed where joint custody was recommended in the face of documented domestic violence. None of those cases considered the propriety of joint custody in light of either a statutory presumption against shared care or the impact that the violence may have on family safety or the capacity of the parties to co-parent.

#### IV. Recommendations

Our study of these reports indicates that key changes need to be made on the local and national level to improve outcomes in custody cases involving domestic violence, especially cases involving coercive control and resistive violence.

**A. Each court that handles custody determinations should communicate its expectation that custody evaluators ascertain the nature and context of domestic violence and its relevance, if any, to parenting.**

Courts and ancillary personnel charged with custody evaluations need to understand and appreciate the relevance of the violence to all of their decisions related to developing a parenting plan, i.e., physical and legal custody, supervised or unsupervised visitation, visitation scheduling, exchanges of the children between the parents, and ongoing communication regarding the children. In particular, a pattern of coercive, controlling violence has negative implications regarding future parenting and co-parenting. In these cases, the abusive parent is likely to attempt to use each of these situations to reassert control and/or punish the victim for challenging it. The safety and emotional well-being of the victimized parent and the children are unprotected when the court fails to see the relevance of the context of the violence to its responsibility to determine custody arrangements in the “best interests of the child.”

A major problem with the reports we reviewed was that the evaluator failed to explore whether the incidents of violence were indicative of a pattern of control and abuse. Lacking this context, the effects of the incidents on the children were minimized, and the ability of the abuser to parent or co-parent in non-violent, coercive ways went unquestioned. The statutory mandate to act “in the best interests of the child” would seem to require that judges, custody evaluators and

other court personnel seek to assess how children have been affected by the context of violence in which they have lived, not simply whether they witnessed individual incidents of abuse.

**B. Courts should clearly define the scope of the evaluations they order.**

Our review revealed that custody evaluators often had very little direction from the court. Judges should ensure that orders of appointment clearly define: a) the purpose and scope of the evaluation; b) the function and tasks of the evaluator; and, c) the standards that will govern the evaluator and the evaluation process.

In our review, psychological testing was used in cases where no mental health problems were alleged, and in some cases, results were interpreted erroneously. The costly use of inappropriate psychological testing could be limited if courts adopt protocols that specify when psychological testing is deemed relevant to a custody evaluation.

**C. Courts should set specific standards for custody evaluation reports ordered in cases involving domestic violence to require that evaluators compile sufficient information to determine the context of the violence, discuss its implications for future parenting/co-parenting, and connect these implications to their recommendations on custody and parenting arrangements.**

Courts should develop and enforce consistent standards for conducting custody evaluations and producing fair, accurate and complete reports. This might be facilitated by the development of a standard format for writing custody evaluations in cases with a history of domestic violence.

In several cases reviewed, potential sources of information about the violence, such as existing public records or third parties, were not consulted during the evaluation. These sources could have confirmed or negated information about the context of the violence or coercion that was occurring. To improve the consistency and comprehensiveness of efforts to determine the context of violence, guidelines or checklists of useful sources of information in these cases should be developed for evaluators.

Standards should require that evaluators make clear how the information gathered about the context of violence is related to each party's parenting and ability to co-parent, and how subsequent recommendations regarding the parenting plan reflect these implications. In our review, even when the occurrence of domestic violence was confirmed, evaluators failed to explore or connect its particular dynamics to the ability of the abusive partner to parent children or co-parent successfully post-separation, and thus failed to address these issues in their recommendations for the parenting plan. Too often the parenting plan failed to provide the victimized parent or children meaningful protection from ongoing, post-decree harassment or abuse.

Additionally, evaluators should understand how the context of violence, especially coercive control, affects the ability of victimized parents to parent, undermining their authority and role within the family, and sometimes causing serious levels of stress and debilitation. Evaluations of their functioning and parenting skills need to take this into account. If the court is willing to provide abusive parents with opportunities to improve their parenting, so too should battered parents be provided with opportunities to recover from the traumatic effects of violence and establish appropriate parental relationships with their children post-divorce.

Judges need to carefully review and reject subjective, speculative and ideologically-driven recommendations. Likewise, attorneys need to be prepared to identify and challenge these recommendations on behalf of their clients.

**D. Domestic violence-specific screening and assessment tools would improve the capacity of family court practitioners to identify and assess the context of the domestic violence occurring in these cases**

Custody evaluators would benefit from tools that assist them in linking the nature, context and implications of domestic violence to the best interest of the child factors. Tools are also needed to help evaluators analyze how parents' use or experience of violence shapes their parenting. Such tools need to be developed, validated and incorporated into custody evaluations.

**E. Children's negative feelings about a parent must be evaluated within the context of the violence that has occurred.**

Our analysis found that, over and over, children's negative feelings about a controlling, abusive parent were not seen as a legitimate independent response to that behavior. Instead, the theoretical construct of "parental alienation" was used to explain the children's reactions, even in the face of substantial evidence of repeated child abuse or an atmosphere of domineering control of the household. As a result, victimized parents were blamed for children's hostility toward or rejection of the abusive parent.

While the concept of "parental alienation syndrome" has been rejected by several professional organizations, the related belief that a child's rejection of a parent is likely due to the "alienating" behaviors of the other parent surfaced regularly in the custody evaluations we reviewed. Evaluators ignored or seemed unfamiliar with alternative explanatory concepts from the literature on children exposed to violence and on parenting of domestic violence offenders. Likewise, almost no evidence was presented to support the hypothesis that the other parent was actually doing things to "alienate" the children – the simple fact that the children felt "alienated" seemed to justify the conclusion. At times the victimized parent's expressions of legitimate fear of an abusive partner were noted as evidence of an "alienating" behavior, despite the research available on heightened risk of re-assault associated with separation.

Leaders in the domestic violence and family law fields need to engage in a critical dialogue on how research on children exposed to domestic violence, parenting by domestic violence offenders, and risk/lethality factors in domestic violence cases, should be factored into any analysis of children's "alienation" observed during custody evaluations. This would be a key element to add to existing standards for evaluations.

**F. In cooperation with experts in the field of domestic violence, new guidelines that specifically address issues of domestic violence should be incorporated into existing standards of practice for custody evaluations.**

Existing standards of practice, such as those developed by the Association of Family and Conciliation Courts, do not specify how domestic violence should be addressed by custody evaluators. Since the completion of this analysis of custody evaluation reports, the AFCC has appointed a task force to develop a supplement for its standards that will specifically address domestic violence.

**G. Domestic violence training organizations and family law professionals should collaborate on national efforts to increase the capacity of custody evaluators to assess cases involving domestic violence.**

Training curricula should be developed and educational programs provided in order to build skills and understanding in the following areas:

- Identification of the features, characteristics and dynamics of the domestic violence that is occurring.
- Understanding of the overlap of intimate partner violence with child abuse/child sexual abuse, and identification of these behaviors
- Assessment of how the history and current level of coercion, intimidation and violence correlates to the best interest of the child standards.
- Assessment of how the history of domestic violence impacts parenting in ways not captured by the best interest of the child standards.
- Assessment of how domestic violence impacts parents' ability and inclination to parent in ways that centralize the safety and wellbeing of children.
- Development of reports that more clearly link the nature, context and impact of violence in the family to the recommended custody and parenting arrangements.

However, these training efforts cannot be effective unless paired with the development of clear standards, assessment tools and protocols that will provide the framework necessary to re-orient evaluators and guide them in investigating and making visible the dynamics of abuse present.

## V. Conclusion

This report describes problems generated by current practices for producing evaluative reports in cases involving domestic violence. We sought to explicate how practitioners across the country are organized, both conceptually and through common practices, to produce accounts of what is going on in families. We also sought to discover how, in domestic violence cases, those descriptions are often inaccurate and often misleading.

Any one of these cases, if examined in isolation, might lead to the assumption that the practitioner was poorly trained or applied questionable concepts and theories to the case s/he was evaluating. However, these same actions and operational concepts surfaced in cities across the country, in urban and rural communities, and in tribal and non-tribal settings. We must therefore assume the problem is located within the institution of family law and across the disciplines that carry out its work. As outlined in this report, the problems are found in the way case processing routines are organized, in the current definitions of practitioners' roles and responsibilities, and in the common use of certain professional discourses and the disregard of others.

Most of the problems identified in this report are resolvable. The solutions lie in restructuring institutional practices to better: (1) identify the nature and context of domestic violence; (2) link the dynamics of violence to the capacity of the parties to parent their children and co-parent with each other; (3) account for the implications of violence on parenting and co-parenting in reports and recommendations to the court; and (4) examine and elevate the capacity of evaluators to perform these critical functions.

Institutional assessments of the practices within the criminal justice system and the child protection system have uncovered similar issues related to the handling of cases involving domestic violence. When the dynamics of the violence are made visible to interveners, the institutional response can produce more effective, appropriate and protective outcomes for the families involved. We trust that this same effort will address the current problems in the family court response to domestic violence cases and improve the capacity of the professionals involved to craft safe and workable custody and parenting arrangements that truly serve the best interests of children.

## **Appendix A**

### **National Child Custody Project Custody Evaluation Meeting Participants May 2010**

#### **Facilitators:**

Dorothy E. Smith, Ph.D. Professor of Sociology, University of Toronto  
Martha McMahon, Ph.D. Associate Professor of Sociology, University of Victoria

#### **Participants:**

Ellen Pence, Ph.D.	Director, Praxis International
Loretta Frederick, J.D.	Senior Legal Policy Advisor, Battered Women's Justice Project
Hon. Dale Koch	Senior Judge, Multnomah County Oregon District Court
Maureen Sheeran	Director, NCJFCJ Family Violence Department
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Sandy Davidson	Praxis International
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Shannon Gaskins, J.D.	Office of Violence Against Women, U.S. Department of Justice
Darla Simms	Office of Violence Against Women, U.S. Department of Justice