

Peter G. Jaffe • Nancy K. D. Lemon • Samantha E. Poisson

CHILD CUSTODY & DOMESTIC VIOLENCE

*A Call for Safety
and Accountability*



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Peter G. Jaffe

The Centre for Children & Families in the Justice System

Nancy K. D. Lemon

University of California, Berkeley

Samantha E. Poisson

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CHILD
CUSTODY &
DOMESTIC
VIOLENCE

To Deb for her love, patience, and help
in finding some balance in my life. P. J.

To my friend Harriette Davis,
her three children, and her seven grandchildren,
who continue on a daily basis to be impacted
by the justice system's failure to assist her
in escaping an abusive relationship
almost 20 years ago. N. L.

To the matriarchs in my life
who showed me the many faces of courage:
my mother Shirley, my grandmother Libby,
and my guardian Ann. You are missed always. S. P.

Preface

There has been tremendous progress in the public and professional understanding of the plight of children caught in the middle of custody disputes. The stigma attached to divorce in the past has dissipated; today, divorce and separation are understood to be painful crises in the lives of children and adults. Rather than being outcasts, children and parents have access to a host of services to counsel them through their ordeal. Friends, relatives, and colleagues at work may offer the names of helpful lawyers to resolve the dispute. Parent-education programs are available to assist parents in finding cost-effective solutions to their conflicts, and most jurisdictions in North America have mediation services.

As the findings of major research studies on children of divorce have become common knowledge (Hetherington & Kelly, 2002; Wallerstein, Lewis, & Blakeslee, 2000), social attitudes toward divorce have changed. The issue has received widespread media attention, with publications such as *Time* magazine devoting cover stories to children of divorce (Kirn, 2000). Although it is recognized that children may be adversely affected by divorce, there is general agreement that children's adjustment improves when postseparation conflict ends and their relationship with both parents is supported and sustained. In other words, divorce ends marital relationships, not parent-child relationships.

Today, fathers play a more active role in parenting and nurturing their children than they likely experienced with their own fathers. Both parents offer their children love, education, support, and guidance through the most critical phases of development. At the dawn of a new millennium, society and the courts often look to mothers and fathers as

partners in raising their children, both before and after separation. Parental involvement is no longer intractably wed to gender.

In dealing with separation and divorce, legal and mental health professionals assist in the development of parenting plans in which both parents play an active and meaningful role. Messages of "coparenting" and "shared parenting" are promoted and viewed as very much in keeping with the best interests of children post-separation. Several research studies have found that children adjust better in joint custody postseparation arrangements than in sole custody arrangements. Although there is an obvious bias in this research because less conflictual divorces make for better adjusted parents and children at the outset, there is a general agreement among the public and professionals that cooperation and coparenting is much better than litigation and postdivorce acrimony. The popular press has even promoted "happy" divorces for which parents can find lawyers who will "collaborate" rather than litigate (Underwood, 2002).

Over the past 25 years, many families have benefited from court reforms and legislative changes promoting joint custody and shared parenting arrangements. This progress has come with a genuine desire to improve the quality of children's postdivorce experience. At the same time, there remains considerable debate on the accessibility and effectiveness of various forms of legal and clinical remedies and interventions. New controversies and challenges have emerged around such issues as parental mobility (Irving & Benjamin, 1996), grandparent rights (Shaffer, 2001), and the increasing rate of same-sex parent separation (Hartman, 1996). Few issues, however, have sparked more passionate public discussion than custody disputes involving allegations of domestic violence.

This book focuses on the complexity of this issue and the challenges facing judges, lawyers, legislators, and mental health professionals in developing safe and effective response strategies. Most separating parents are able to resolve their disputes over custody and visitation with minimal intervention from the legal and mental health systems (Johnston, 1994). As authors, we endorse the active and meaningful postseparation involvement of both parents with their children, in the absence of a history of domestic violence. However, the presence of domestic violence within a custody dispute demands a different analysis and distinct interventions by judges, policymakers, and mental health professionals.

This book is neither for nor against mothers or fathers. It is directed to the safety and security of separating parents and children in circumstances of domestic violence. Its intended audience is legal and mental health professionals who provide services to divorcing parents and who should be alerted to the unique dynamics and aftermath of domestic violence. This book may also be helpful to those who have found their lives and their children's lives affected by domestic violence, and can assist close friends and relatives providing support for victims of domestic violence to broaden their understanding of the issues.

Chapter 1 provides an overview of the terrain, including the prevalence of divorce and domestic violence, the relevance of domestic violence in custody disputes, and the intensity of the debate surrounding this subject. Chapter 2 focuses on the evaluation of the meaning of domestic violence allegations in custody disputes for mothers, fathers, and children. Special effort is made to assist those attempting to determine whether a history of violence exists within a family. The chapter also addresses such thorny issues as parent alienation syndrome, false allegations, and mutual abuse. Chapter 3 reviews the relevant legislation and guidelines applicable to custody disputes involving domestic violence in four countries: the United States, Canada, New Zealand, and Australia. Chapter 4 outlines significant judicial decisions in these four countries, the scope of which highlights the inconsistency and unpredictability of recent judgements and reveals how well-intended legislation does not always produce the desired outcome. Chapter 5 ends the book with recommendations for legislative improvements, increased training for legal and mental health professionals, enhanced services and programs, and the development of new policies to deal with domestic violence in custody disputes.

Acknowledgments

Although this book took 4 years from inception to publication, the time delays were well spent. The legal and mental health concerns of our clients invariably took precedence over precious writing time. The positive by-product of the delay is that it gave us countless additional hours to do research and ground our thoughts in the clinical feedback from our clients around the challenges they face in the court system, as well as the dilemmas posed by professionals in our training sessions. The three of us benefited from several conferences on children exposed to domestic violence where we role-played in mock trial situations the many difficult issues that judges, lawyers, and custody evaluators face on a daily basis. Through our countless e-mails and phone conversations we believe we have been able to produce a valuable resource that can be digested readily by individuals representing a variety of disciplines and viewpoints, including frontline advocates and parents trying to make sense of their courtroom situations.

For two of us (P. J. & S. P.), working at the Centre for Children & Families in the Justice System, this book would not have been possible without the support of the Atkinson Foundation, who funded a 3-year research project examining the plight of abused women and children seeking refuge from batterers and safety in the court system. The voices of women and children from this research, as well as our clinical work, form the foundation for many of the ideas outlined in this book. This book would not have been completed without the encouragement of staff and board members at our Centre. In particular, we received adept assistance from Andrea Finlay in helping with the literature review and organizing hundreds of references; Karen Chalmers provided expert clerical support in the many revisions of the document and broad shoulders in times of setback; and Peggy Sattler provided invaluable assistance in editing our original manuscript for greater clarity.

We continue to receive phone calls and e-mails from abused women across North America who are desperately seeking our help in having a custody evaluator, lawyer, or judge understand their unique circumstances in the aftermath of domestic violence. The experiences of these women have been echoed in many jurisdictions around the world. It is always striking that when the three of us discuss the plight of abused women and children it seems almost irrelevant whether one of us is in London, Ontario, or Berkeley, California. Domestic violence and revictimization through the court system knows no jurisdictional boundaries. We wrote this book for abused women, their children, and the multiple professionals they come into contact with in the court system.

For all the abused women who continue to call and e-mail us, seeking help with complex and lengthy custody battles in a confusing, expensive, and often biased legal system, we wish we could give each one of you the help you and your children truly need. We hope this book will help prevent some of the stories you have told us from happening to more mothers and children.

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1

Why Domestic Violence Is Relevant in Child-Custody Disputes



Everyone is touched by divorce. Separating parents turn to friends, relatives, and colleagues at work for advice and assistance with their new life circumstances. Some parents seek advice in advance, and plan for the pending transition in their lives. Other parents find themselves in unexpected crisis situations and their children in turmoil. Support comes from informal groups, and professionals in the mental health and legal arenas. The challenges in giving meaningful and helpful advice are enormous. Questions such as the following are raised: How will my children be affected by my divorce? What schedule will best meet their needs at various ages? Can I successfully share parenting and decision making with my ex-partner? What role will future stepparents play in my children's lives? The complexity of these questions is underlined by the fact that separation is a process and the impact for all involved is unique and dynamic. In this chapter, we address the issues that all divorcing families face, and then highlight the distinctive plight of children dealing with both separation and domestic violence.

❖ CHILDREN OF DIVORCE

Millions of children across North America have experienced the pain, confusion, and grief that result from divorce. In 1998 alone, 1,135,000 divorces occurred in the United States, representing a rate of 4.2 per 1,000 people (National Center for Health Statistics, 1998). In Canada, a total of 69,088 couples divorced in 1998, which represents a relatively lower rate of 2.2 divorces per 1,000 people (Statistics Canada, 2000b). Based on the Canadian divorce rate, 36% of marriages are expected to end in divorce within 30 years of marriage. Of the approximately 70,000 Canadian couples who divorced in 1998, 21,448 cases involved a custody order for dependent children, representing nearly a third of all divorces in that year. Given the trends with respect to common-law relationships, same-sex relationships, and remarriages, it is probable that these statistics seriously underestimate the number of children coping with the breakdown of their family.

Research on children's postseparation adjustment has painted a confusing and sometimes contradictory portrait of how children are affected by divorce and postseparation contact with each parent. As a result of these mixed messages, policymakers, legislators, and the community at large have drawn sweeping conclusions about all divorcing families with little or no awareness of the differences between families. Some researchers have found that divorce per se is highly traumatizing and can create a lifelong legacy of relationship problems, low self-esteem, and lowered social competency. Other research studies have concluded that a child experiencing divorce may be relatively unscathed. It may be that researchers' failure to clearly define and consider the nature of the interpersonal conflict both prior to and following marital dissolution has resulted in such disparate findings. This research deficiency has led the general population, politicians, mental health professionals, policymakers, and judges to base strong, and sometimes unyielding, views about divorce and custody disputes on findings that fail to adequately address the multiplicity of factors affecting children's postseparation adjustment.

In a 12-year longitudinal study involving 471 adult children, Paul Amato and his colleagues (Amato, Loomis, & Booth, 1995) found that the consequences of divorce for children was dependent on the parental conflict prior to divorce. They reported that in high-conflict families, children had higher levels of well-being as young adults if their parents

divorced than if they had stayed together. However, in low-conflict families the opposite was the case: Children had higher levels of well-being if their parents stayed together than if they divorced. This type of research moves us toward a more complete understanding of the complexity of the issues, and validates opinions that seem diametrically opposed. Divorce may be harmful for children from some families in certain circumstances, whereas it may be beneficial for children from other families. When divorce is inevitable, the effect on children is partially dependent on the parents' ability to resolve conflicts.

Because resolving child-custody disputes requires separating parents to focus on the needs of the child rather than past hostilities and adult grievances, disputes are more readily settled when the separation has not harmed the basic trust and respect that is the foundation of parenting. Some disputes may require external interventions such as mediation or consultation with family law lawyers; these interventions require that the parents feel safe and comfortable engaging with one another. With a history of domestic violence, however, professionals cannot instruct or advise parents simply to put the past behind them. These situations require a careful evaluation of the violence, including the possibility that one parent may pose a significant risk to the other parent and the children. It is unreasonable to expect a parent who has experienced physical, sexual, and/or psychological abuse at the hands of the other parent to negotiate custody and visitation agreements when fear is the overriding emotion. Yet because many legal and mental health professionals prize reaching a resolution to the dispute, they may overlook subtle signs that a custody agreement was not reached voluntarily. And in a family court system that reinforces "friendly parents" and is punitive or troubled by the prospect of "difficult parents" raising allegations of abuse, parents who have suffered the violence often feel coerced into settlements that further endanger themselves and their children.

❖ WHAT IS CUSTODY?

Many separating parents do not fully understand what is meant by the term "custody." Custody of a child includes both a legal and physical aspect. Physical custody is the right to physically have the child live with a parent and have visitation (or access) with the other parent.

Legal custody is the right to make major decisions about a child's care, such as a child's education, medical care, and religious upbringing. Physical and legal custody can be sole (the right of only one individual) or joint (a right shared between two or more individuals). In a sole physical custody situation, the child resides primarily with one parent and has visitation with the other. When sole legal custody is in place, one parent has the right to independently make the major decisions affecting the child. Joint physical custody means that the child lives with both parents and joint legal custody means that the parents share the right to make major decisions about the child's care.

❖ DOMESTIC VIOLENCE

Domestic violence is best understood as one intimate partner's attempt to control, dominate, and humiliate the other partner through a variety of means, including physical, sexual, psychological, financial, and spiritual abuse. Domestic violence goes beyond individual acts of aggression to encompass an overall pattern of behavior aimed at maintaining complete control. Researchers and practitioners alike recognize that domestic violence typically escalates in both frequency and severity over time. Without intervention, battering may grow into a habitual method of resolving conflict.

As a field of academic study, the issue of domestic violence is only a quarter century old and most of the advances in the research have occurred recently. In 1980, there were several books and a handful of journal articles featuring domestic violence. Today there are whole sections in major bookstores, many journal articles, and countless Web sites dedicated in large part to the issue of domestic violence.

The statistics reveal a problem much more prevalent than the average citizen would predict. When Murray Straus and his colleagues (1980) completed their initial research for the book *Behind Closed Doors: Violence in American Families*, they were the first social scientists to confirm what the women's movement and battered women's shelter advocates had been saying for some time: Home was not a safe place (Straus, Gelles, & Steinmetz, 1980). Their pioneering research unearthed the reality that millions of men, women, and children lived with violence as an integral part of family life. According to their research, approximately 1 out of 10 women had experienced violence

at the hands of the one they loved. Three percent endured severe violence including life-threatening attacks and injuries requiring medical attention.

Many other researchers have confirmed and expanded these findings using a variety of methodologies including phone surveys, police reports, and structured interviews in a range of clinical and community settings. In 1984, the U.S. attorney general declared domestic violence a major social problem that, if tolerated, allows the seeds of violence to be sown in the next generation (Department of the Attorney General, 1984). In 1992, the American Medical Association reported that women were four times more likely to be injured in their homes by their current or former partner than in motor vehicle accidents (American Medical Association, 1992).

A 1993 national study in Canada involving telephone interviews with over 12,000 randomly chosen women found that 29% experienced physical or sexual abuse by an intimate partner over their lifetime (Rodgers, 1994). The definition of abuse used in this study was consistent with the Criminal Code of Canada: The abuse could have resulted in criminal charges with reasonable and probable grounds that it had taken place. Ten percent of women stated that the abuse made them so fearful for their personal safety that they feared for their lives.

In the U.S. National Violence Against Women Survey (Tjaden & Thoennes, 2000), 22.1% of the women and 7.4% of the men surveyed reported they were physically assaulted by a current or former spouse in their lifetime. An estimated 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States. Further, women are significantly more likely than men to be injured during an assault and the risk of injury increases for women when their assailant is a current or former intimate partner. Approximately one third of injured women receive medical treatment for their injuries.

Statistics from Australia confirm a similarly high rate of domestic violence. According to the Australian Bureau of Statistics, 23% of women experienced violence by a current or former intimate partner in their lifetime (Putt & Higgins, 1997). Although the majority of women indicated that the abuse occurred in a past relationship, 12% of women reported that they lived in fear of abuse during their current relationship. Some groups of women appear especially vulnerable to abuse. For example, in Western Australia, Aboriginal women make up only