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Custody and Visitation: Considerations for Every Attorney Retained by a Survivor of Domestic Violence

By Caitlin Glass, Tamara Kuennen, and Sharon López

[*Editor's note:* This article is adapted from the authors' presentation at the National Legal Aid and Defender Association's Substantive Law Conference workshop on custody and visitation for survivors of domestic violence, Colorado Springs, Colo., July 2002.]

Legal representation is a critical tool for survivors of domestic violence to live free from their battering partners.¹ Representation in custody and visitation matters—integral issues in the separation context—is particularly consequential for survivors. First, studies of custody litigation indicate that fathers who battered the mothers of their children are twice as likely to seek

sole physical custody as are nonviolent fathers.² Batterers are as likely as nonbattering fathers to prevail.³ Since the 1970s, fathers in general have been at a marked advantage in custody disputes.⁴ Second, custody and visitation claims involve a complex array of legal issues, laws, practices, and procedures including jurisdiction, standing, discovery, evidence presumptions, and the interplay of federal and state law. Third, separation increases the survivor's risk of violence by the batterer.⁵ This context requires us to consider innovative legal strategies and assess personal assumptions to afford survivors of domestic violence the relief that they seek and the justice that they deserve.

¹ In this article we use the term “survivor of domestic violence” rather than “victim of domestic violence.” “[A] particularly troublesome word that seems neutral is ‘victim.’ But it is a disempowering, pejorative word. It fails to credit the violated person with the strength and integrity suggested, for example, in the word ‘survivor.’” Barbara J. Hart, *Burn-Out: A Political View* (address at Minnesota Coalition for Battered Women Conference, Mar. 1981) (copy of speech available at Pennsylvania Coalition Against Domestic Violence Legal Department). Recent research shows that increased provision of legal services for victims of intimate-partner abuse contributed to the decline in the incidence of domestic violence during the 1990s. See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, in *CONTEMPORARY ECONOMIC POLICY* (forthcoming Spring 2003).

² *VIOLENCE AND THE FAMILY: A REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* 39–41 (1996).

³ *Id.*

⁴ LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 115 (Nancy Hale ed., 2002).

⁵ For statistics and discussion of the concept of “separation assault,” see Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1990).

For the note on the authors, see page 543.

I. Effective Representation, Domestic Violence Law, and Reexamining Your Role

When your client is a domestic violence survivor, the hallmark of effective representation is your commitment to the promotion of her safety, autonomy, and restoration.⁶ Safety, autonomy, and restoration are ideals and are challenging to achieve. Nevertheless, they guide our work and are benchmarks to help us evaluate our strategies as domestic violence lawyers.

Safety is the ultimate goal of domestic violence work. This concept includes physical, emotional, and financial safety. It is measured not by the time that passes between assaults or threats but by the way the survivor's community responds to requests for intervention. Without safety, the goals of autonomy and restoration are out of reach.

Autonomy is the ability to organize one's life.⁷ A survivor should be able to make informed decisions and take her own steps, free of coercion, to implement them.⁸ The challenge for you as her attorney is to consider how you can avoid subconsciously coercing her and how to create a custody process that promotes her ability to parent her children free from the batterer's abusive control.

Restoration means placing the survivor back in the position in which she would have been had the abuse not occurred.⁹ This goal includes restoring

the survivor to her community, her faith, and her hope. The domestic violence attorney must make restoration part of the agenda of the case so that the survivor can reclaim her status as a person free from violence.

In order to approach the ideals of safety, autonomy, and restoration, comprehension of the dynamics of domestic violence is essential. We know that domestic violence "is not simply one partner hitting another."¹⁰ Rather it involves strategic and targeted conduct on the part of the batterer to further power and control over the survivor.¹¹ A pattern of intentional and repeated coercive controls meant to induce fear and punish non-compliance comprises these actions.¹² Persons working in this field must understand these complex dynamics to be effective domestic violence attorneys.

The challenge of achieving safety, autonomy, and restoration is particularly difficult when the cultural context promotes values that are at times diametrically opposed to these ideals. Custody and visitation cases are usually considered family law cases. The goals of family law are to bring about the amicable dissolution of family relationships, promote equitable distribution of the assets, and encourage frequent and continuing contact between parents and children.¹³ Family law presupposes that litigants are able to make joint decisions about children and that, despite domestic violence,

⁶ Barbara J. Hart, *Arrest: What's the Big Deal?*, 3 WM. & MARY J. WOMEN L. 207, 207 (1997).

⁷ *Id.* at 209.

⁸ Donna Coker, *Feminism and the Criminal Law: Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L.R. 801, 823 (2001).

⁹ Hart, *supra* note 6, at 208.

¹⁰ Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 188 (1995).

¹¹ Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System* (1998) (paper on file with the Pennsylvania Coalition Against Domestic Violence Legal Department); *see also* Ellen Pence & Michael Paymar, *Power and Control: Tactics of Men Who Batter* (1990) (unpublished manuscript, on file with Duluth: Minnesota Program Development Inc.).

¹² Barbara J. Hart, *Rule-Making and Enforcement, the Violent and Controlling Tactics of Men Who Batter, Rule-Compliance and Resistance, the Response of Battered Women* (2002) (slide presentation to Pennsylvania Coalition Against Domestic Violence Legal Department, on file with Sharon Lopez).

¹³ *Id.* at slide 7.

children can have independent relationships with each parent.¹⁴ These assumptions produce risks for achieving safety, autonomy, and restoration for the survivor and her children.

An effective domestic violence lawyer must recognize the competing goals and outcomes of family law and domestic violence law. On the one hand, domestic violence law holds the batterer accountable via the enforcement of court orders through prompt and consistent response to violations.¹⁵ On the other hand, family law places the responsibility on the survivor for making the order and the relationship work. Domestic violence law requires structured agreements and schedules; family law requires both parties to have equal responsibility for reaching mutually agreed-upon settlements. Domestic violence law gives the survivor a voice in the process; family law places obstacles in the way of contested litigation and deprives her of her day in court.

The principles of domestic violence law generally prohibit the use of mediation in a custody dispute.¹⁶ This is because mediation promotes greater access by the batterer to the survivor and allows him to manipulate and control her in the

judicial process. However, in family law practice, mediation is the rule rather than the exception. In fact, a party who refuses to mediate runs the risk of being deemed an “unfriendly parent,” and thus less deserving of judicial relief.¹⁷

In this article we offer practical tips regarding the effective representation of domestic violence survivors in child custody and visitation litigation.¹⁸ We hope that, when representing a survivor, you will consider these ideals so that your counsel and litigation always promote your client’s safety, autonomy, and restoration.

Well before your initial interview with a survivor, take time to reflect on the differences between domestic violence law and family law. Examine how family law pressures influence your attitude toward your client, the way you gather information and investigate the facts of her case, the advice you offer (especially with regard to settlement), the litigation strategy you develop, and the orders you draft.

Remember that “process counts.”¹⁹ Prepare to listen carefully and patiently to your client’s story not only to acknowledge and support her but also to develop your legal theory and case strategy.²⁰ Listening to the survivor’s story will give

¹⁴ Martha Albertson Fineman, *Domestic Violence, Custody & Visitation*, 36 FAM. LAW Q. 211, 216 (2002).

¹⁵ Roberta L. Valente and Andrea Farney, Full Faith and Credit and Child Custody Workshop (June 8, 2000) (training material, on file with the Pennsylvania Coalition Against Domestic Violence).

¹⁶ “A small but increasingly visible sector of the family mediation community has concluded that custody mediation compromises the interests of battered women and their children.” Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990).

¹⁷ Margaret Martin Berry, *The District of Columbia’s Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U.L. REV. 767, 799–800 (1997); see also Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407 (1985) (citing Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 538, 554–56, 558–60 (1982)).

¹⁸ We practice law in three different jurisdictions and recognize that local rules and procedures may limit or expand the reader’s ability to implement some of the suggestions that we offer. As you consider executing these strategies, always check your local rules and modify your approach accordingly.

¹⁹ Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman’s Story*, 35 HOUS. L. REV. 29, 73 (1988).

²⁰ The “process” is especially important when there is little or no direct evidence of what kind of parent the batterer will be. You should consider a case theory that allows the court to view his past treatment of the survivor as an analogy to the way he will treat the children when he parents them in an unsupervised setting.

you clues about the batterer's parenting: for example, you may hear how he corrects the child when the child does not listen.²¹ Or you may find out how your client's presence tempered the batterer's responses to the child. Ask your client about the batterer's behavior and what meaning the behaviors that she witnessed had for her.²² Inquire about the batterer's rules regarding her conduct and how he enforces them.²³

Prepare to safety-plan with your client about her contact with you, with other witnesses, and with her children.²⁴ Be ready to explain the possible ways that the batterer may use the legal system to further control and harass her. Educate yourself about domestic violence so as to inform her choices, options, and decision making. Seek out training from your local domestic violence program or state coalition about safety planning.²⁵

As a domestic violence attorney, you are to stop yourself and the judge from denying the violence and its effect on the children. Family law attorneys and judges fail to acknowledge adequately the impact of intimate partner violence.²⁶ As domestic violence lawyers, we may inadvertently be doing the same. All too easily we can make a comment such as, "Let's focus on how your partner physically abused the children (rather than you)," or "That incident happened a long time ago." Review how the batterer has controlled your client's life by discussing the entire history of the relationship. Try not to downplay the violence. Examine your own experience of family law pressures in advance so that you keep these pressures in check when she as a domestic violence survivor needs you to represent her zealously.

II Preparing Survivors for Litigation

Explain your role and limitations of confidentiality clearly by discussing your client's expectations. Consider that you and she are members of a team, bearing in mind that what directs your work is her voice.²⁷ Build trust by assuring her that she is the decision maker and that you will give her the information necessary to make thoughtful and informed decisions. Explain the legal and physical aspects of custody and the type of visitation arrangement that your court typically orders. As you discuss the facts of her case with her, the two of you will assess what is the best fit for her situation.

Ask your client to articulate what her goals are so that you are not making any assumptions. Discuss with her how litigation can help her achieve her long-term goals. Be sure to explain that filing a custody case may reduce her control over custody of her children. Be candid about the fact that the court may have gender biases or believe stereotypes about domestic violence survivors. Assure her that your role is to counter the effects of these unjust perceptions. When a domestic violence survivor leaves your office, she should feel heard, respected, informed, and encouraged. You are now another ally helping her to achieve safety, autonomy, and restoration.

A. Custody Work Plans

When you meet with your client, clarify your role as an advocate and advisor but explain that you are not a mediator. Discuss any pressures to settle the case and reassure her that you will not pressure her to settle. Survivors of domestic violence may be more likely to agree

²¹ BANCROFT & SILVERMAN, *supra* note 4, at 30.

²² Barbara J. Hart, *Assessing Whether Batterers Will Kill* (1990) (unpublished manuscript, on file with the Pennsylvania Coalition Against Domestic Violence).

²³ Barbara J. Hart, *Rule-Making and Enforcement, the Violent and Controlling Tactics of Men Who Batter, Rule-Compliance and Resistance, the Response of Battered Women, Police Response to Domestic Violence*; Pennsylvania Law and Practice app. A-18 (unpublished manuscript, on file with Pennsylvania Coalition Against Domestic Violence).

²⁴ See *infra* V.B for additional information about safety planning after the order is entered.

²⁵ An excellent resource for learning about safety planning is JILL DAVIES & ELEANOR LYON, *SAFETY PLANNING WITH BATTERED WOMEN, COMPLEX LIVES/DIFFICULT CHOICES* (Claire M. Renzetti & Jeffery L. Edleson eds., 1998).

²⁶ Fineman, *supra* note 14, at 212.

²⁷ DAVIES & LYON, *supra* note 25, at 110.

to the entry of an order that does not fully consider long-term safety needs.²⁸ Therefore you must discuss what she can live with now, three months from now and a year later. If she indicates a willingness to settle, review every provision and present hypothetical scenarios so that she can identify the provisions that create risks for her. Agreeing to a provision today may result in unacceptable restrictions on her parenting or the batterer's excessive access to the child later. As she explains her barriers to safety and autonomy, consider how the language of the order and the methods of enforcement serve her as a tool to achieve these goals.

Agree to a "custody work plan"—a strategy and time line for litigation. Identify a potential witness list by helping her identify whom her allies and possible witnesses are: Who are the people who help her with parenting? Who are the people who know about the abuse? Who are the professionals who know her and her children, and how might they be helpful at trial?²⁹ Keep in mind that people who are her allies may not necessarily be appropriate as witnesses. Domestic violence survivors often need confidential allies.³⁰ Although calling these allies as witnesses may bolster aspects of your case in chief, you may be compromising your client's safety by doing so.³¹ In the end, "any 'solution' not based on battered women's experiences is doomed to failure."³²

Once you both have identified the allies to call as witnesses, begin to establish your own relationship with the witnesses. Explain the importance of their participation at trial. Tell them that their support is needed throughout the litigation process³³.

If the client has no or few allies, develop a plan to obtain them. Consider a parenting-education referral whom you could call as a witness. Evaluate the risks and benefits of referring your client or the children to a counselor.³⁴ Refer her to community-based domestic violence advocates, and explain their role as well as how you work with them. Set up regular contacts with her and assess how the custody work plan is affecting her safety, autonomy, and restoration.

B. Contacting Your Client

Carefully consider how and when you will have contact with your client in the future.³⁵ Plan when you will call her and with whom you may safely leave messages. Give her special ways to contact you. Let her know where she can leave confidential messages for you and when and how often you will check them. Ask her how you can safely mail her letters and documents.

Define what an emergency may look like by exploring the differences and similarities between both of your definitions of an emergency. Also discuss how to re-

²⁸ "Research indicates that a climate of fear during custody proceedings leads to a substantial number of women to compromise their rights." Jennifer Hardesty, *Separation Assault in the Context of Post Divorce Parenting*, 8 VIOLENCE AGAINST WOMEN 597, 606 (May 2002).

²⁹ On "allies" see Barbara J. Hart, Understanding the Client (address delivered at the Legal Assistance Providers Technical Outreach Project's Regional Conference—Safe at Home, Safe at Work, Portland, Or. (May 21, 2002).

³⁰ E.g., a therapist may be a critical support outside of the legal system for your client.

³¹ If your jurisdiction allows discovery in family law cases, warn your client about the possible disclosures that her allies may be compelled to make should they be subpoenaed.

³² Waits, *supra* note 19, at 78.

³³ But remember the duty of confidentiality to your client, and be on guard so as not to jeopardize the attorney-client privilege.

³⁴ Caution your client about information that she should and should not share with the counselor. This approach is especially important when the communication with the counselor does not fall under any evidentiary privilege.

³⁵ Deborah M. Goelman, *Safety Planning*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 2–11 (ABA Commission on Domestic Violence) (1996).

spond to these emergencies. Many clients minimize the violence or the threat of violence.³⁶ Talk to her about changing her passwords and access codes, especially with regard to remote access to messages from answering machines. Explain the dangers of e-mail, which is easily intercepted and forwarded.³⁷ Also tell her about the risk involved with cell phones and cordless phones, which are more easily intercepted than calls on land lines.³⁸

III. Litigation

Four major goals of domestic violence litigation should include the following. First, be prepared to litigate these cases despite the pressure of the family court to overlook the abuse and encourage settlement. In light of required mediation, friendly parent statutes and the generally accepted premise that frequent and continuing contact with both parents should be the norm, you must be ready at every stage of the case to argue why these concepts are not only inapplicable but also inappropriate in the context of domestic violence. In order to make this argument forcefully and effectively, you must be willing and ready to go to trial.

Second, you will need to prove to the judge that although your client's survival strategies may appear maladaptive, they are not. For instance, your client may have stayed with the batterer despite severe physical abuse. She may have left the batterer and moved from one place to another with the child. She may have drug or alcohol abuse issues or a mental

health disorder as a result of the abuse. Your job is to reframe these behaviors as normal, rational responses to the batterer's "crazy-making" behavior.³⁹

Consequently your third goal is to shift the judge's attention to the conduct of the batterer rather than the conduct of the survivor. Focus on his physical and emotional abuse of her, his craziness making, his isolation of her, his jealousy, and his control of all aspects of her life, including finances. Explain to the judge how the batterer's conduct toward the mother hurts the children. Compared to other children, those exposed to domestic violence between adults: are more likely to be physically abused themselves; are more likely to witness violence or its aftermath; show significantly elevated rates of behavioral problems, hyperactivity, anxiety, withdrawal, and learning difficulties; are more aggressive with peers; spend less time with friends and have lower-quality friendships; feel burdened with guilt; and experience disruption in eating and sleeping routines.⁴⁰ Throughout every stage of the litigation, the batterer, as the primary perpetrator of violence and of psychological aggression in the home, should be seen as responsible for the exposure of the children to these negative effects.⁴¹

Fourth, you will need to anticipate how the batterer will present his story and frame your client's behaviors. He may accuse her of fabricating the abuse because it is to her advantage under the child custody statute.⁴² He may try to

³⁶ PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE, A CALL FOR SAFETY AND ACCOUNTABILITY 38 (Margaret H. Seawall ed., 2003).

³⁷ If your client uses e-mail or the Internet, she should be especially cautious and educate herself about ways by which she can reduce the batterer's ability to see onto what Internet sites she logs. This is especially important when she is using the Internet as a means of developing alternate safety plans.

³⁸ For more information on the risks associated with technology, check with your local domestic violence coalition or with the National Network to End Domestic Violence.

³⁹ "Crazy-making" is used to describe a type of emotional abuse. E.g., the batterer may tell the survivor not to do something and then later harangue her because she did not do it. The crazy-making occurs when he denies his previous directive and instead calls her crazy or mentally ill. Domestic violence attorneys should consider examining how the batterer uses this tactic to interfere with the survivor's parenting of the children and consider opposing shared custody requests as a result of such interference.

⁴⁰ BANCROFT & SILVERMAN, *supra* note 4, at 37–42.

⁴¹ *Id.* at 39.

⁴² JAFFE ET AL., *supra* note 36, at 17.

characterize the relationship as one that is full of mutual conflict and aggression, thereby painting a picture of your client as equally blameworthy. He may even allege that, although there was abuse in the relationship, his abuse of her has no impact whatsoever on his ability to be a good father, and that her attempt to gain custody or restrict his visitation is simply vindictive.⁴³ Plan your case accordingly. Develop effective cross-examination questions that elicit his motive. Have rebuttal witnesses reserved. Be aware of the otherwise impermissible evidence that you will be allowed to admit.⁴⁴

A. Know Your Judge

At the outset, be sure that you know your audience. In other words, be familiar with the present status of your custody court or judge. What is your judge's view of domestic violence? What factors most influence the judge's decision regarding custody or visitation? Is your judge educated about domestic violence, or will an expert or memorandum be necessary? Talk to attorneys in the community; review your judge's past decisions and orders, especially past decisions with regard to either party in your case.⁴⁵ Sit in on custody and visitation hearings to gather information. Knowing your judge is as important as the factual investigation of the case and is crucial to trial preparation and strategy.

B. Developing a Case Theory

Develop a one-sentence case theory that summarizes why your client deserves the relief that she is requesting.⁴⁶ Although your case theory will change as you develop the facts, you must always have a general theory from which to spin facts, focus thoughts, and draft themes, arguments,

and testimony for trial. A concise case theory is especially important in the context of domestic violence litigation. In these cases, you should strive to use vivid images that keep the judge focused on the batterer's violent conduct rather than your client's responses to that conduct.

C. Direct Examination of Your Client

Your client's testimony is critical to the success of the case. Because of the batterer's likely portrayal of your client as the unstable one and because many of your client's survival strategies will appear, at first glance, irrational to the judge, ask her strategic background questions at the outset. For example, instead of asking your client the typical questions regarding where she has lived over the past five years (which will likely paint a picture of an unstable person), elicit testimony with regard to what she has done to keep herself and her children safe. Ask her what her reasoning has been in order to show the judge that her plans have been thoughtful. Ask her what her coping mechanisms have been and, in hindsight, how she would evaluate their effectiveness. Her ability to learn and change should be highlighted; this characteristic is especially important if your client does not have the same assets that the batterer may have, such as a stable living situation, job, or education or all three. Because her credibility can also be bolstered by her willingness to seek help, consider exploring on direct examination such attempts and their outcome.

As you get into the heart of the direct examination, remember the basic principles of drafting questions.⁴⁷ Tell an organized story that the judge can easily follow not only by asking about events in chronological or some other coherent and logi-

⁴³ Prepare your client for these contradictions and advise her as to how she should respond in the courtroom. Her demeanor at counsel table as well as her demeanor under oath is considered by the court.

⁴⁴ See *infra* III.G.

⁴⁵ Be sure you have reviewed any litigation in all jurisdictions with regard to either party and have done criminal background checks on both parties and potential witnesses.

⁴⁶ E.g., "Since petitioner became pregnant with their child, respondent's violence, drinking and drug abuse have escalated in frequency and severity, to the point that the child is physically and emotionally endangered by continuing contact with him."

⁴⁷ THOMAS A. MAUET, TRIAL TECHNIQUES (Erwin Chemerinsky et al. eds., 6th ed. 2002).

cal order but also by setting the physical scene before getting into any specific incident. Elicit facts rather than opinions. When you ask about the abuse, slow the pace of the questions down, putting the abusive acts in slow motion. Draw out sensory information to create a vivid and dramatic picture for the judge.⁴⁸ Follow up with questions regarding disclosures that the children may have made to your client about the abuse. Ask that this testimony be admitted to show its impact on your client and her state of mind.

Before you ask substantive questions about custody, such as the primary caregiver questions, ask her how she feels about the child. Many mothers will be expressive, both physically and verbally, about their bond with their child. Often the expression of the emotion is overwhelming; and because it is your client's words (not yours), the testimony is more credible. As you go through the factors that the judge considers in determining the child's best interests, draft creative questions. For example, in a case in which a client testifies that she and the baby are well bonded and that she takes the baby with her to work, you might follow up with questions such as, Where in your office does the baby sleep? (Answer: In a crib.) How is there a crib in your office? (Answer: I brought it in for the baby because she is there all day with me.) Think outside the box to elicit details that create compelling mental images for the judge.

As in any custody case, you will be conducting a comparative analysis of your client's ability to care for the children versus the ability of the opposing party.

Be knowledgeable about the ways that batterers typically interact with their children and elicit this testimony from your client. Research shows that batterers tend to be rigid, authoritarian parents who expect their will to be obeyed unquestioningly, taking an intolerant view of any resistance or arguing from their children.⁴⁹ In combination with periods of authoritarian involvement, batterers also tend to be underinvolved, neglectful, and less physically affectionate with children than are nonbatterers.⁵⁰ They often do not know the names of their children's schoolteachers or day care providers, the details of medical conditions or the names of doctors, aspects regarding their children's interests, strengths, or ambitions.⁵¹ They tend to be interested in their children when seeming to be interested is convenient or when an opportunity arises for public recognition for fathering.⁵² They are abusive to their partners in the presence of their children and are several times more likely than are nonbattering men to abuse children physically.⁵³ Ask your client questions with regard to these behaviors and to the batterer's actual past performance as a parent, in general.

After scrutinizing the batterer's dysfunction in detail, shift the focus not only to what your client's strengths are as a parent but also, perhaps more important, to your client's course of action to protect the children from the batterer. For example, she might have purposefully put the children to bed before the batterer returned home from work; she might have taken the children to sleep elsewhere at times she perceived to be dangerous; she might

⁴⁸ E.g., when discussing an act of physical violence, such as a slap, ask where the children were, where she was, how far away the batterer was from her before the slap occurred, what his demeanor was, what his tone of voice was, whether he said anything to her, whether she anticipated the slap because of some conduct of the batterer, what that conduct was, how he held his hand, where he made physical contact with her, how forcefully he struck her, how the blow felt or appeared or sounded, what physical reaction she had, what physical sensation she felt, and what injury she sustained.

⁴⁹ BANCROFT & SILVERMAN, *supra* note 4, at 30.

⁵⁰ *Id.* at 32.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 42.

have had a code or other secret means of communication with the children; she might have helped the children develop a safety plan for themselves.⁵⁴ Elicit this testimony not only to bolster proof of the best-interest factors but also to reinforce your client's credibility with the judge. Help the judge understand that your client took many steps before leaving—or instead of leaving—the batterer to keep herself and her children safe by portraying her as the active, strong, and capable person and parent that she is while simultaneously being a survivor of abuse.⁵⁵

D. Evidence

Think about, get, and organize the evidence available to corroborate your client's story, such as photographs; protection orders; 911 tapes; voice mail tapes; police reports; medical reports; bills; criminal histories; letters; journals kept by the survivor or the child; real evidence such as weapons, clothing, a telephone cord that was broken when it was ripped out of the wall; and other testimony. Consider whether demonstrative evidence would be helpful, given that most people process information visually. Prepare a trial notebook that includes the foundation that you must lay for any given exhibit. Have case law ready for the anticipated objections. Study and be prepared to argue with regard to hearsay exceptions, most notably state of mind, present sense impression, excited utterance, prior statements, and prior bad acts.⁵⁶

E. Cross-Examination of the Batterer

Put a great deal of time into the cross-examination of the batterer. Although impeachment is an important goal, save it for the very end. Instead think constructively. Specifically what



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facts would you like to characterize as “undisputed” when you are making your closing argument? For example, although the batterer would surely deny on cross-examination that your client cared for the baby all day long every day, he might admit to the existence of a crib in her office. You could then argue, in closing, that your client undisputedly had a crib in her office and that the only reasonable inference to be drawn from this fact is that the baby spent a significant amount of time at your client's workplace.

Be knowledgeable about batterers' motivations for seeking custody; often batterers' primary goals are retaliation; vindication; the need to impose control; and the desire to gain economic or legal concessions.⁵⁷ Gather information from your client regarding the batterer's tactics. Remember that batterers have distorted perceptions of themselves, their victims, and the effects of battering on their former partners.⁵⁸ You may be able

⁵⁴ See *infra* V.B.

⁵⁵ ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 74–86 (2000); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. AND MARY L.R. 805, 834–45 (1999).

⁵⁶ See LITIGATING DOMESTIC VIOLENCE CASES: EFFECTIVE USE OF THE RULES OF EVIDENCE (outline of a Continuing Legal Education teleconference conducted October 16, 2002, through the ABA Commission on Domestic Violence), available at www.abanet.org/domviol.

⁵⁷ BANCROFT & SILVERMAN, *supra* note 4, at 115–22.

⁵⁸ *Id.* at 114.

to elicit testimony that shows that the batterer not only minimizes the abuse against your client but also the effect that abuse has on the children, who likely witnessed it. Be sure that you will have asked your client what she believes his chief motives are and how he has articulated his opinion of her and of the battering in the past. Although you certainly would not ask a batterer to admit his motive, you may very well elicit damaging testimony. For example, immediately preceding an incident of abuse, he was jealous, was upset, felt betrayed, or thought that your client was conducting herself outrageously, such as denying him access to the children. Then, during your closing argument, you can ask the court to make reasonable inferences with regard to which party's version of reality makes more sense.⁵⁹

F. Witnesses

Know in advance whether your judge will decide on the basis of an expert's testimony. Many judges will defer, almost completely, to a professional's opinion about which party should have custody of the child. Other judges may deem a professional's testimony inappropriate. Some jurisdictions require a custody evaluation, conducted by a court-appointed evaluator. Whether you choose to use a custody evaluator or one is required, be certain that this witness is knowledgeable about the dynamics of domestic violence and is not fooled by the batterer's projection of a

nonabusive image.⁶⁰ Beware of psychological testing; batterers generally outperform survivors.⁶¹ Be prepared to challenge the adverse expert's qualifications by asking the expert about recent research with regard to domestic violence, the expert's training in domestic violence and custody issues, and what standards the expert follows in making her determinations. Elicit testimony with the goal of creating a doubt in the judge's mind about the witness' opinion or recommendations. Then drive the point home during closing.⁶²

Identify other witnesses early on. Think strategically about who might be able to testify to the abuse as well as the parties' interactions with and ability to care for the child. Consider preserving witnesses' testimony by deposition or affidavit if you feel that their stories may be subject to change at trial when they are nervous and, for the first time, are asked to make statements that are damaging to the batterer while in his presence. As in any case, be sure to prepare your witnesses thoroughly not only by practicing their testimony with them but also by anticipating questions that they will be asked on cross-examination.

G. Rebuttal

Rebuttal is more important in domestic violence cases than in other cases because the crazy-making behavior of the batterer in the relationship is frequently mimicked during trial. You should anticipate a batterer's counsel litigation strate-

⁵⁹ E.g., a series of questions regarding an incident of abuse that occurred as the batterer picked up the children for visitation could be: You have a close relationship with your children? (Answer: yes.) You visit them? (Yes.) You visit them frequently? (Yes.) Naturally, you wanted to visit them on Christmas? (Yes.) You arranged for a visit? (Yes.) You went to petitioner's home? (Yes.) As she agreed you should do? (Yes.) You went to pick up the children? (Yes.) But petitioner would not allow you to take them? (Yes.) Even though you had arranged the visit with her? (Yes.) Even though it was Christmas Day? (Yes.) You must have felt upset? (Yes.) Then, on closing, you can argue the whole story: that (as your client testified) he was three hours late for the visitation, that undisputedly the respondent was "upset" and "outraged" when your client refused to open the door; and hence her version of the facts (that he broke into the home and assaulted her) is more credible than his version of the facts (that when he was leaning on the window, it broke and he fell into the home).

⁶⁰ BANCROFT & SILVERMAN, *supra* note 4, at 119–20.

⁶¹ *Id.* at 118.

⁶² If a guardian ad litem is appointed to the case, be certain that you know in advance what that person's recommendations will be, and be prepared to discredit that person if domestic violence is not given the weight it deserves in any recommendation or opinion.

gy that utterly and completely denies the existence of abuse or that characterizes your client as abusive and insane. If the batterer puts on evidence that your client is lying, be prepared to offer testimony and evidence that she is truthful. For example, the batterer may allege that your client fabricated an incident of abuse. Call a witness in rebuttal to testify to the client's prior consistent statement about the abuse. Consider calling a witness to testify to your client's reputation for truthfulness. Find documentation that corroborates the incident in question, such as a medical or police report.

When the batterer states that he was acting in self-defense, rather than acting as the primary aggressor, or that the abuse was an accident, bring in evidence of his prior bad acts under Rule 404(b) to rebut this defense claim.⁶³ Consider arguing for the admission of prior bad-act evidence in your case in chief, particularly when a pattern of abuse is supposed to be considered by the court, such as in a protection order hearing. Similarly, in child custody cases, most state statutes direct the court to consider the parties' history of abuse or require consideration of domestic violence as a factor in the best-interest analysis.⁶⁴

IV. Drafting the Pleadings

A custody and visitation order can enhance the future safety of the survivor and the children, or it can create avenues for abuse. Thus carefully drafting the pleadings is essential.

A. The Petition

As the first pleading filed, the petition is the place to start shaping your case; specifically focus the court on the violence. In some states, you may be able to attach the protection order to the petition for permanent custody. In other states, you may be able to consolidate the protection order and custody case; however, this may not be advisable unless the protection order has already been granted.⁶⁵

In general, a good custody and visitation order starts with a good petition. A good petition includes accurate information and contemplates the possibility of a default order. Try to gather as much information as possible from your client at the petition drafting stage.

Remember that you can amend the petition. You may decide to amend to change or add forms of relief. For example, the survivor may want to add a condition of no telephone contact with the children in the amended petition if the batterer begins calling her repeatedly after filing the petition. Adding this type of relief is especially important if the batterer is not likely to respond to the petition and the order will be by default.⁶⁶ Amending the petition may be necessary if the client initially filed pro se. For example, a survivor who filed pro se might not have known to ask in the petition for supervised visitation.

B. Withholding Addresses

Know your state laws for withholding a confidential address in the petition, order, and other pleadings.⁶⁷ Under the

⁶³ Remember that this rule generally prohibits admission of prior bad acts to prove character or propensity but permits this evidence when it is relevant to a noncharacter issue such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident.

⁶⁴ See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Cases*, 34 FAM. LAW Q. 43 (2000).

⁶⁵ Consolidating the cases before the protection order has been granted may actually assist the batterer in delaying the protection-order hearing and deflecting attention away from the abuse.

⁶⁶ In a default the order should mirror the petition. See *infra* IV.D for a discussion of default orders.

⁶⁷ Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act § 209(a) (1997), supplying addresses and other information in the pleadings is subject to local laws on confidentiality.

Uniform Child Custody Jurisdiction and Enforcement Act, addresses and other identifying information may be kept confidential.⁶⁸

C. Provisions of the Order

In general, the order should be as structured as is feasible in both the parameters and conditions of the visitation. The structure supports the best interests of the children: "For healing after separation or divorce, children need structure, limits and predictability as a counterweight to the dynamics with which they have lived previously."⁶⁹ An order with clear parameters can also improve enforcement.⁷⁰ When drafting an order, always think about whether the language is specific enough to be enforceable; be wary of boilerplate language.⁷¹

Consider preconditions to visitation. Those could include completing a drug and alcohol treatment program, batterer intervention, or parenting classes or all three. Have information about specific programs and list those programs or alternatives in the order. At a minimum, set forth the length and description of the required type of program and the process for notification of successful completion.

In some jurisdictions you may want to require an "affidavit of accountability" for anyone who supervises visitation as a precondition to the start of visitation.⁷² Such an affidavit is signed by the supervisor and states that the supervisor is willing to abide by the court order.⁷³ It is then filed with the court.

Unsupervised visitation should be structured to limit the harm that the batterer may inflict on the child and survivor during exchanges and visitation. The language setting forth the times and days and the pickup and drop-off should be clear. Limit contact between the parties. Think about using telephone contact or e-mail or both as a type of visitation. Consider prohibiting overnight visitation. Looking to a safe exchange center in your jurisdiction or appropriate third parties for the exchanges is always advisable.⁷⁴ For supervised visitation, a supervisor trained in the dynamics of domestic violence and the parenting of batterers is critical.⁷⁵

To increase safety, conditions during the visitation should include the following: Not taking children out of town, city, state and country; no firearms present; no use of drugs or alcohol during and twenty-four or forty-eight hours before; and no

⁶⁸ "If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice." Uniform Child Custody Jurisdiction and Enforcement Act § 209(e) (1997). Note, however, that the predecessor Uniform Child Custody Jurisdiction Act (1968), still in place in several states, does not expressly provide that addresses may be kept confidential. However, states enforcing the Uniform Child Custody Jurisdiction Act may have special statutory provisions regarding address confidentiality.

⁶⁹ BANCROFT & SILVERMAN, *supra* note 4, at 103–4.

⁷⁰ See discussion *infra* VI.

⁷¹ Remember to be forthright with your client about the difficulty of enforcing an order even if it is written with clear and specific parameters.

⁷² Pennsylvania has a provision on point in the Protection from Abuse Act. Pursuant to the statute, a court may require an affidavit of accountability to be on file before the visitation begins. 23 PA. CONS. STAT. ANN. § 6108(a)(4) (2001).

⁷³ The affidavit of accountability can also include contact and other information about the supervisor.

⁷⁴ You could decide to help develop such a center if there is not one in your jurisdiction. Pursuant to the Violence Against Women Act, 42 USC § 10420 (2002), Congress may appropriate funds to provide supervised visitation and safe exchange for children of child abuse, domestic violence, sexual assault, and stalking cases under the Safe Havens for Children Pilot Program. The Violence Against Women Office Web site, www.ojp.usdoj.gov/vawo/applicationkist.htm, has information on grants.

⁷⁵ BANCROFT & SILVERMAN, *supra* note 4, at 112.

physical discipline of the children. Conditions could also include the following: valid driver's license and insurance for all transports; support counseling for children including necessary transport; and no exposure to violence, including but not limited to television, movies, books, video games, and magazines.⁷⁶

If the batterer has the children's passports, the order should require that those be turned over within a certain number of days to the survivor or to the court. If the children do not have passports, include in the order language stating that the batterer should not be allowed to obtain passports.⁷⁷

Depending on the case, the order may also need to address school conferences, sports, arts, religious activities, and other locations where the parties may have contact.

Include in the order, in bold letters, the consequences of any violations. For example: "Failure to abide by any and all of the conditions in this order subjects the party in violation to contempt proceedings and thereby possible fines and changes to visitation, custody, and child support."

D. Tips for Different Types of Orders

If you are drafting a stipulated order, contemplate the implications of the adverse party's requests. Let us suppose that the adverse party in your case first agreed to visitation on Tuesdays and later wants visitation on Thursdays. Even if Thursdays work with your client's schedule, you may have to probe deeper. For example, does the adverse party always

drink on Wednesday nights with his work friends? Be sure that you have asked your client to think through and anticipate as many ramifications as possible.

If you are drafting a modification, make sure that the final order is clear. While important in any case, it is especially relevant in domestic violence cases where enforcement is often an issue. The client should not be confused about which provisions of which order apply. You may want to insert provisions from the original order that are not being changed into the modification order to ensure clarity for the parties and for future enforcement of violations.

If the order is posttrial, the adverse party may agree to provisions after the trial that the judge did not order. For example, you may have forgotten to ask the court to order that the noncustodial parent refrain from smoking during visitation. Seeing if counsel or the pro se party will agree to such a provision is worth a call to either party.

If you are drafting a default order, be as detailed as with a nondefault order. Even though a batterer does not respond to a petition, the batterer very well may resurface.⁷⁸

E. Compliance with the Parental Kidnapping Prevention Act

The initial order must comply with the Parental Kidnapping Prevention Act in order to be given full faith and credit in other states; that is, if the initial order is not entered properly, no other states are required to enforce it.⁷⁹

⁷⁶ Please note that if a court is not trained in domestic violence, the court may also impose these types of conditions on your client. And if these conditions are also imposed on your client, the batterer could very well use these conditions to further harass her.

⁷⁷ A copy of this order should be forwarded to the U.S. Department of State Office of Passport Services to stop the issuance of passports or duplicate passports for the children should the batterer try to obtain them. See LESLYE E. ORLOFF, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN*, A "HOW-TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS 178 (1999). See also www.travel.state.gov. The judge should also order that no visitors' or other visas be issued for the children without a court order; copies of this order should be forwarded⁷⁸ to all relevant consulates, embassies, passport offices and airlines. *Id.*

⁷⁸ See BANCROFT & SILVERMAN, *supra* note 4, at 107. "[There is] the phenomenon of the batterer who disappears for months or even years from the children's lives, often failing to pay child support over that period, but then resurfaces and seeks a court order granting him visitation for 48 hours on alternating weekends."

⁷⁹ The requirements of the Parental Kidnapping Prevention Act are set forth in 28 U.S.C. § 1738A (2002).

V. Implementing the Order

Obtaining the custody and visitation order in some ways is a first step even though many law offices consider it to be the last. After obtaining the order, the next step is to implement the order in a manner that empowers the client and increases safety.

A. Ensuring That the Client Understands the Order

While attorneys and paralegals are familiar with orders and can identify violations, lay people frequently cannot. You must go through the order with the client step by step. The client needs to understand what would constitute a violation of the order and what would not. Go through each of the provisions to ensure this. Also, discuss the implications of failing to file for contempt when a violation occurs.

B. Safety Planning

As legal advocates know, safety planning is an evolving process for domestic violence survivors. Safety concerns change, and so, too, should safety plans to meet new circumstances. Safety-plan with the client specifically around provisions of the custody and visitation order. Whom will the client call if the batterer will not have brought the children home at the time designated in the order? What will the client do if the batterer calls the children four times per week rather than the three times set forth in the order? Batterers certainly utilize orders as another tool to harass and inflict further violence upon the survivor and children. Advocates can help clients proactively prepare for that possibility by exploring potential scenarios and allies whom she may have.⁸⁰

An oft-overlooked area after the order is signed is safety planning for children. Consider the following: The court awards the batterer unsupervised visitation with his son every Saturday. The batterer every Saturday asks his son where mommy grocery shops or where mommy is working. As part of the mother's safe-

ty plan in this example, she may decide to limit the information that her son has to protect their safety. She may also decide to identify allies (nearest police officer, restaurant employee, or friend around the corner) in all venues where the exchanges and visitation transpire, making allies aware of the situation and her son aware of the allies.⁸¹

VI. Enforcing the Order

As any domestic violence attorney knows, there can be a dearth of and delay in consequences when a batterer violates a custody and visitation order. Finding ways to improve enforcement must be a goal of the practice.

A. Partnering with the City Attorney and Law Enforcement

What will law enforcement entities in your jurisdiction do if a custody order is violated? What will they do if a visitation order is violated? Does that answer change depending on the race or ethnic background of the survivor?

The practice of law enforcement can vary from officer to officer. For that reason, you may find it helpful to know the city attorney's position on whether officers may enforce a custody order without some type of writ or comparable document. Helpful protocols or internal memoranda brought to the attention of individual officers could change their course of action. If the protocols or internal memoranda are not helpful, a meeting with the city attorney could generate improved policies.

The partnerships that you form with law enforcement agencies can prove invaluable to survivors. Whether you have a formal domestic violence council or you have an informal group interested in the administration of justice as it relates to domestic violence, you should consider participating as a civil domestic violence lawyer. Your voice at the table is another important ally for the survivor in the policy development process.

⁸⁰ This assistance includes helping her decide who should have copies of the order, (e.g., day care, school, neighbor, friend, family member, workplace).

⁸¹ For further discussion of safety planning for children, see Barbara J. Hart, *Safety Planning for Children: Strategizing for Unsupervised Visits with Batterers*, 2 SYNERGY 4 (Winter-Spring 1997).

B. Contempt

Does your office accept and file contempt cases? Has there been a discussion in the office about this decision? Filing contempt cases is as important as filing initially for custody when there is domestic violence. Depending on the jurisdiction, contempt actions can range from a slap on the hand to a wake-up call for batterers. The goal, of course, is for the court to take action against the batterer. In some cases, filing for contempt is more harmful because the court may not hold the batterer accountable.⁸² For this reason, safety planning is necessary in any discussion of filing for contempt.

Determining whether to file for contempt based on safety and other considerations is the first step. If the decision is to file, the strategy should focus on timing. The options include filing after the first violation occurs or waiting until there is a serious violation or a witness. Filing a contempt action immediately may actually be important, after the very first violation, to forestall chronic behavior and teach the batterer about immediate consequences.

When the same judge is going to hear different contempt cases, you may find it advisable to file each violation as a separate contempt action. Utilizing this strategy could increase the judge's frustration with the batterer and thereby maximize the possibility that contempt serves as a wake-up call.

When the violation is of custody or visitation provisions in a protection order, request that the district attorney file those actions. Also consider asking the district attorney to raise the violation of a custody and visitation order if the district attorney is bringing a different type of case, such as a protection-order violation or criminal assault case. The judge may take a violation of the custody and visitation order more seriously if the district attorney raises it and if the batterer is before the judge on criminal matters. As with law enforcement, partnering with district attorneys will thus prove useful.

THE NEED FOR WELL-TRAINED, ZEALOUS, AND empathetic civil attorneys who will give survivors an opportunity to acquire and preserve safe custody and visitation orders is immense. The charge for any attorney representing a domestic violence survivor in a custody and visitation case is to follow the main principles of safety, autonomy, and restoration. From preparing the domestic violence client for litigation to the trial itself and through drafting and implementing the custody and visitation order, our role as domestic violence attorneys is to take time to listen to and inform our clients. We should not be afraid to litigate or take steps that may be discouraged by the bench or bar. We should educate judges and ourselves, think creatively, form strategic partnerships, and always take the violence seriously.

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⁸² The goals of contempt could be likened to the goals of arrest in criminal cases. See Hart, *supra* note 6, at 208. "A fourth goal of legal intervention against domestic violence is divestiture by perpetrators. Most batterers believe that they are fundamentally and irrevocably entitled to relationships with battered women; entitled to the services, loyalty, obedience and fidelity of a battered partner and entitled to superimpose upon her.... Arrest profoundly challenges the beliefs of batterers that they have the right to control their battered partners." *Id.*