

Getting Beyond “What Did She Do to Provoke Him?”

Comments by a Retired Judge on the Special Issue on Child Custody and Domestic Violence

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Background

Oftentimes, when men abuse their wives or the mothers of their children, we find ways to vindicate and help the men and to blame the victims. We characterize these crimes as “social problems.” We do not believe women victims of violence but instead believe the denials and justifications of male offenders (Sheehy, 2007).

The research articles published in the special issue of *Violence Against Women* in August 2005 (Zorza & Rosen, 2005a), are studies of the impact of prior intimate partner violence (IPV) on court determinations regarding custody of and visiting with children. The studies show that courts ignore the risks of physical and mental harm to children and their mothers. Courts deny victims of IPV and their children protection and grant offenders visits or custody.

The studies show that judges base their orders on the recommendations of mental health professionals, guardians ad litem, court-appointed special advocates, and mediators (hereafter collectively “evaluators”). Those recommendations determine the extent and conditions of visits by fathers who were abusive to the mothers of their children. Thus, the safety of IPV victims and their children can be compromised by evaluators who recommend custody or unsupervised visits for IPV offenders.

Apparently, there is an assumption among the evaluators working with the courts that visits are to be allowed under all circumstances. The custody evaluators seem to believe they are constrained to recommending the frequency of visits and whether supervision is needed. None of the studies mention the possibility of recommending that the court order no contact by violent offenders with their children.

The New York City study (Rosen & O’Sullivan, 2005) suggests that judges force courthouse hallway settlements because judges will not try the cases. The Seattle (Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005) study suggests that the court’s system for informing judges of the IPV history in prior court proceedings needs to be improved. The guest editors’ “Introduction” (Zorza & Rosen, 2005b), however,

suggests that when women reveal an IPV history, this may produce worse outcomes, as shown in the mediation results in the San Diego study (Johnson, Saccuzzo, & Koen, 2005). In addition, the guest editors suggest we need to know more about the content of IPV education of judges and evaluators.

Although the content of educational programs is important, it is impossible to assure that the good content of educational programs is applied in individual cases. Education does not substitute for evidence presented in court. The best “trained” judge cannot find or be persuaded by missing evidence. Reliance on judicial education, therefore, is misplaced.

Data published by the U.S. Department of Justice, Bureau of Justice Statistics (2006) show a small decrease in the intimate partner homicides of women but a great decrease in the intimate partner homicides of men from 1976 to 2004. In 1976, there were 1,348 male intimate partner homicide victims; in 2006, the number of male victims was 385. In contrast, in 1976, 1,596 females were murdered by intimate partners; in 2006, the number of female victims was 1,159.

These data show that twenty years of judicial education seminars on domestic violence and new laws in every state have not improved the safety outcomes of court cases for victims of IPV and their children. This conclusion also is shown in the studies in the special issue. An alternative to investing in more judicial education programs is to have evaluators conduct thorough background investigations and eschew family systems theory.

Evaluators Make a Difference

IPV is common in disputed child custody cases (Bancroft & Silverman, 2002; Keilitz, 1997). For this reason, evaluators have a duty to screen all custody and visitation cases for IPV as well as for child abuse and neglect. Tested screening instruments and guides should be used (Bancroft & Silverman, 2002; Counts, Brown, & Campbell, 1999). Evaluators who conduct thorough court record reviews and IPV screening, investigate collateral sources, and include this information in their reports may compensate for court system deficits and the lack of experienced lawyers to represent IPV victims and their children.

Mediation Is Dangerous for IPV Victims

Mediators should terminate settlement negotiations when the court records, initial screening, or the sessions reveal histories of IPV, prior protection orders, or criminal convictions. Mediation proscribes discussion of past injuries and the context of the parties’ relationship. It looks to future cooperation only. Mediation, therefore, is dangerous for victims of domestic violence because they are not able to assert their

safety needs or obtain protection for themselves and their children (Grillo, 1991; Nadler, 1993).

By contrast to mediators, judges have the power to set limits on offender behavior and impose penalties for violations of court orders. The victims are not responsible for the offenders failing to get their way. Judges make the orders and shift the power from the offenders to the court. Robust court responses protect victims (Dugan, Nagin, & Rosenfeld, 2003).

Furthermore, there is evidence that court-ordered mediation deprives weaker parties of essential legal remedies, thereby undermining their safety (Kuhner, 2005). Correspondingly, there are no data showing that mediated agreements produce better results for children.

Recommendations Are Feeding Judicial Misperceptions

Of course, the judges are responsible for their decisions and improper delegation of their decisions to evaluators. Evaluators, however, must take responsibility for contributing to judicial misperception that IPV presents no risk of harm to children. This misperception is the reason for the dangerous orders described in the special issue. Evaluators should change their methods and theories to provide recommendations that support custody and visitation orders that protect IPV victims and their children, including recommending denial of visits.

Family Systems Theory Is Inappropriate for IPV Cases

Family systems theory is inappropriate for assessing or responding to IPV. Mental health professionals and judges who adopt the family systems perspective in IPV cases blame victims for provoking violence and abuse. They perceive IPV as the result of "reciprocal interactions" within the family system. They do not hold the offender responsible for his violent acts, contrary to the provisions and intent of both criminal and family law (Bancroft & Silverman, 2002; Hansen & Harway, 1993; contrast Murray, 2006; Neidig & Friedman, 1984).

Family systems theory should not be applied to IPV. It ignores all aspects of the family system other than communication and dyad interaction. It excludes the legal, social, and political "systems" or contexts within which families exist. Differences in size and strength between partners, social status, and economic and political power between men and women are omitted from family systems analysis. Thus, violent behavior of offenders and the safety needs of weaker family members are disregarded (Hansen & Harway, 1993). Moreover, family systems theory overlooks that there is no legal justification (other than self-defense) for violence. The most verbally provocative, nasty partner is not an appropriate target for violent reaction. Physical separation from unpleasant partners is the only alternative, legally.

IPV Is Volitional Behavior

So pervasive is our tendency to ignore that IPV is criminal conduct directed primarily against women that even the critics of family systems theory as applied to cases of IPV commit the error of describing “violent families” and “families in which violence occurs” (e.g., Hansen & Harway, 1993, pp. 227, 237). Those characterizations obscure the gendered nature of IPV and relieve offenders of responsibility for their violent acts. The studies in the special issue showed that IPV is male violence against women.

U.S. Department of Justice, Bureau of Justice Statistics (2006) data for both intimate partner homicide, as discussed previously, and assault show women are the primary victims and their male intimate partners are the primary offenders. “An estimated 876,340 violent victimizations against women by intimate partners occurred during 1998 . . . men were the victims of about 160,000 violent crimes by an intimate partner” (Rennison & Welchans, 2000, p. 1).

Furthermore, use of the intransitive verb *occur* is misleading. *Violence*, unlike weather and earthquakes, which occur, is intentional action taken by a person or persons against others. The intransitive verb hides that the actions are intentional, violent crimes (Jaffe, 2002).

In addition, the studies in the special issue illustrate legal systems in which there are three separate planets on which IPV is handled. There is the IPV planet, where offenders are prosecuted and victims are protected in criminal and civil court proceedings. There is the child protection planet, where the state charges mothers with neglect for failing to protect their children from their violent fathers. On the child custody and visitation planet, however, offenders are granted visits or even custody (Hester, 2004). The second and third planets are based on family systems theory. On those planets, the offenders are not held responsible for their decisions to use violence.

The second and third planets ignore prior court decisions and orders and criminal convictions. This is contrary to the express provisions of the criminal and civil laws, which establish increasing penalty levels based on violations of prior court orders. It is contrary also to the legislative intent that the criminal laws and civil protection order, child custody, and child protection laws are to protect family members.

Protection of women and their children requires integration of the information from all three planets to provide full histories on which to base reports, recommendations, and orders. Violent men should be acknowledged as violent fathers and domestic violence offenders who pose a continued risk of harm to children and their mothers (Hester, 2004). The emotional, psychological, and cognitive harm to children who have lived with domestic violence is shown in a study published in the special issue (Morrill, Dai, Dunn, Sung, & Smith, 2005). Evaluators who wish to

maintain their credibility in the legal system must not adopt the statements of offenders denying or minimizing the history.

IPV Is Not Caused by Mental Illness; Clinical Evaluation Is Seldom Indicated

Mental health evaluations and psychological tests cannot establish that IPV occurred or did not occur or may occur (Erickson, 2005). There are no diagnostic labels of *violent intimate partner* or *victim of IPV* in the American Psychiatric Association's (2000) *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text revision). Mental illness and severe mental disorder rates are about the same among IPV offenders as in the general population (Gondolf, 1999). Thus, clinical evaluations often provide no admissible information, cause delay, and increase litigation costs (New York State Matrimonial Commission, 2006).

Furthermore, victims of IPV may appear less stable than their violent partners because they are suffering from the emotional effects of abuse and fear of losing custody of their children. Thus, their test results may not provide accurate assessments of their parental capacity. Abusive partners, by contrast, appear calm and self-assured (Bancroft & Silverman, 2002; Erickson, 2005).

Mental health evaluations are not required in all custody and visitations cases. During the 16 years when I presided in the New York Family Court and Supreme Court, I declined to order mental health evaluations unless there were allegations of mental illness during the 16 years when I presided in the New York Family Court and Supreme Court. I was never reversed for making decisions in custody, visitation, and child protection cases without mental health evaluations.

IPV Is Criminal Conduct

IPV is criminal behavior for which the offender is responsible. Custody evaluators should consider the studies showing that men who commit IPV often commit other types of crimes (Labriola, Rempel, & Davis, 2005). They are serial offenders who commit multiple crimes against a single victim and with multiple victims. The term *batterers*, therefore, hides their status as criminal offenders because it distinguishes IPV offenders from other offenders.

Evaluators may not know that alleged verbal provocation is not a legal defense to assault, kidnapping, rape, attempted assault, reckless endangerment, menacing, and stalking, all of which are typical IPV offenses. Frequently, evaluators ignore the history of criminal conduct or prior criminal convictions and protection orders. They may characterize IPV as a problem of family dynamics. They do not know that court decisions and orders are final, controlling determinations of the issues of IPV. As a matter of law, evaluators must accept prior court determinations as the history

of the case. They cannot revise that history based on IPV offenders' denials and excuses when making reports and recommendations.

Courts Must Reject Reports That Ignore Prior Court Determinations

Reports based on offender denials rather than the prior court orders, verdicts, and findings of fact violate the rules of evidence and must be rejected by judges. Evaluators who do not comply with the law should be removed from custody and visitation assessment work. Judges who base their decisions on reports and recommendations that ignore court determinations of IPV will be reversed on appeal. Reversals will cause the judges to use different evaluators in the future.

Conclusion

When the evidence establishes that parents were abusive or violent and are risks of harm to custodial parents or the children, it is appropriate to deny all contact by the abusive parent. Evaluators have a duty to place victim and child safety and mental health first when making reports and recommendations to the courts.

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