

# Representing Protective Mothers in Custody and Visitation Litigation

By Lundy Bancroft



Many Americans believe that the solution to domestic violence is for women to leave their abusive relationships. In practice, however, batterers often win extensive unsupervised access or even custody of children by misleading the court to see them as responsible parents and to take a dim view of the mothers' efforts to limit contact with the children. In this context, high-quality representation for mothers who are in custody litigation with abusers ("protective mothers") becomes crucial to the safety and well-being of children.

I have been involved in the overlap between domestic violence and custody litigation for decades as a counselor and administrator in batterer programs. I have observed recurring themes in these cases and learned legal approaches that increase the chances of an outcome that protects mothers and children. My suggestions fall into four broad categories:

- (1) Making the legal process as safe as possible for the family
- (2) Demonstrating to the court that safety and recovery need to come first
- (3) Preparing for the influence of professionals involved in the case
- (4) Empowering your client for the long haul

In this article, I address male-perpetrated violence against female victims, as all available research continues to indicate that these cases are the most likely to lead to homicide, serious injury, sexual assault, and child trauma.

## Making the Process as Safe as Possible

A batterer's dangerousness jumps sharply when a relationship is dissolving,<sup>1</sup> and litigation drives the risk even higher. At a time when battered women need to avoid abusers, litigation puts the parties in frequent contact, including physical proximity, and gives batterers access to information about victims' activities. Moreover, many batterers hurt children in order to hurt the mothers.<sup>2</sup> In the Melanie Edwards case, Melanie and her two-year-old daughter were murdered by the child's father as they were leaving a supervised visitation center.<sup>3</sup> In the Amy Castillo case, the father of Amy's children said he could best hurt her by killing the children and letting her live, and when a court refused her pleas to restrict his access, he drowned the children in a bathtub.<sup>4</sup>

Steps that attorneys can take include:

- Performing a risk assessment with your client to assess the severity of danger that her ex-partner represents to her and her children<sup>5</sup>
- Protecting the confidentiality of sensitive information—including residence—that the abuser might glean from documents or discussions
- Objecting to mandatory mediation between the mother and the abuser; if it is required, request safety measures including the use of shuttle mediation where parties are in separate rooms<sup>6</sup>

**FAST FACTS:**

Men who batter have been found to be far more likely than other men to seek custody of children post-separation.

Child custody determinations across the U.S. and Canada are largely made on the basis of theories that have no scientific support.

Mothers in family law proceedings find it difficult to persuade the court to protect their children from violent fathers.

- Being aware of signs that your client is feeling intimidated by the legal process or by the abuser, which could lead her to sign agreements that are unsafe for her children
- Attending to the risks involved in arriving for and leaving court, including the risk of homicide

### Advocating for the Children's Needs

One key task of the protective mother's attorney is to help the court understand how abuse cases differ from other custody battles. I have observed that raising a history of domestic violence can undermine a mother's case unless concrete connections are made between that history and the children's current needs. For example, attorneys can draw from domestic violence literature to show:

- Statistics indicate a strong correlation between abuse of women and child abuse.
- Mother-child relationships are critical to children's post-divorce functioning, and batterers often target these relationships for deliberate harm.
- A significant portion of batterers use their post-separation contact with children as a way to continue physically or emotionally abusing the mother.<sup>7</sup>

Combining this literature with related examples of the batterer's past and recent conduct makes a persuasive argument and helps demonstrate to the court that your client's concerns are valid.

Many abused mothers want their children to have contact with the fathers if it is safe, and I have found it important to avoid creating the impression that your client's goal is to drive the father away. Focus discussion on the children's needs, not the father's faults. Frame the discussion in terms of the behavioral changes the father must make for the children's safety; the services needed, such as batterer intervention; and the immediate safe conditions of contact, such as supervision, toward the ultimate goal of involving the father in a way that is physically and emotionally safe for the children.

Abusers employ an array of tactics to discredit abuse allegations, usually involving counter-accusations against the mother. Among the most common is the charge of "parental alienation." This charge is without scientific validity as a purported cause of abuse allegations.<sup>8</sup> Attorneys should challenge the admissibility of evidence of alienation; admittance of this evidence is potential grounds for appeal.

### Professional Opinions

Assessments of evaluators and experts can carry important weight in these cases. It is important to work effectively with professionals whose testimony favors protecting the children and to expose errors made by professionals on the other side.

Presenting expert testimony is one avenue for shaping the court's understanding of key issues. For a mother with resources, there are experts who can evaluate her, the abuser, and the children and testify on that basis. For women with few resources, experts may be personnel from abused women's programs who can explain the dynamics the court needs to take into account, drawing from facts that are already in the record or responding to hypotheticals. Expert testimony can help explain the abuser's positive public image, the woman's difficulty in leaving him, and the children's current distress before or after seeing him and can be critical to discrediting parental alienation claims.

Court-appointed mediators and evaluators have been found to fail to address domestic violence more often than not.<sup>9</sup> Vigorous advocacy is needed to press professionals to properly examine the abuser's behavioral history and its implications for child well-being. I recommend that attorneys attend clients' meetings with court-appointed personnel to ensure proper assessment and ethical conduct on the professionals' part. If an evaluator draws upon psychological tests to form negative conclusions about the mother or favorable ones about the abuser, the validity of those findings should be challenged; such tests do not have scientific validity for use in making custody or parenting time determinations or in assessing the truth of abuse allegations.<sup>10</sup>

Stipulating to the appointment of an evaluator can be risky. I have been involved in cases in which evaluators with excellent reputations underestimated the risk posed by a domestic violence perpetrator, and it is difficult to object strongly to an evaluator's conclusions after agreeing to that person's appointment.

### Empowering Your Client

Because men who batter are tenacious, your client may need to advocate for the children's interests for years to come. Thus, a central goal is to help her more forcefully and effectively voice her



concerns and strengthen her position. Some approaches toward that end include:

- **Prepare your client for court.** Some battered women do not present well in court because of the effects of trauma and intimidation. Trauma symptoms such as incoherence, anger, difficulty remembering details, emotionality, or lack of emotion can be misread as signs of dishonesty. An angry presentation can cause the court to doubt that the woman is in fear of the batterer and to see her as vengeful. To overcome these challenges, your client should practice her testimony with you to become comfortable talking about the abuse and responding to challenging or insulting questions the abuser or his attorney may ask. Additionally, disbelief by professionals or court officials can be re-traumatizing for the woman if she is not prepared.
- **Encourage your client to prioritize her well-being.** The stress of litigation can cause a battered woman's health and emotional condition to deteriorate. Support groups, regular exercise, cultivating friendships, maintaining sobriety, and spending quality time with her children are important priorities for her, as is trauma-informed therapy, if possible. Remind her that self-care is part of a good legal strategy and that both she and her children will reap the rewards.
- **Build a supportive relationship with your client.** Battered women report that the tenor of interactions with their attorneys affects the quality of their lives. You can contribute to your client's empowerment through the level of respect and support you show her, the information you share with her, and the ways you help her strengthen her voice. Maximizing your patience and offering any necessary criticisms kindly will increase her confidence in herself and in you, which, in turn, will improve her performance in court.
- **Make it difficult for the batterer to use litigation as a tool of abuse.** Respond forcefully to false claims he makes in court papers or in correspondence. Ask for court costs to make it harder for him to harm your client financially through excessive court appearances. Ask that he pay for supervised visitation, children's therapy, evaluations, and other expenses that result directly or indirectly from his behavior.
- **Develop a long-term strategy.** The effects of battering give perpetrators numerous advantages in custody litigation.<sup>11</sup> Therefore, it's best to lay groundwork to reveal abusiveness over time. Some possibilities include:
  - Ask for mandated batterer intervention counseling and substance abuse treatment, if relevant, so the batterer is required to confront his behavioral problems.
  - Ask that the batterer be barred from direct contact with your client since many abusers pursue child contact as a way to intrude on the mother's life.
  - Have the children participate in specialized services for children exposed to domestic violence to facilitate their recovery.

- Require the batterer to pay debts that he owes your client and other appropriate expenses caused by his behavior so he finds his behaviors unrewarding.

When a batterer is held accountable in these ways, his polished behavior sometimes begins to unravel, allowing court personnel to see the truth of the mother's reports. And when the court stops rewarding the abuser's tactics, he sometimes becomes willing to drop litigation and reach agreements.

- **Make the record for appeal.** Raising objections and listing excluded evidence is essential to preserving your client's chances of reversing an unfavorable decision by appeal.

## Conclusion

As has been extensively documented elsewhere, men who batter women tend to be physically, sexually, and psychologically harmful to children.<sup>12</sup> An attorney who helps to restrict an abuser's unfettered access to children and ensure that appropriate safeguards are put in place for contact has done a tremendous service to that family and to the community. ■

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## FOOTNOTES

1. Campbell, *Prediction of Homicide of and by Battered Women*, in Campbell, ed, *Assessing Dangerousness* (New York: Springer, 2007), pp 85–104.
2. Bancroft, Silverman & Ritchie, *The Batterer As Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks, CA: Sage Publications, 2d ed [2011]).
3. Parker, Rogers, Collins, & Edleson, *Danger zone: Battered mothers and their families in supervised visitation*, 14 *Violence Against Women* 1313–1325 (2008).
4. Morse & Shaver, *Deaths of 3 children test Md. legal system*, *Wash Post* (April 6, 2008), available at <<http://www.washingtonpost.com/wp-dyn/content/article/2008/04/05/AR2008040502575.html?nav=emailpage>>. All websites cited in this article were accessed August 9, 2011.
5. For guides, see Campbell, n 1 *supra* and Bancroft, n 2 *supra*.
6. MCR 3.216(D) (stating grounds for objecting to mediation); see also MCR 3.216(C)(3). For safety measures during mediation, see Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court, *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation: Model Screening Protocol*, pp 20–21 (2006), available at <<http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>>.
7. See studies cited in Bancroft, n 2 *supra*.
8. Meier, *A historical perspective on parental alienation syndrome and parental alienation*, 6 *J Child Custody: Research, Issues, and Practices* 232–257 (2009).
9. Johnson, Saccuzzo & Koen, *Child custody mediation in cases of domestic violence: Empirical evidence of a failure to protect*, 11 *Violence Against Women* 1022–1053 (2005).
10. Emery, Otto & O'Donohue, *A critical assessment of child custody evaluations: Limited science and a flawed system*, 6 *Psychological Science Pub Interest* 1–29 (2005).
11. Bancroft, n 2 *supra*.
12. *Id.*