

POLICY PRIORITY

CUSTODY REFORM TO ENSURE THE SAFETY OF BATTERED PARENTS AND THEIR CHILDREN

ISSUE

One of the PCADV's policy priorities is **improving Pennsylvania's child custody laws and processes** to ensure that the state's laws, judges interpreting those laws, and the various personnel and systems involved in custody proceedings, all **share the priority of protecting the safety and well-being of children and their caregivers**. For battered parents and their children involved in the custody process, safety is the paramount concern.

- **Up to 50% of contested custody cases involve physical violence between the parents.**²⁵

RECOMMENDATIONS

- **Amend the Custody Statute to Prevent Continued Abuse**
 - ◆ Support a Rebuttable Presumption Against Custody/Visitation to Abusers
 - ◆ Support Exception to “Friendly Parent” Preference in Domestic Violence Cases
- **Oppose Presumptive Joint Custody**

BACKGROUND

Battered Parents and Their Children Need Special Considerations and Protections

Battered parents often withstand brutal abuse while also going to extraordinary lengths to shield their children from it and minimize its impact on the children. In fact, it is battered parents' well-founded **fear of losing their children** – and the fear that batterers will kill them, the children, or both, as batterers often pledge to do – that **too often prevents victims from leaving violent, abusive relationships**.

Custody proceedings typically arise during the period of time just after leaving an abusive relationship, which is the **most dangerous time for victims and their children**, with substantially elevated risks of retaliatory violence and even homicide.

- Research shows that *separated* battered women report being **assaulted 14 times as often** as women still living with their abusive partners.²⁶
- About **25% percent of domestic homicides are witnessed by the victim's children**,²⁷ and in about **one in eight domestic homicides, the batterer also kills one or more of the children**.²⁸

25 State Justice Institute, *Domestic Violence and Custody Disputes* 4-8 (1997); J. Pearson, “Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs,” 14 *Mediation Quarterly* 319, 320 (1997).

26 T. Harms, A. Richardson Ray, & P. Rolandelli (Eds.), *Preserving Childhood for Children in Shelters* (1998).

27 S. Doyne, J. Bowermaster, & R. Meloy, *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50(2) *Juvenile & Family Court Journal* (1999); P. Jaffe, D. Wolfe, & S. Kaye Wilson, *Children of Battered Women* (1990).

28 L. Bancroft and J.G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).

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In custody proceedings involving domestic violence, stringent safety precautions must be made to protect both the battered parent and the children. Not only are children harmed by witnessing abuse of a parent, but there is a **very high likelihood that the abuser of the parent is also abusing the children.**

- Studies indicate that in families where either child abuse or woman battering is identified, it is likely that both forms of abuse exist in between 30 to 60% of those families.²⁹ In other words, **30% to 60% of perpetrators of intimate partner violence also abuse children** in the household.
- The **risk of child abuse co-occurring with intimate partner abuse may increase post-separation** as a result of retaliatory behavior by the abuser and the victim's inability to monitor the abuser's parenting or serve as a buffer.
- Many abusive fathers manipulate the children **in order to continue control over their mother**, especially after separation, due to the loss of other methods of exerting control.³⁰
 - ◆ Research has shown that **during visitation**, 5% of abusive fathers made **threats to kill the mother**, **34% threaten to kidnap their children**, and **25% threaten to hurt their children.**³¹

Despite the known dangers batterers pose to both their adult partners and their children, PA custody law fails to provide adequate protections. In general, **Pennsylvania trial courts presume that ongoing custodial relationships with both parents is in the best interests of children – even when one of those parents has a proven history of being violent and abusive.** That faulty assumption must give way to the reality that ongoing contact with a batterer harms children.

It is a sad truth that **battered parents too often lose custody of their children to the abusive parent, or are forced to endure ongoing abuse through court-ordered shared custody or visitation orders.**

- Abusive parents are twice as likely to seek sole custody of their children than non-abusive parents are – **and they are successful about 70% of the time.**³²
- Batterers' **use of the custody litigation process as a means of further abuse** is a cruel yet effective means of following through on their threats to take the children away should the victim ever leave: for example, one study indicated that women reduced their requests for resources during negotiations when they were afraid they might lose custody.³³

29 J. Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (1997, revised April 1999), available at <http://www.vawnet.org>.

30 J. Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 *Clearinghouse Review* 1, 113 (1996); Amer. Bar Ass'n Commission on Domestic Violence, *10 Myths about Custody and Domestic Violence and How to Counter Them*, available at http://www.abanet.org/domviol/custody_myths.pdf (retrieved August 7, 2007) (citing L. Bancroft & J.G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002); I. Langford & Kabat *Homicides Related to Intimate Partner Violence in Massachusetts 1991-1995*, Peace At Home (1999)).

31 J. Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 *Clearinghouse Review* 1, 113 (1996).

32 Amer. Bar Ass'n Commission on Domestic Violence, *10 Myths about Custody and Domestic Violence and How to Counter Them*, available at http://www.abanet.org/domviol/custody_myths.pdf (retrieved August 7, 2007) (citing Amer. Psychological Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996), available at <http://www.apa.org/pi/viol&fam.html>, and Amer. Judges Foundation, *Domestic Violence and the Court House: Understanding the Problem...Knowing the Victim*, available at <http://aja.ncsc.dni.us/domviol/page5.html>).

33 L. Brown, *Stop Domestic Violence: An Action Plan for Saving Lives*, at 106-107 (1997), cited in Amer. Bar Ass'n Center on Children and the Law, *A Judge's Guide: Making Child Centered Decisions in Custody Cases* (2001).

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Pennsylvania's **Child Custody Statute** mandates that courts consider domestic violence in their custody determinations, but **does not prevent abusers from gaining sole custody of their children** even where there is a demonstrated history of domestic violence.

- Specifically, the Child Custody Statute requires courts to make their custody decisions based on the **best interests of the child**.³⁴
- A “best interests” determination is defined by Pennsylvania law as a case-by-case decision based upon consideration of all factors which legitimately impact the child's physical, intellectual, moral, and spiritual well-being.³⁵
- In this context, the Child Custody Statute requires a court to consider three main issues:
 - ◆ the preference of the child;
 - ◆ which parent is more likely to allow frequent and continuing contact and access to the child, a provision typically known as the “**friendly parent**” provision; and
 - ◆ “each parent and adult household member's **present and past violent or abusive conduct**.”³⁶

Rebuttable Presumption Against Custody/Visitation to Abusers

First, our Child Custody Statute must be amended to include a rebuttable presumption directing that where domestic violence is established, it is against the best interests of the child for the violent parent to be awarded custody or visitation until the safety of the child and battered parent is assured.

- Once sufficient evidence is produced establishing that one parent has a proven history of violent and abusive behavior, then the court must presume it is against the best interests of the child for the abuser to be awarded custody until his or her safety with the child is assured.
- The burden then shifts to the abusive parent to show evidence that he or she does not pose a continued safety risk. Evidence may include successful completion of a batterers' intervention program, a period of time with no abusive incidents, use of a supervised visitation or custody exchange center, and/or other proof.

Rebuttable presumptions against custody to abusers are the recommended best practice by national experts on custody law, and are being enacted by a growing number of states.

- **More than two dozen states have already enacted a presumption against custody to batterers.**
- The **National Council of Juvenile and Family Court Judges** (NCJFCJ), the preeminent expert organization on child custody cases, created a national task force composed of judges, prosecutors, defense attorneys, legislators, and domestic violence experts, who worked for three years on a **Model Code on Domestic and Family Violence**. Section 401 of this Model Code states the following:
 - ◆ “In every proceeding where there is at issue a dispute as to the custody of a child and a determination by the court that domestic or family violence has occurred raises a **rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.**” (NCJFCJ, 1994).

³⁴ *McMillen v. McMillen*, 529 Pa. 198, 602 A.2d 845 (1992).

³⁵ *Wiskoski v. Wiskoski*, 629 A.2d 996 (Pa. Super. 1993).

³⁶ 23 Pa. C.S. §§ 5301-5314.

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- The **American Bar Association** likewise recommends against presumptive joint custody. The **ABA Model Joint Custody Statute** states that shared custody is “**inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.**” Further, the ABA’s report “The Impact of Domestic Violence on Children,” states “[a]nyone who has committed severe or repetitive abuse to an intimate partner is presumptively not a fit sole or joint custodian for children.”³⁷

Research on the efficacy of rebuttable presumptions against custody to violent abusers shows that they are indeed **successful in preventing custody awards to abusive parents.**

- A broad study published in 2005 found that, contrary to the trend of abusers seeking and receiving sole custody about 70% of the time, **in most jurisdictions where a rebuttable presumption is in place, battered parents more often received custody and violent parents were more often given scheduled or restricted visitation with their children.**
- Unfortunately, this was *not* true in jurisdictions where a “friendly parent” provision existed to create a contradictory legal environment.

Exception to “Friendly Parent” Preference in Cases Involving Domestic Violence

The second critical reform needed in Pennsylvania to protect children from continued exposure to batterers is an exemption from the “friendly parent” provision in cases of demonstrated domestic violence.

- The **purpose of the “friendly parent” provision** is to award custody to the parent who is more willing to **foster a relationship between the child and the non-custodial parent.**
- **However, where that other parent is violent and abusive, the abused parent will justifiably want to minimize any contact whatsoever with the perpetrator** – particularly where the children have also been abused.
- As a consequence, if the abused parent insists on provisions for the child’s protection, the victim risks losing custody in family court due to the “friendly parent” preference.
- The “friendly parent” provision thus creates an inherent **clash between the statutory preference for the parent who encourages contact, and the well-founded policy interest in ensuring the safety of domestic violence victims and their children.**³⁸

Having a law in effect that penalizes victimized parents for trying to protect their children from a known risk of violence runs counter to our efforts to protect children from the known harm caused by domestic violence. **The “friendly parent” provision in Pennsylvania’s custody statute should be amended to clearly state that it does not apply in cases of demonstrated domestic violence.**

³⁷ Amer. Bar Ass’n, Model Joint Custody Statute, 15 *Family Law Reporter* (BNA) 1494, 1494 (1989); H. Davidson, “The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association” 13 (1994).

³⁸ Amer. Psychological Ass’n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 100 (1996).

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Presumptive Joint Custody

Another important policy priority of the PCADV is continued opposition to presumptive joint custody. **Current Pennsylvania custody law requires that the “best interests of the child” be the guiding legal standard in custody decisions.** Under this standard, judges must consider the unique facts and circumstances of each family and decide what custody and visitation arrangement will promote the children's best interests.³⁹

Some individuals want to change Pennsylvania custody law to a “one size fits all” approach, where joint 50-50 custody would be presumed best in all cases. However, this “one size fits all” approach ignores critical factors that bear on the safety and well-being of children, including whether a parent is abusive to the children and/or the co-parent.

Presuming that custody should be split 50-50 prioritizes parents' desires over what is best for children.

- Joint custody may work well where parents can cooperate, put their children's interests ahead of their own, and live near each other. Many divorcing families simply do not meet these criteria.
- Most parents do not choose joint custody for themselves.
 - ◆ One study found that **only 20% of divorcing couples chose joint custody, and more than half of these couples did not maintain joint custody over time.**⁴⁰
 - ◆ The remaining 80% of divorcing couples agreed on custody at the beginning of their separation; more than 70% of those agreements were for maternal custody.

Presumptive joint custody fails to acknowledge the overwhelming number of domestic violence cases in Pennsylvania's child custody system.

- Studies show that **25 – 50% of contested custody cases involve domestic violence.**⁴¹
- Abusive parents are twice as likely to seek sole custody of children than are non-violent parents,⁴² and they are successful about 70% of the time⁴³ – even though parents who abuse a co-parent are far more likely to also abuse the children.⁴⁴
- Joint custody is simply not appropriate in cases where one parent is abusive.⁴⁵ Joint custody is dangerous to abused parents and their children because it forces continued contact and interaction even where the abusive parent poses a known risk of continued abuse.

39 23 Pa. C.S. §§ 5301-5314; *McMillen v. McMillen*, 529 Pa. 198, 602 A.2d 845 (1992). A “best interests” determination is defined as a case-by-case decision based upon consideration of all factors that legitimately impact the child's physical, intellectual, moral, and spiritual well-being.

Wiskoski v. Wiskoski, 629 A.2d 996 (Pa. Super. 1993). Courts are required to consider: 1) the preference of the child; 2) which parent is more likely to allow frequent and continuing contact and access to the child, a provision known as the “friendly parent” provision; 3) each parent and adult household member's present and past violent or abusive conduct; and 4) any other factor which legitimately impacts the child's physical, intellectual, and emotional well-being.

40 E.E. Maccoby & R.H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, 103, 300 (1992).

41 State Justice Institute, *Domestic Violence and Custody Disputes* 4-8 (1997); J. Pearson, “Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs,” 14 *Mediation Quarterly* 319, 320 (1997); S.L. Keilitz, National Center for State Courts, *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers* (1997); J.R. Johnston, “High-Conflict Divorce,” 4 *Future of Children* 165 (1994).

42 Amer. Psychological Ass'n, *Violence and the Family: Report of the American Psychological Ass'n Presidential Task Force on Violence and the Family*, (1996), available at <http://www.apa.org/pi/viol&fam.html>; P.G. Jaffee & G. Austin, “The Impact of Witnessing Violence on Children in Custody and Visitation Disputes,” *Fourth Int'l Family Violence Research Conference* (1995).

43 Amer. Judges Foundation, *Domestic Violence & the Courtroom: Understanding the Problem...Knowing the Victim*, available at <http://aja.ncsc.dni.us/domviol/page5.html>

44 J. Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (Apr. 1999); Appel & Holden, “The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal,” 12(4) *Journal of Family Psychology* 578-99 (1998); S.M. Ross, “Risk of Physical Abuse to Children of Spouse Abusing Parents,” 20(7) *Child Abuse & Neglect* 589-98 (1996).

45 R. Bauserman, “Child Adjustment in Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review,” 16(1) *Journal of Family Psychology* 91-102 (2002).

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A presumption of joint custody would increase the adversarial nature and expense of litigation.

- Overcoming the presumption would require one parent to prove that joint custody is not good for the children, leading to accusations of parental unfitness and character attacks.
- Families are more likely to relitigate custody issues where courts mandated joint custody.⁴⁶

Presumptive joint custody ignores pre-separation family circumstances and destabilizes children's lives.

- Where there is ongoing conflict between parents, joint custody has been linked to higher levels of emotional, behavioral, and social problems for the children.
- Presumptive joint custody gives **no consideration to a parent's prior involvement with the child**. Rather, it requires courts to grant joint physical and legal custody to parents who were only meagerly involved with their children or unable to parent appropriately before the separation.
- Presumptive joint custody does not allow judges to take the family circumstances into account and craft a custody decision based on parenting skills and the changing needs of a growing child.

Presumptive joint custody ignores recommended best practices of national child custody experts.

- As set forth above, both the National Council of Juvenile and Family Court Judges (NCJFCJ), and the American Bar Association recommend that custody not be granted to perpetrators of family violence; that batterers be presumed unfit custodians for children; and custody awards to batterers are contrary to the best interests of children.

PCADV strongly urges that custody be adjudicated according the best interests of children, and that the legislature continue to reject proposals that would override the existing “best interests of the child” standard with a presumption of joint custody.

⁴⁶ M.T. Flannery, “Is 'Bird Nesting' in the Best Interest of Children?,” 57 *SMU L. Rev.* 295, 343 (2004).