

Protective Mothers, Endangered Children: Quantifying System Failure

Based on data collected by Geraldine Stahly, Ph.D. on 399 protective mothers from 39 states.

Abstract. The purpose of this study is to identify and quantify factors involved in system failure that result in children being placed at risk of reinjury or possible death when family violence or sexual abuse is reported. Data is presented from original research regarding outcomes for children of divorce and separation when various forms of family violence are reported to child welfare services, law enforcement and family court. A group of 399 non-violent parents ("Protective Parents") from families experiencing some type of incest, domestic violence or child physical abuse provided answers on a 101-item questionnaire that was placed in hard copy format at workshops and conferences across the United States. The participants were self-selected. 163 Protective Parents were from California and 236 Protective Parents were from 38 other U.S. states. 100% of the sample used in this study were female respondents from the United States. Responses to the items on the questionnaire from California parents were compared with responses from parents from other states, to determine whether California had a higher rate of system failure than other states. Analysis of the data showed that few of the interventions by child welfare services, law enforcement and family courts were effective in keeping children of divorce and separation safe from abuse. Findings included that mediator and evaluator interventions in California cases were more likely to lead to dangerous placements than they were in non-California cases. The principal conclusion is that California children are placed in dangerous custodial situations with abusive parents more often than are children in other states. The significance of the various findings is discussed, along with recommendations for areas needing further study. The primary limitations of this study are the use of a sample of convenience and the lack of a control group.

INTRODUCTION

Leading authorities on child abuse estimate that 58,000 U.S. children per year are court-ordered into the custody of parents who have been identified as abusive to the children placed in their custody.ⁱⁱ Experts in family violence and child abuse refer to such custodial placements as "System Failure Cases." The systems of child protection: social services, law enforcement and courts, are considered to have failed when a credible disclosure by a child about abuse at the hands of his or her parent or evidence of such abuse leads to that child being placed in the custody of the identified abuser. These are cases in which a safe, non-violent Protective Parent is denied custody in favor of the abuser. Various theories have been suggested as to why such failures occur: gender bias, cognitive dissonance avoidance, unwillingness to believe children's disclosures of incest and violence, a purposely created and carefully maintained culture of denial in family courts, motivated by an interest in financial gain.

A large majority of mothers of abused children in this study who went to family court to seek protection for their children came out with limited access to or no custody at all of those children. Nationwide, family courts serve a *parens patriae* role and are expected to protect children. Specifically, the California Legislature places a duty on the family courts to prioritize as its primary concern the health, safety, and welfare of children (Family Code Section 3020) when making custody placement decisions. This study investigates aspects of these cases in which, rather than protect the children, the family court gave custody of the children to the identified abusers. The focus of this particular analysis is to compares California with non-California cases.

Most custody and visitation matters are settled by parents without outside assistance. Cases in this study represent situations in which custody and visitation cannot be resolved amicably. Research shows that about 20% of divorcing or separating families turn to the court to resolve differences, and most of those cases settle during the court process. Ultimately, about 4-5% go to a full trial.ⁱ These are considered "high conflict cases," and often involve various forms of domestic violence. In many such cases, the system failed to protect the children from violence and sexual abuse.

METHODS

A questionnaire with 101 items was developed and distributed at national and international conferences dealing with domestic violence and child abuse, and through the internet from 2002 through 2011. 399 completed questionnaires were collected from Protective Parents living in 39 states and entered into SPSS (Statistic Package for the Social Sciences) software. 163 (40.86%) of the surveys came from California. 236 (59.14%) of the surveys came from 38 other states. 100% of the sample in this study were female, mothers of a total of 673 children. 378 attorneys had been involved in the reported cases. This analysis compares responses from California mothers to responses from mothers in other states.

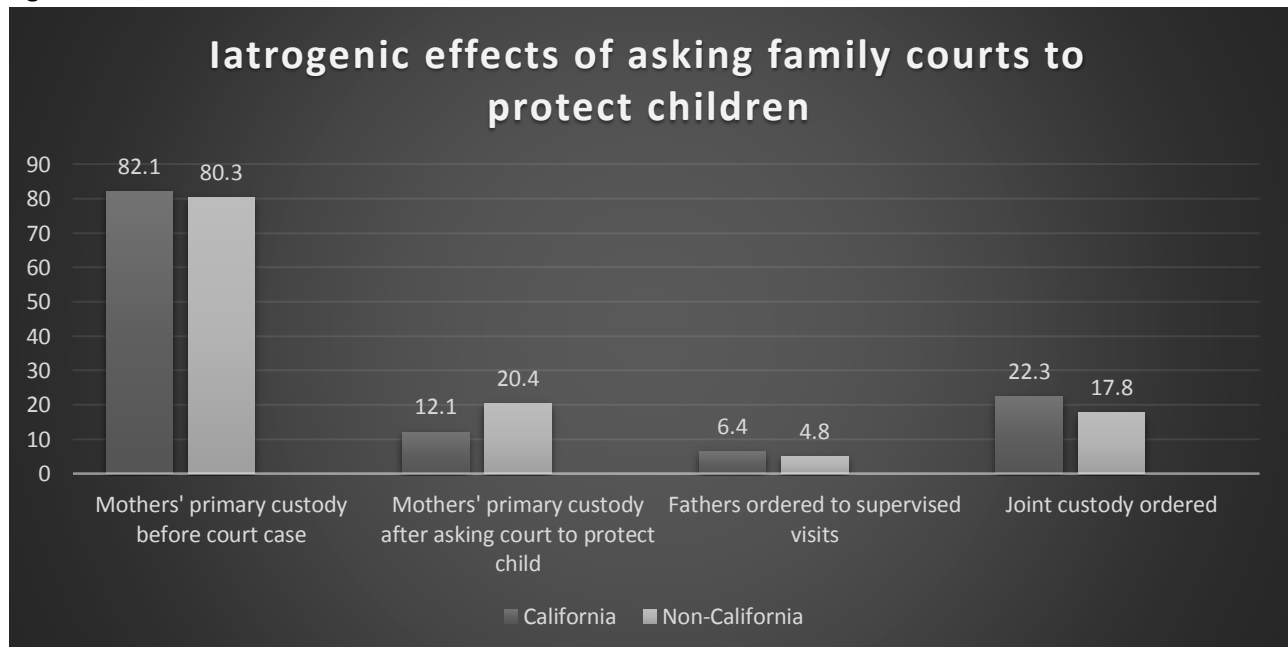
RESULTS

Iatrogenic effects of asking family courts to protect children. Despite having approached the family court to protect children from abuse by the children's fathers, most California and non-California mothers reported that they lost custody to the identified abusers.

- 82.1% of California mothers had primary custody when they asked the court to protect their children; only 12.1% had primary custody at the time they completed the survey. This represented a total drop of 85.3 percent.^{xii}
- 80.3% of non-California mothers had primary custody at the beginning of the case; 20.4% had primary custody at the time they completed the survey. This represented a total drop of 74.6 percent.^{xiii}

Only 6.4% of California fathers accused of abuse were placed on supervised visits. 4.8% of non-California fathers were placed on supervised visits. When joint custody was ordered (22.3% of California and 17.8% of non-California cases), children were required by courts to spend increased unsupervised time with the fathers they had accused of violence and sexual abuse.

Figure 1



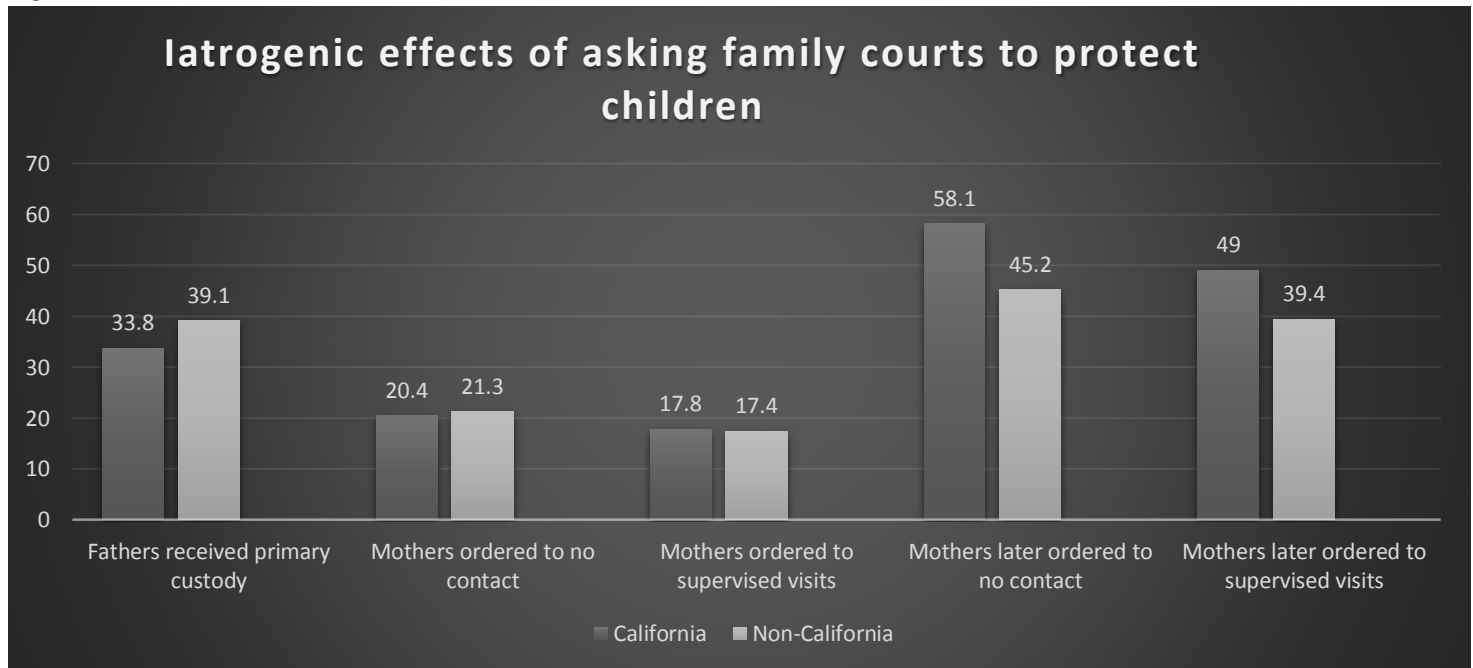
A small minority of cases had outcomes in which the children were protected from the abuse they had reported, but most judges did not make child safety a priority. In about a third of the cases (33.8% of California cases and 39.1% of non-California cases), family court gave primary custody to the fathers after the mothers asked the court to protect the children from abuse by the fathers.

At the time primary custody was changed to the fathers, over 20% of mothers in both groups were ordered to have no contact at all with the children whom they were trying to protect, damaging the childrens’ critical attachment bond with their primary parent. Over 17% of the mothers in both groups were placed on supervised visits despite no history of being abusive or inappropriate with their children.

At some point in the case, the courts restricted more California mothers (58.1%) than non-California mothers (45.2%) from any and all contact with the children and placed more California mothers (49%) than non-California mothers (39.4%) on supervised visits. (Custodial placements add up to more than 100% due to overlaps in restrictions on mothers’ custodial time.)

Supervised visits were ordered less frequently for the fathers than for the mothers in both groups, even though fathers had been identified as abusers and the mothers were trying to protect the children.

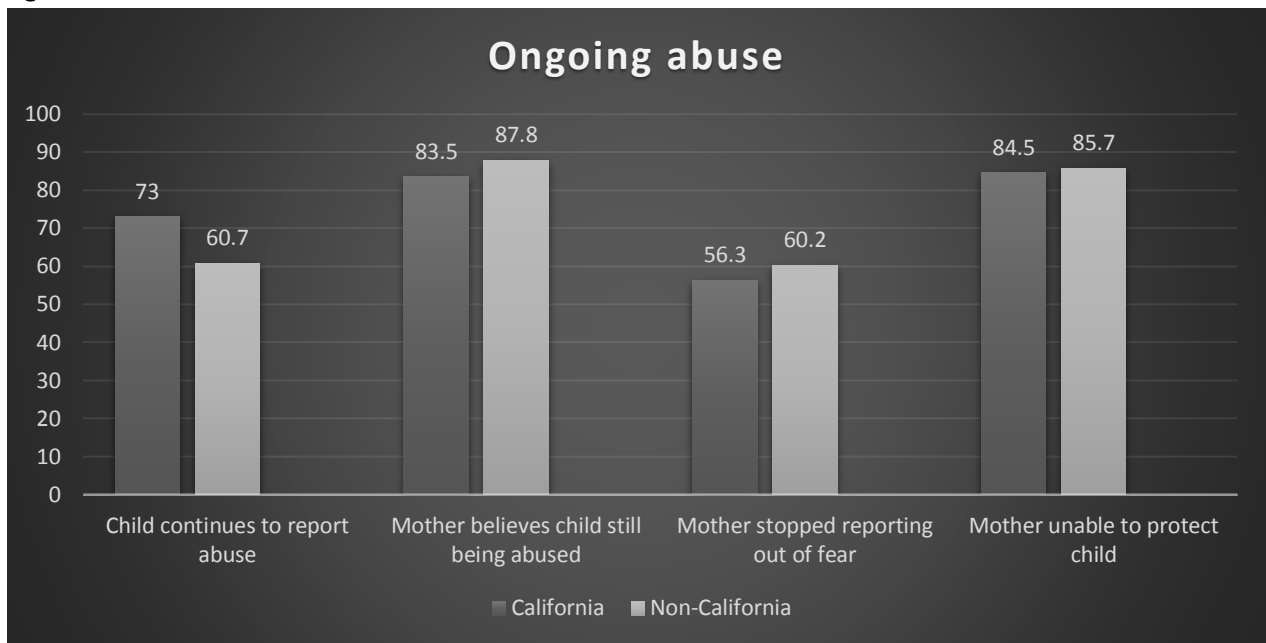
Figure 2



Ongoing abuse. Children did not appear to benefit from the courts’ new custodial placements with their fathers. 73% of California children and 60.7% of non-California children continued to report abuse, even after being placed with their fathers, whom they had previously identified as having abused them.

Most mothers (83.5% of California mothers and 87.8% of non-California mothers) believed the children were still being abused after custody was changed, but over half of the mothers (56.3% of California mothers and 60.2% of non-California mothers) had stopped reporting abuse because they feared their contact with the children would be terminated entirely if they continued to complain. Most mothers in both groups reported that they were unable to protect the children from further abuse.

Figure 3

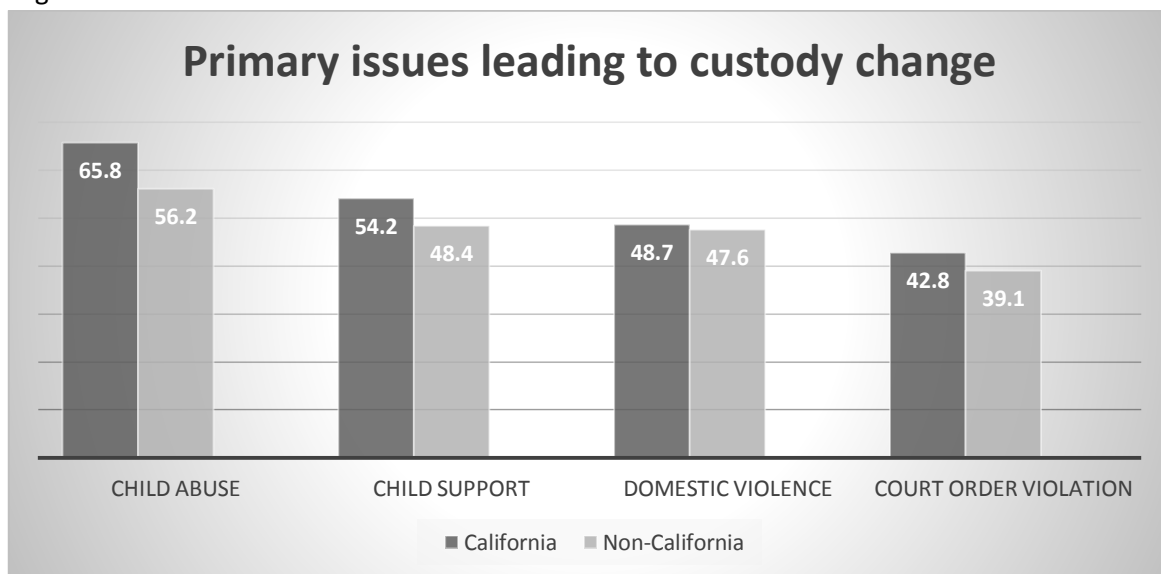


Primary issues leading to custody change. Several specific issues were identified by mothers as precipitating the loss of their children. California mothers lost custody of their children more often than non-California mothers after bringing child abuse to the attention of the family court (65.8% versus 56.2%).

Similarly, California mothers reported losing custody after seeking child support from abusive fathers (54.2%) whereas non-California mothers lost custody 48.4% of the time in the same circumstances.

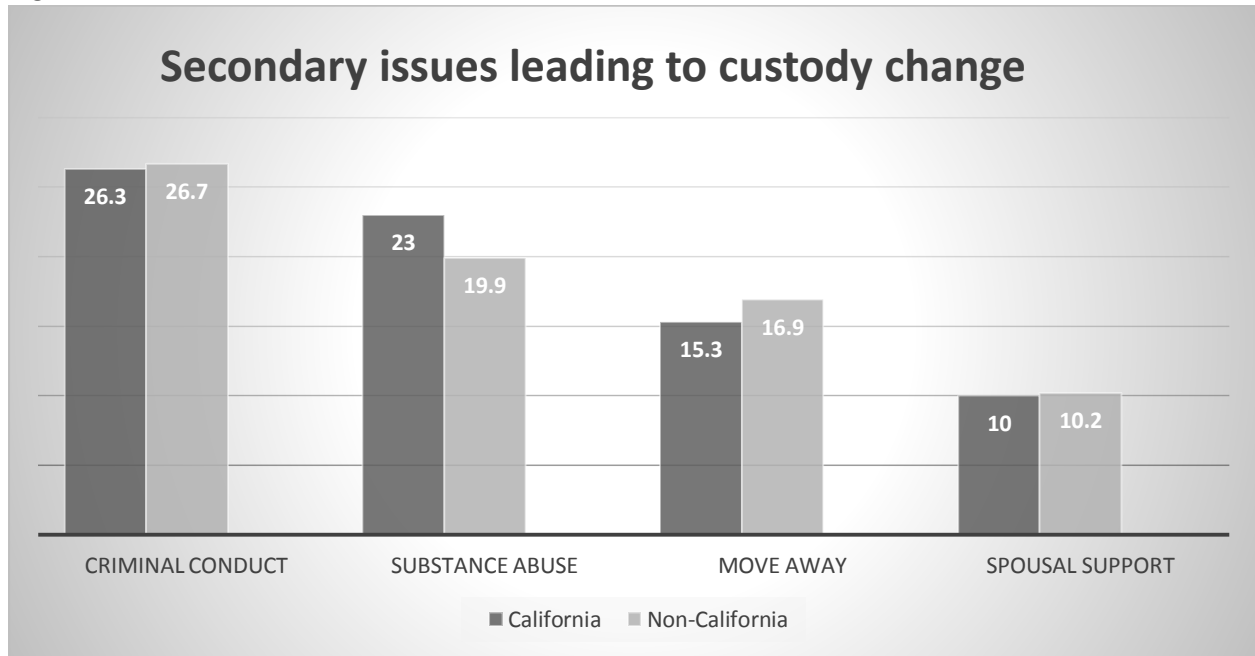
Nearly half of mothers in both groups lost custody when they brought up domestic violence, and about 40% lost custody when they brought up a violation of a court order by the abusing parent.

Figure 4



Secondary issues leading to custody change. There were essentially no differences between California and the other states in the rate of loss of custody as a result of mothers bringing criminal conduct, substance abuse, move away requests, or requests for spousal support to the attention of the family court.

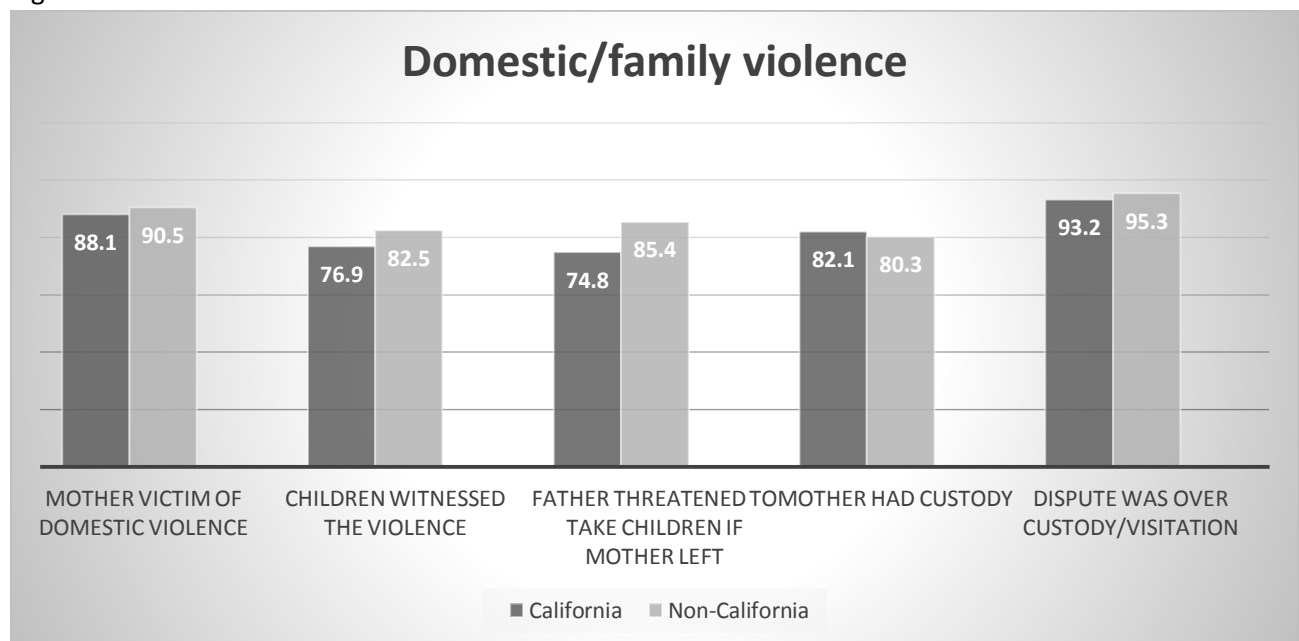
Figure 5



Domestic/family violence. At the time of separation, over 80% of mothers in both groups had primary custody, meaning that the children lived primarily with them and visited their fathers. Over 90% of disputes were about custody and visitation. At the time the family court dispute began in the reported cases, nearly 90% of all mothers reported that the fathers had perpetrated domestic violence against them and over three-quarters of their children had witnessed the violence.

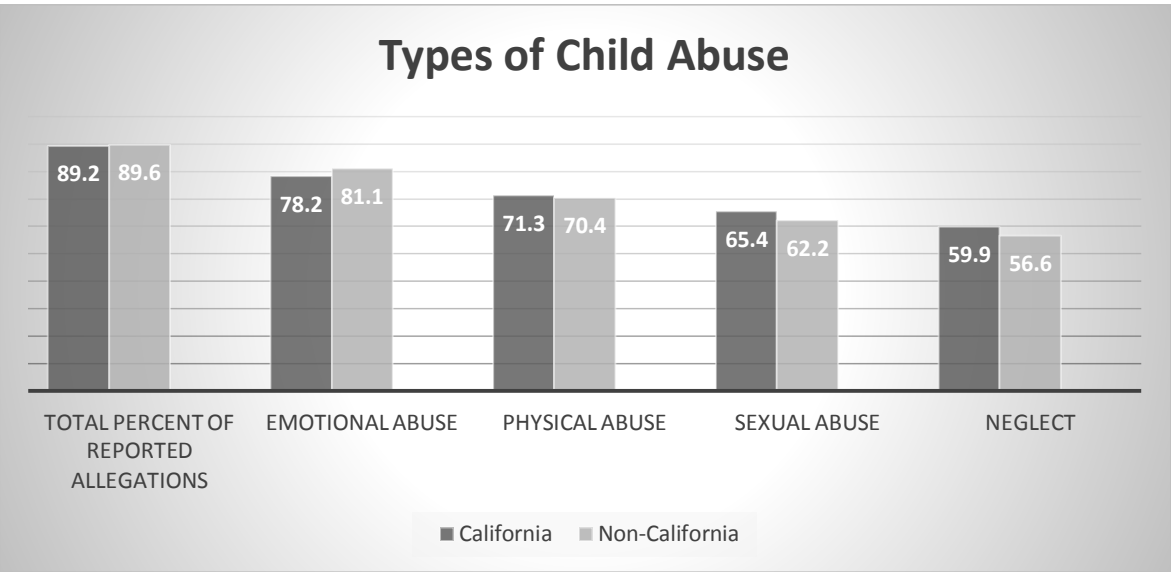
More non-California mothers reported that the fathers had threatened to take the children if they left the relationship (85.4% of non-California versus 74.8% of California mothers).

Figure 6



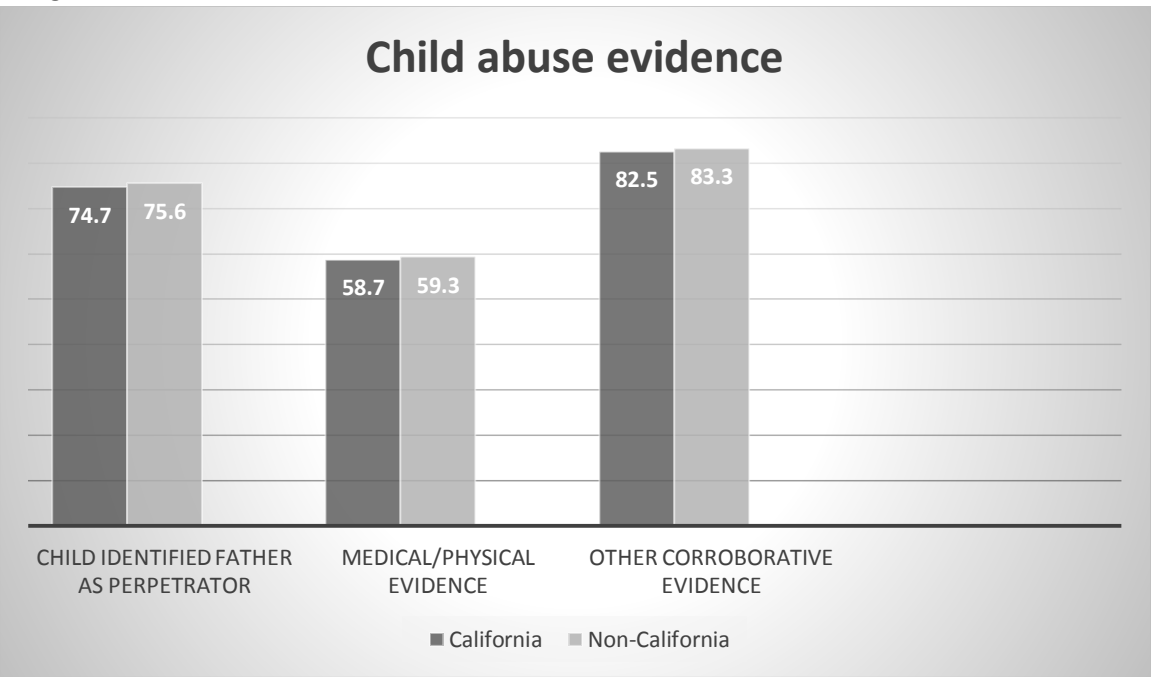
Types of child abuse reported by mothers. Nearly 90% of mothers in both groups reported that the fathers had perpetrated child abuse and neglect on their children. This included emotional abuse, physical abuse, sexual abuse and neglect. There was close similarity in the California and non-California cases in the rates of child abuse and neglect reported.

Figure 7



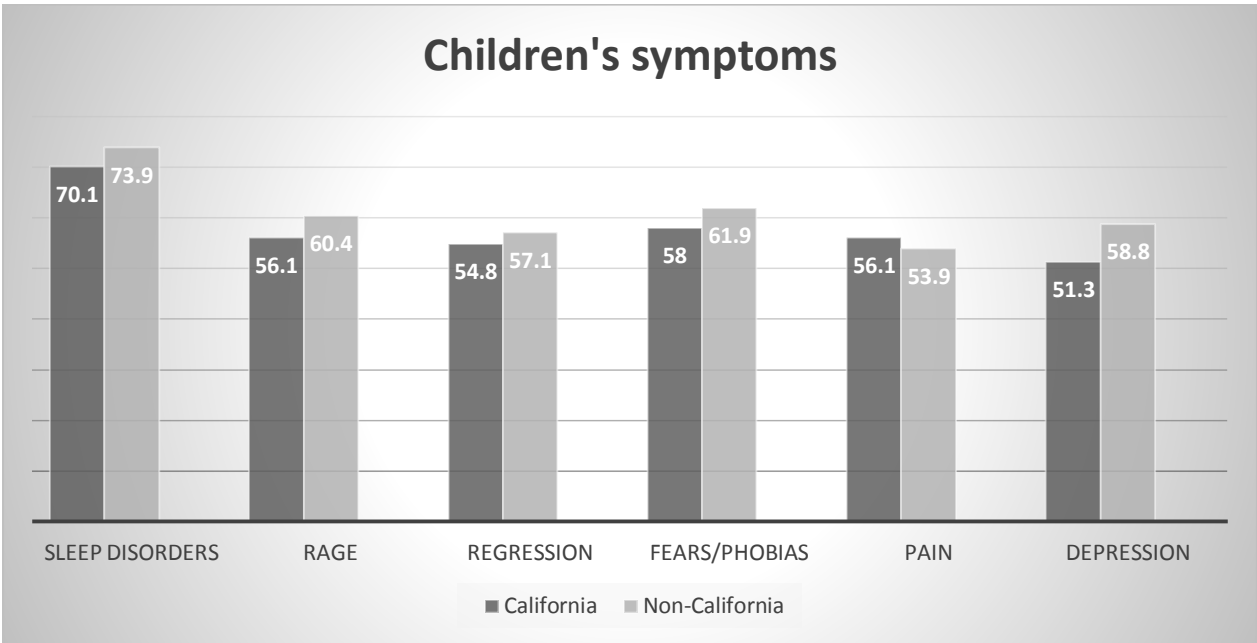
Child abuse evidence. The mothers reported that three-quarters of the children had positively identified their fathers as perpetrators of child abuse. Nearly 60% of mothers reported having medical or physical evidence of the reported child abuse, and over 80% reported other corroborative evidence of abuse. Both groups of mothers reported nearly identical information about evidence of the abuse.

Figure 8



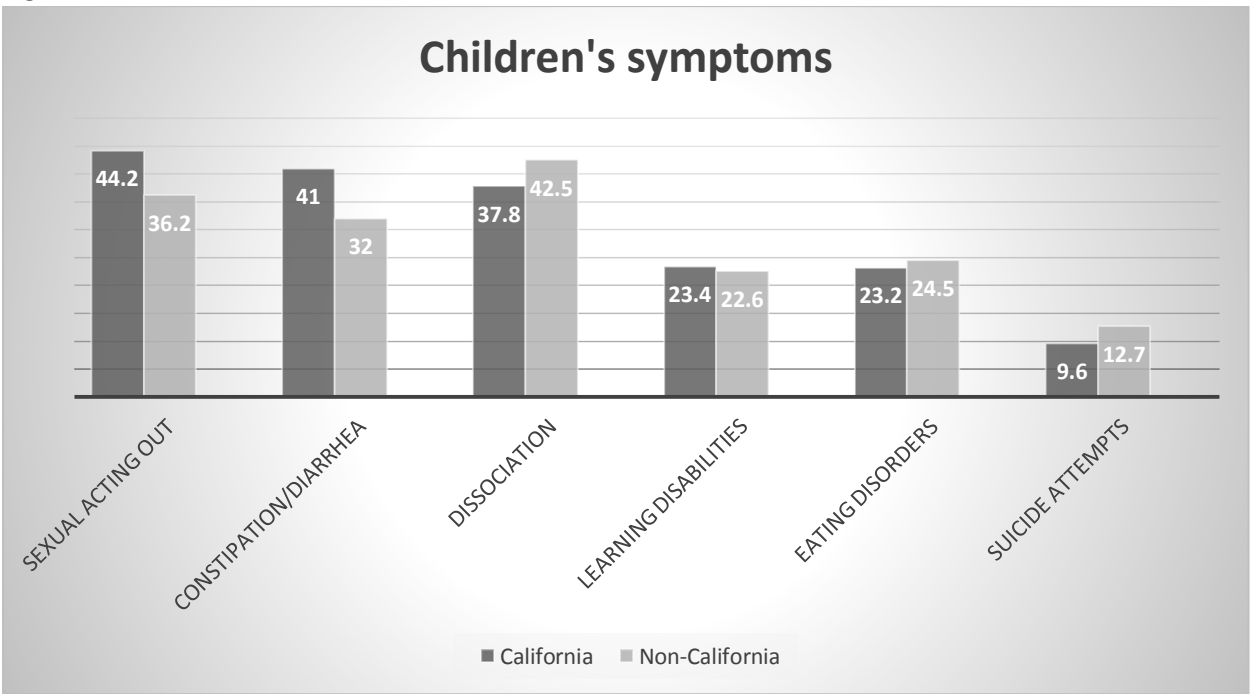
Children’s symptoms. Mothers in both groups similarly reported that their children who were reporting child abuse exhibited a variety of symptoms of distress and trauma. Over 70% of children in both California and non-California groups were reported to have sleep disorders, and more than half of the children were reported to have symptoms of rage, regression, fears/phobias, pain and depression.

Figure 9



About a third or more of the children in both groups were reported to have sexual acting out, constipation/diarrhea and dissociation. Nearly a quarter had learning disabilities and eating disorders. Suicide attempts were not as common.

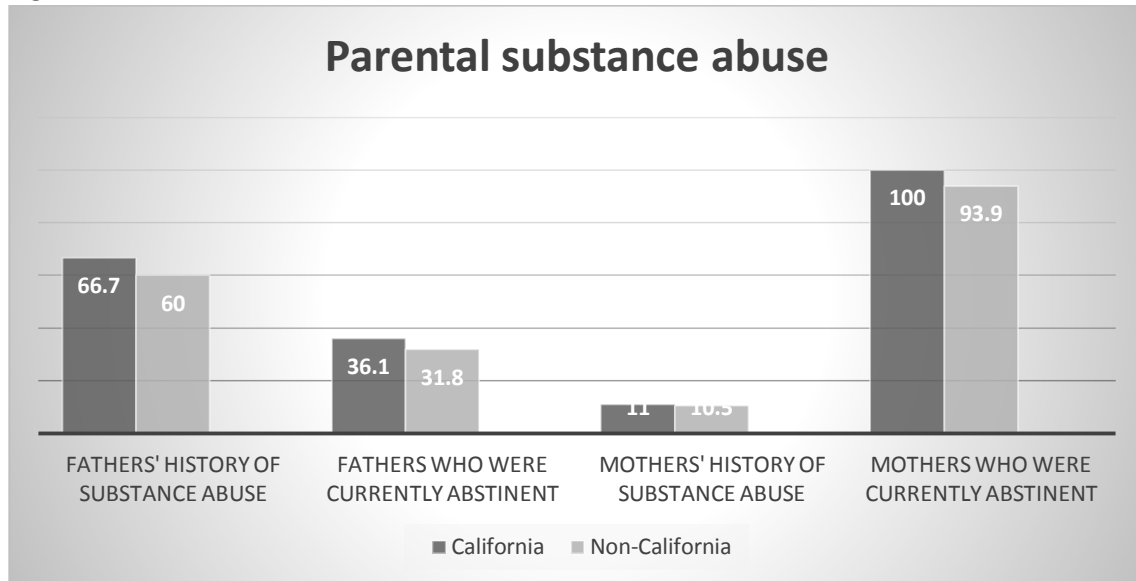
Figure 10



Parental substance abuse. Parental substance abuse was an issue for both groups. More California mothers than non-California mothers reported that the fathers had substance abuse problems. About half of the fathers who were reported to have substance abuse problems in both groups were described as currently abstinent.

A small number of mothers in both groups reported they had had their own substance abuse problems. Of those with substance abuse problems, 100% of California mothers and 93.9% of non-California mothers reported current abstinence.

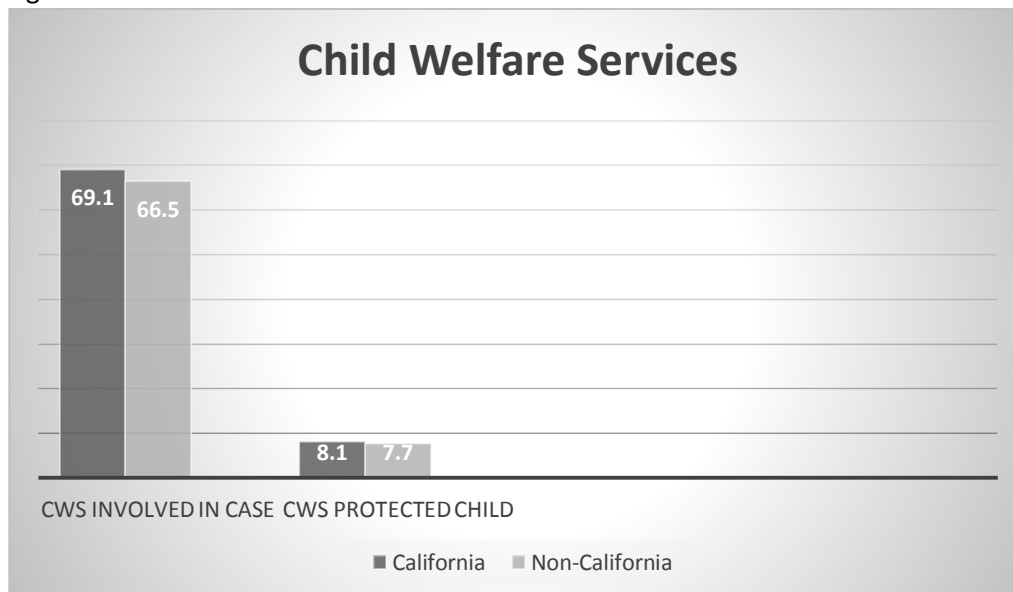
Figure 11



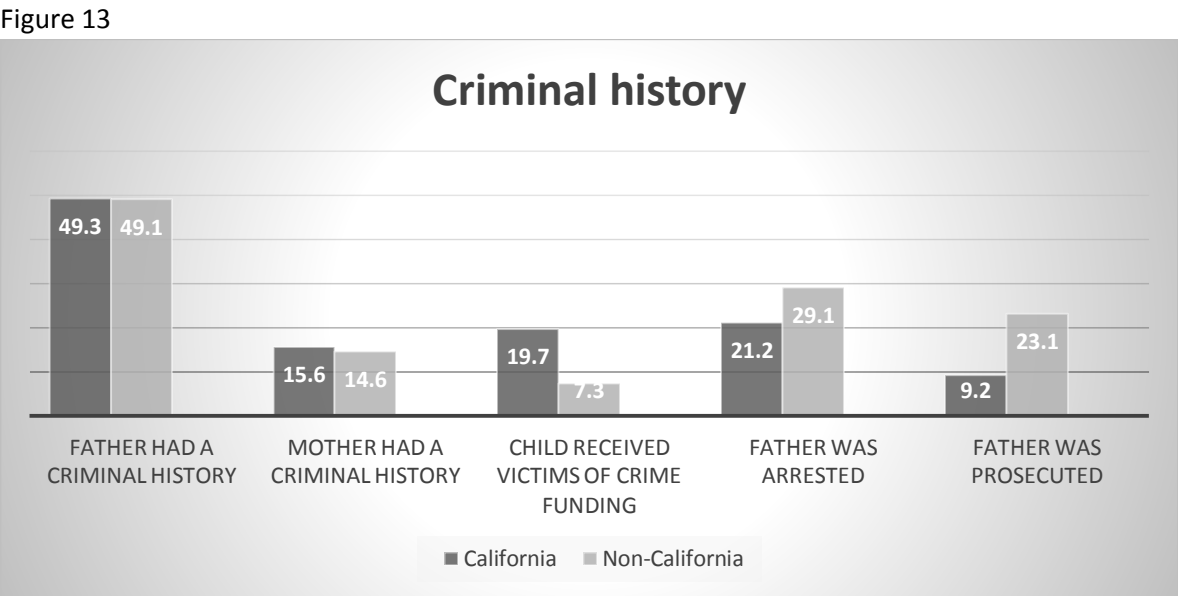
SYSTEM FAILURE

Child welfare services. Children did not appear to have benefited from child welfare services' involvement in either group. Mothers reported that child welfare services were involved in about two-thirds of both California (69.1%) and non-California (66.5%) cases, yet child welfare services only protected 8.1% of the children from California cases and 7.7% of the children from non-California cases.

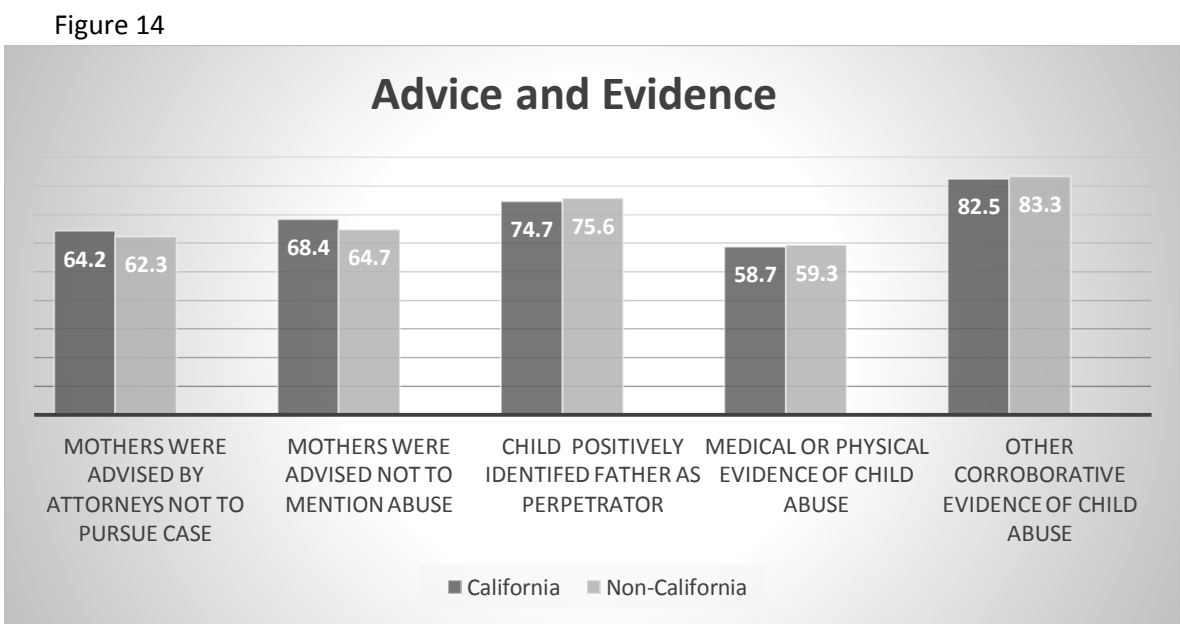
Figure 12



Law enforcement. Children did not appear to benefit from law enforcement involvement. The majority of California fathers were neither arrested nor prosecuted for the reported violent crimes. Both California and non-California mothers reported the fathers had an almost identical percent of prior criminal history (49%). About 15% of both groups of mothers also reported having had their own criminal history. California children (19.7%) received Victims of Crime funding from the Victims Compensation Board more often than non-California children (7.3%). In a minority of cases, fathers had been arrested for spousal or child abuse (29.1% of non-California father and 21.2% California fathers). However, prosecution of California cases (9.2%) was lower than prosecution of non-California cases (23.1%)



Advice from professionals. Over half of mothers’ attorneys in both the California and non-California groups had advised them that pursuing any type of court action against the fathers could negatively affect their child custody. Over 60% of mothers in both groups were advised not to disclose child abuse or domestic violence to the family court. This advice was given even when children had positively identified their fathers as perpetrators, and when there was evidence of the abuse.



Mediators. Children did not appear to benefit from court mediation services. There were differences in California cases and non-California cases with regard to court mediation. In California, mediation is required by statute^{iv} when custody is in dispute, even in cases involving alleged or adjudicated family violence.

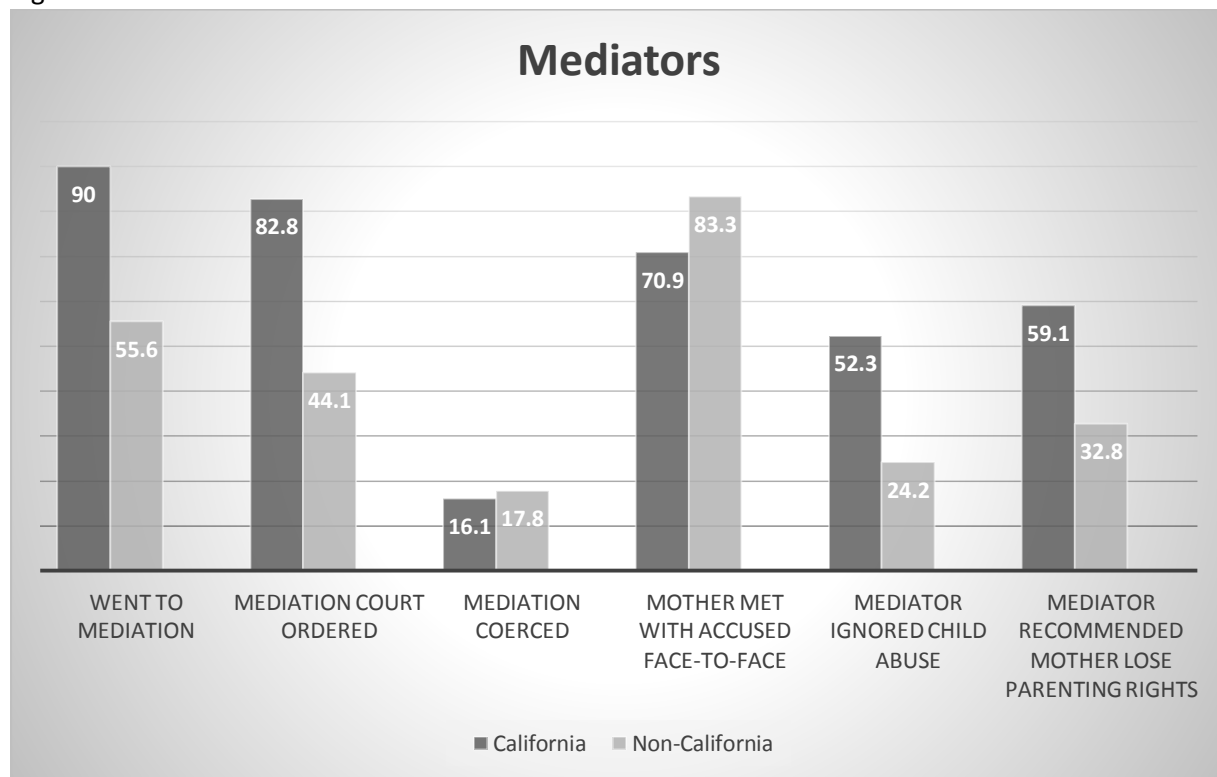
California courts required mediation in nearly twice as many cases (82.8%) as were required in non-California courts (44.1%). 90% of California families in this study participated in court-connected mediation. 55.6% of non-California families participated in court-connected mediation.

California laws^{v vi} and Rules of Court^{vii} provide for separate sessions in cases involving domestic violence; nevertheless, 70.9% of California mothers reported that they had to meet face-to-face with their domestic violence abusers. Non-California mothers had to meet face-to-face with their abusers even more often (83.3%).

52.3% of California mothers in the study reported that mediators ignored, minimized or refuted evidence of child abuse. 24.2% of non-California mothers reported that mediators ignored, minimized or refuted such evidence.

59.1% of California mothers reported that mediators who made recommendations to the court (“Child Custody Recommending Mediators”) recommended that mothers, who had come to court to protect their children, should lose custody rights or all contact with their children. 32.8% of non-California mothers reported that mediators recommended that mothers should lose custody rights or all contact with their children.

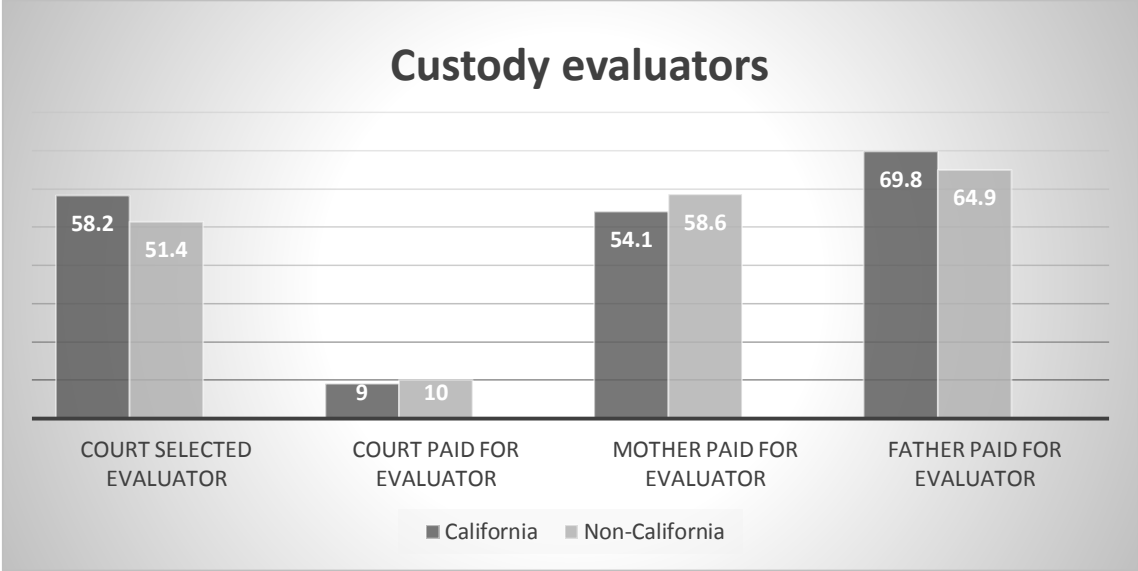
Figure 15



Custody evaluators. Children did not appear to benefit when their families were evaluated by private evaluators. Private child custody evaluators^{viii} played a large role in custody cases when the parents had financial resources.

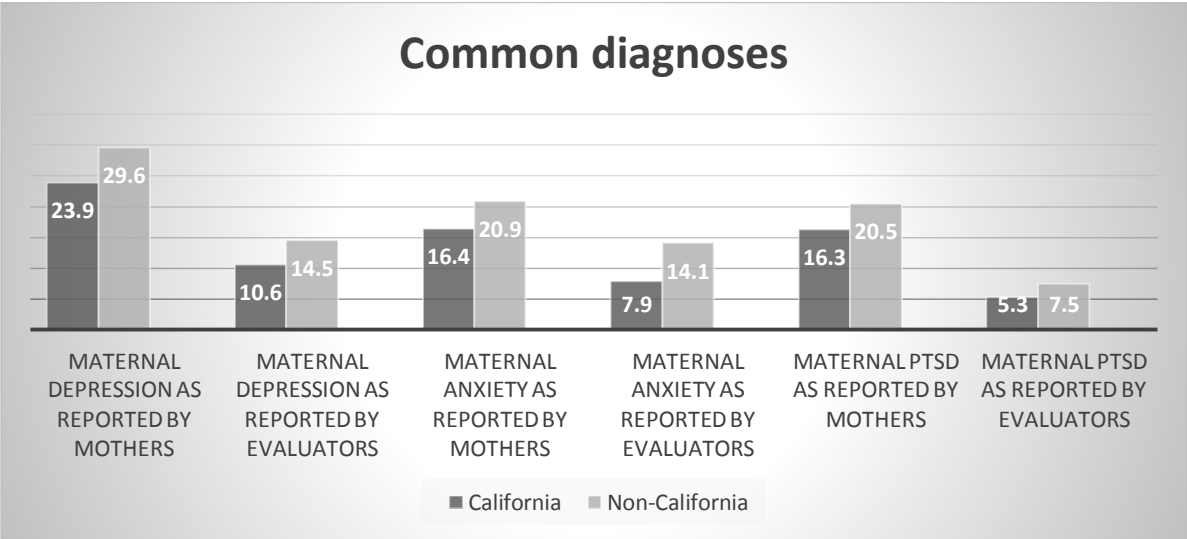
Although court-ordered evaluations occurred in over half of California (58.2%) and non-California (51.4%) cases, the court paid for only a small minority of evaluations (10% or less). Fathers paid for the evaluations (69.8% in California and 64.9% in non-California cases) more often than mothers paid (54.1% in California and 58.6% in non-California cases).

Figure 16



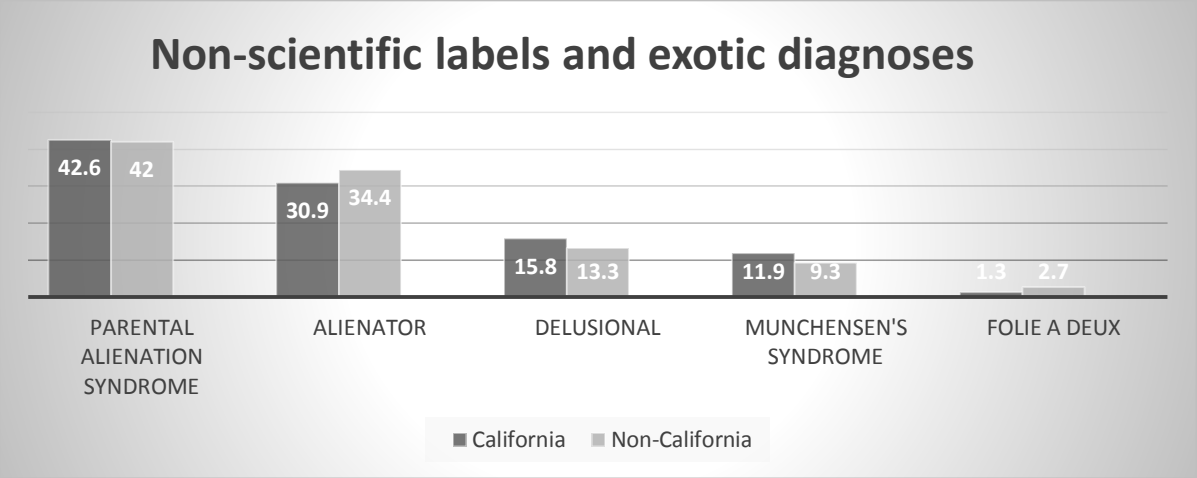
Common diagnoses. Evaluators diagnosed mothers in both groups with common conditions of depression and anxiety at about half the rate that the mothers reported those problems about themselves. Despite the high rate of reported domestic violence, evaluators diagnosed Post-Traumatic Stress Disorder (PTSD) at only a third the rate that mothers in both groups reported PTSD about themselves.

Figure 17



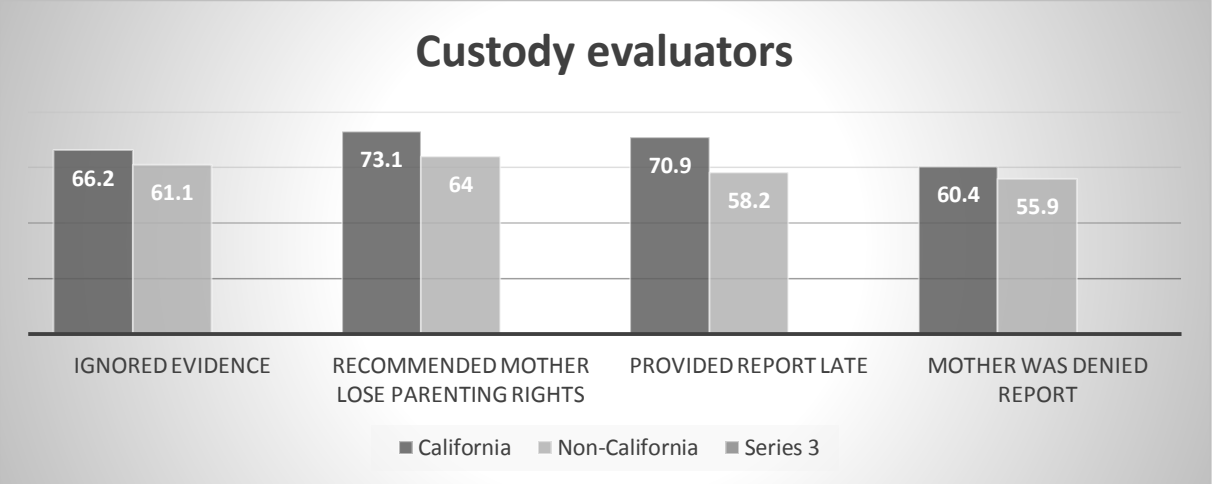
Non-scientific labels and exotic diagnoses. Evaluators assigned a high rate of non-scientific labels and exotic diagnoses to mothers in both groups. The most often-used label (42% for both groups) was “Parental Alienation Syndrome” (PAS), a non-scientific label invented by Richard Gardner M.D.^{ix} The label “Alienator” was used at close to the same rate for California (30.9%) and non-California (34.4%) mothers. Unusual labels and exotic diagnoses such as “Delusional,” “Munchhausen’s Syndrome by Proxy” and “Folie a Deux” assigned at about the same rate for mothers in both groups, none of whom had previously been diagnosed with any such condition.

Figure 18



Evaluators were tasked with investigating the abuse allegations, but failed to do so. Mothers in both groups reported that evaluators ignored, minimized or refuted allegations of child abuse in over 60% of cases. In those cases, evaluators appeared to use the mothers’ reports of domestic violence and child abuse to support the labels and exotic diagnoses they had assigned to the mothers, rather than investigating whether or not such crimes had occurred. They chose to disbelieve the mothers’ reports of domestic violence and child abuse in a majority of the cases, despite medical and psychological evidence and clear disclosures of abuse by the children. Evaluators frequently recommended that mothers, who had come to family court originally to protect their children from abuse, should lose custody rights or contact with the children. This occurred more often in California (73.1%) than in non-California (64%) cases. Custody and visitation recommendations were provided to the court less than the required 10 days before the custody hearing more often in California (70.9%) than in non-California cases (58.2%). Mothers reported being prohibited from seeing or having a copy of such reports at all in 60.4% of California cases versus 55.9% of non-California cases.

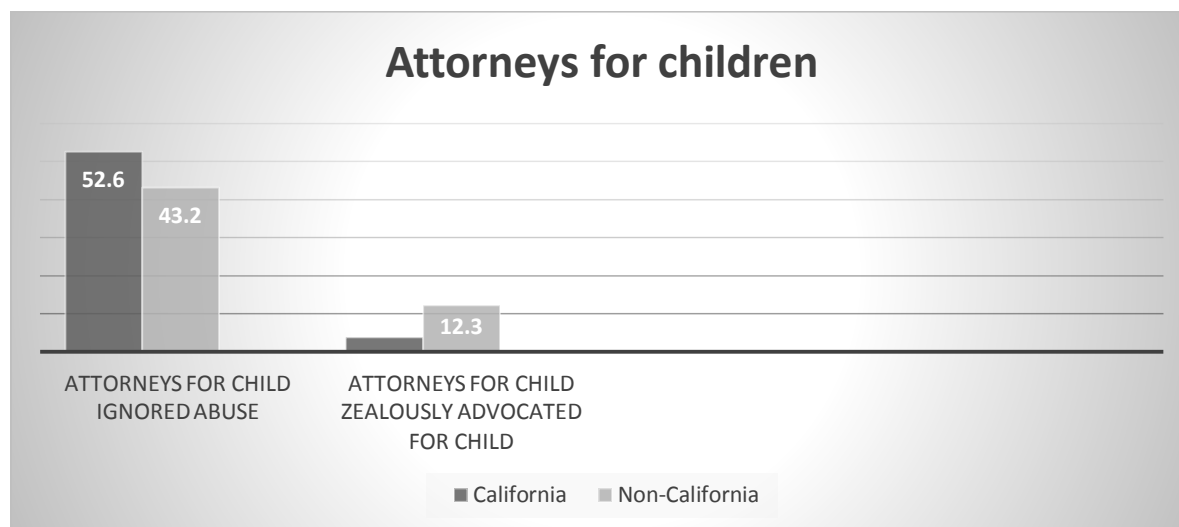
Figure 19



Attorneys for children. Children did not appear to benefit from having their own attorneys. California mothers reported that the children’s attorneys ignored, minimized or refuted evidence of child abuse (52.6%) more often than non-California mothers (43.2%).

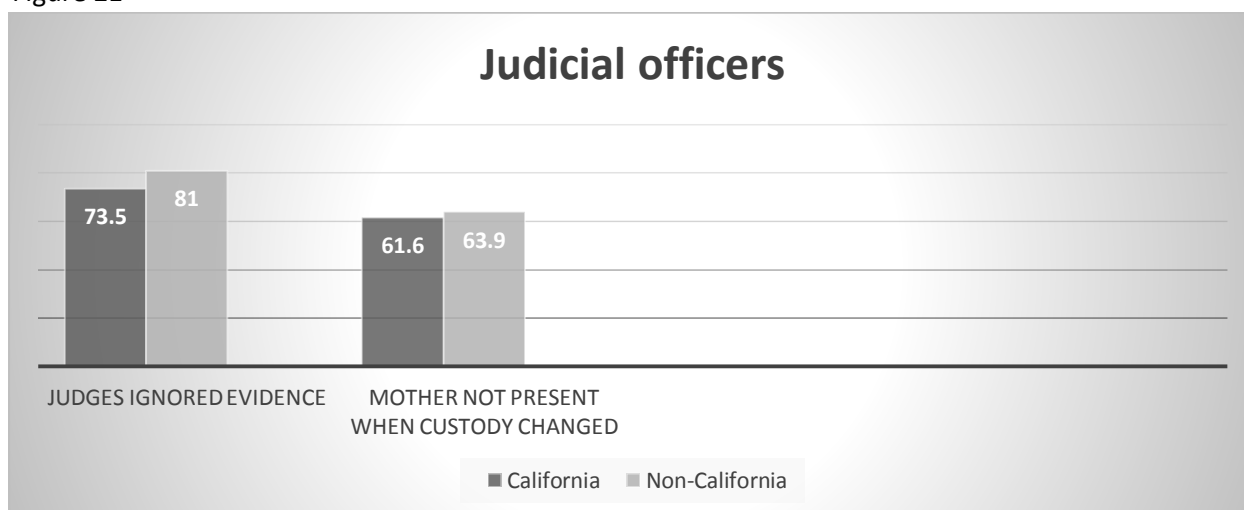
Attorneys for the children rarely zealously advocated for their young clients. Fewer California children’s attorneys (3.8%) zealously advocated for their clients than non-California attorneys for children (12.3%). In California, under Family Code Section 3151, the child’s attorney is required to present the child’s wishes to the court if the child so desires. The American Bar Association guidelines governing the standard of practice of attorneys for children requires attorneys to zealously advocate on behalf of their child clients, just as they would be expected to do under their fiduciary duty their adult clients.

Figure 20

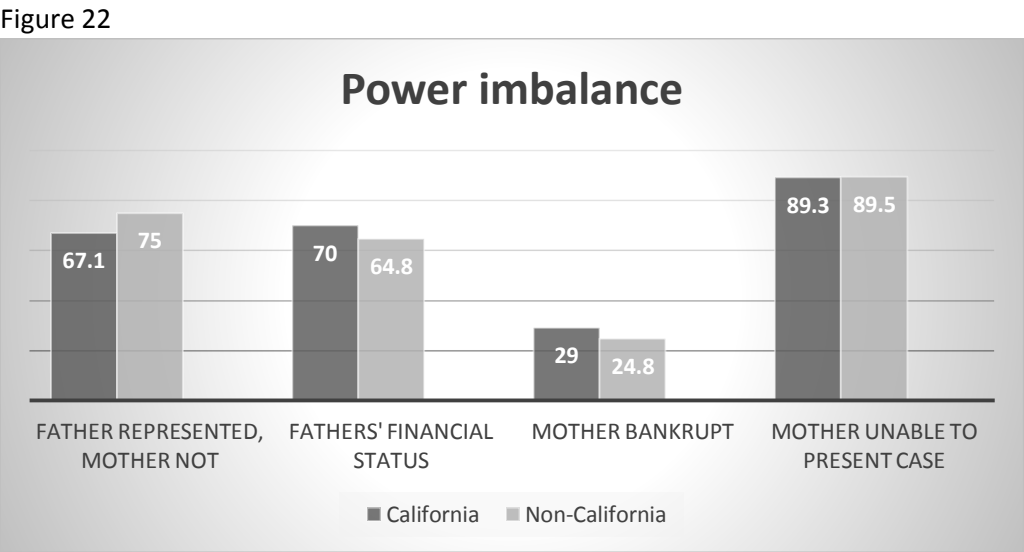


Judicial officers. Children did not appear to benefit when judicial officers ruled on their cases. 73.5% of California mothers reported that family court judges and commissioners ignored, minimized or refuted evidence of child abuse, less often than non-California cases (81%). The mothers in both groups lost primary custody or all custody, with over half of the courts changing custody in *ex parte* hearings without the mother being present and with no opportunity to be heard (61.6% of California cases and 63.9% of non-California cases). This occurred in California even despite Family Code Section 216^{xi} which disallows *ex parte* communications among judicial officers, evaluators, mediators and attorneys.

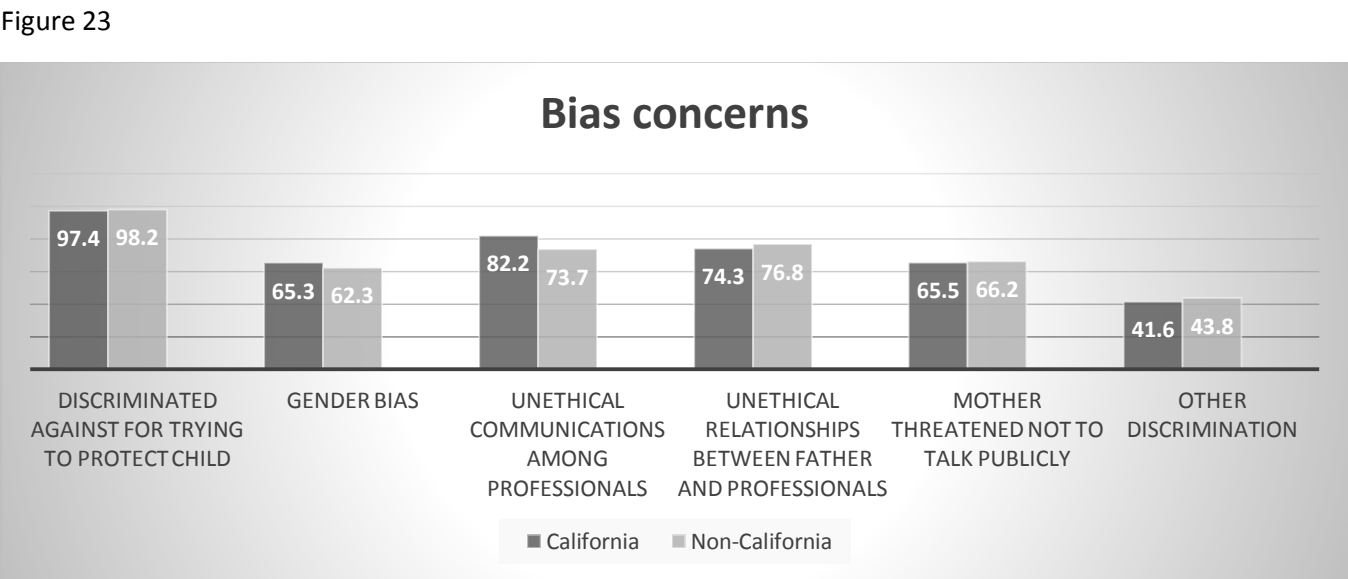
Figure 21



Power imbalance. When they could no longer afford an attorney, mothers were forced to represent themselves against their abusers and the abusers’ attorneys in court. More non-California mothers (75%) than California mothers (67.1%) reported that at some point in the proceedings the fathers had an attorney while the mothers were self-represented. This imbalance of power occurred even though California family courts are required by statute to ensure that each party has access to legal representation. * California mothers were more likely to believe that fathers’ financial status affected case outcomes (70%) than were non-California mothers (64.8%). Bankruptcy was declared by 29% of California mothers and 24.8% of non-California mothers, after they had spent a modal average of \$100,000 on their cases. Nearly 90% of mothers in both groups reported having been denied the ability to adequately present their cases.



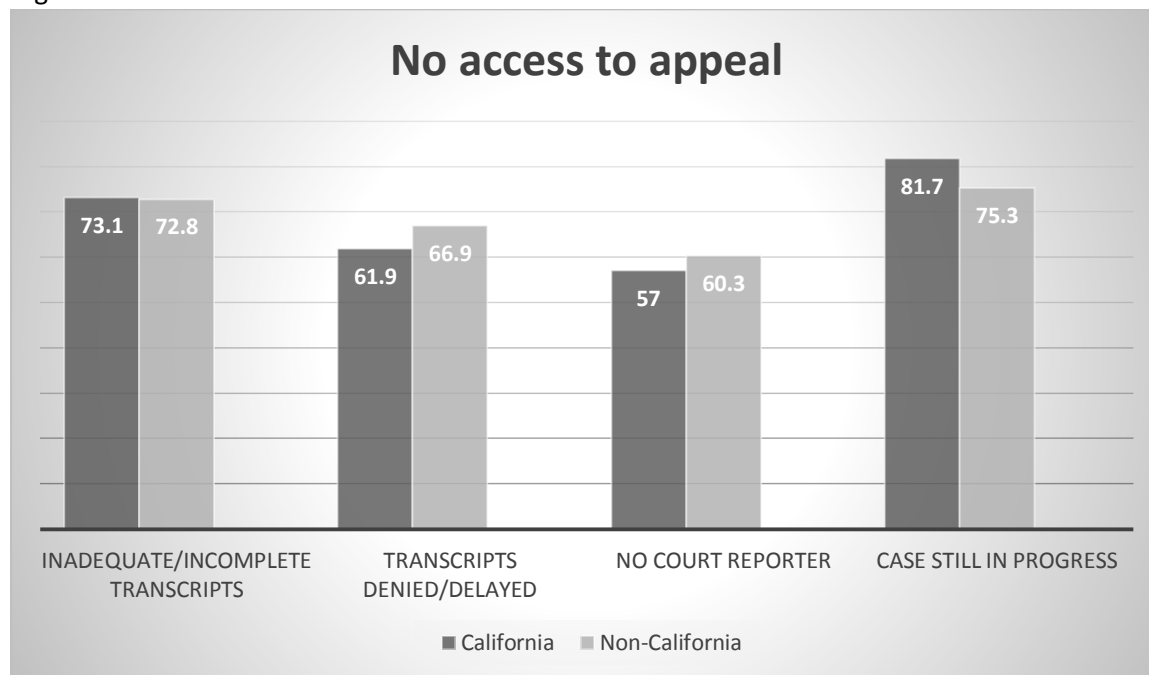
Bias concerns. Nearly all mothers in both groups reported they believed they had been discriminated against because they tried to protect themselves and their children from domestic violence and child abuse. Nearly two-thirds of California mothers (65.3%) and non-California mothers (62.3%) believed that gender bias was a problem affecting their cases. More California mothers (82.2%) than non-California mothers (73.7%) reported believing that unethical/illegal (*ex parte*) communication had occurred among court-related professionals. About three quarters of both groups believed there had been unethical communication or a relationship between the fathers and court professionals. Two-thirds of mothers in both groups reported having been threatened that talking publicly about these communications having occurred could result in damage to their cases.



No access to appeal. The appellate process was essentially unavailable for most mothers. A majority of mothers in both groups reported that hearings were held without court reporters present, which resulted in no transcripts being created. The lack of court transcripts meant that no effective complaint or appeal could be filed, even if the mothers had resources to begin the appellate process.

Nearly three quarters of both groups reported that their court transcripts were inadequate or incomplete, and a majority reported that their transcripts were delayed or denied. Over three quarters of the cases were still in progress at the time the surveys were completed, but it seemed clear that none of the methods attempted by mothers had been successful at keeping their children safe.

Figure 24



NOTE: Appeals address mistakes of law and cannot fix mistakes of fact. Appellate courts cannot re-litigate the facts nor substitute their own judgment as to the credibility of the parties or the believability of the evidence. So even when appeals on the misapplication of a law to the facts are successful, the case is remanded back to the original family court judge who disbelieved the evidence of abuse, and that judge is ordered to reapply the law properly. This seldom results in a different outcome for the child.

DISCUSSION

Data from this study show that Protective Parents are losing custody of children throughout the United States when they bring allegations of child abuse and domestic violence to the attention of family courts. The sample in this study consists of surveys completed by 399 mothers who attempted to protect their children. Responses from 163 California mothers were compared with responses from 236 mothers from 38 other states. There was very little difference in the responses provided by California and non-California mothers in most of the categories studied.

When mothers with custody brought concerns of domestic abuse to family courts and asked for protection of children, a counterintuitive denial of the documented epidemic of family violence took place across all systems. Mothers' reports of violent crimes were mostly ignored or minimized by professionals despite evidence of such abuse. Children's identification of their fathers as perpetrators and fathers' previous criminal history were ignored as relevant evidence of the crimes reported. A majority of the mothers were told by professionals not to report abuse, for fear of negative custody outcomes.

Mothers lost primary custody based on mediator and evaluator recommendations, more so in California than other states. A majority of the children continued to disclose ongoing abuse. The legal system continued to fail these child victims. On the other hand, the system worked quite smoothly for accused perpetrators, who were rarely prosecuted and frequently received unrestricted parenting time or full custody of their alleged victims.

The Leadership Council on Child Abuse and Interpersonal Violence conservatively estimates that family (divorce) courts place about 58,500 children with abusive parents per year nationally, despite their having a safe parent able and willing to protect them.^{xiv} California comprises 12% of the national population, thus, its family courts are estimated to place over 6,000 children at risk every year.

Domestic violence and child abuse in the United States. Domestic violence is a national epidemic, with about one in four women (22.3%) and one in seven men (14%) experiencing severe physical violence by an intimate partner and nearly 1 in 5 women (19.3%) and 1 in 59 men (1.7%) being raped in their lifetime, according to research cited by the Centers for Disease Control and Prevention.^{xv} There is a significant overlap of violence against children when intimate partner violence occurs.^{xvi} Children of batterers are 6.5 to 19 times more likely to be victims of incest than children of non-battering parents, with the vast majority (90-96%) of child sexual abuse being committed by males.^{xvii}

Child abuse is likewise a national epidemic. The U.S. Health and Human Services, Administration of Children and Families' statistics^{xviii} on child abuse and neglect show a rise in the number of referrals to child welfare services (CWS) over an eight-year period, increasing from 3.3 million referrals involving alleged maltreatment of 6 million children in 2009 to 4.1 million referrals involving alleged maltreatment of 7.4 million children in 2016.^{xix}

During that same time period, CWS social worker professional, whose job it was to designate children as victims of child abuse and neglect, substantiated fewer and fewer allegations of abuse. As the number of children reported as having been abused or neglected to CWS increased, the substantiation rate of abuse or neglect decreased from 21.27% (702,000) in 2009 to 16.49% (676,000) in 2016. About three quarters of the children were victims of neglect, over 17% were victims of physical abuse, and over 8% were victims of sexual abuse. More than 13,000 children died as a result of child abuse and neglect between 2009 and 2016. The United States has one of the worst records among the industrialized nations of child abuse and the problem appears to be getting worse.^{xx}

The custodial outcomes for children as illustrated in this study replicate other studies, particularly the 2017 *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation* research by George Washington University Law School professors Joan S. Meier and Sean Dickson. Their research demonstrated that abuse reports by mothers and children were successfully negated by fathers' allegations of "alienation" in the 72% of appellate cases studied. When mothers reported child sexual abuse, fathers won custody 95% of the time (36 of 38 appellate cases.)^{xxi} This is an even more extreme outcome than the outcome found in the 1999 research by Neustein and Goetting^{xxii} involving a sample of 300 protective mothers. That study showed that mothers who reported child sexual abuse to family courts were unable to protect the children in 90% of cases.

Differences. Certain outcomes differentiated California from the rest of the nation.

- Fewer California mothers reported that the fathers threatened to take the children if they left the relationship
- More California children received Victims of Crime funding.
- Fewer California fathers were prosecuted for spousal or child abuse.
- Fewer California attorneys for children zealously advocated for their clients.
- Fewer California mothers reported that they had to meet face-to-face with their domestic violence abusers.
- Fewer California mothers reported the fathers had an attorney while the mothers were self-represented.
- More California mothers reported that unethical communication had occurred among professionals.
- More California mediators were court ordered, ignored abuse, and recommended mothers lose custody rights.
- More California private evaluators provided their reports late.

- More California private evaluators recommended mothers lose custody rights.
- More California mothers lost custody after bringing child abuse to the attention of the court.
- More California mothers were ordered into supervised visits or no contact at some point in the case.
- More California children continued to report abuse, even after being placed with their fathers.

Law enforcement and attorneys for children. When law enforcement does not take a case forward to prosecution, there is a tendency to assume that no crime has been committed. That is an incorrect assumption in many of these cases, since the District Attorney needs to meet a high criminal burden of proof for prosecution and often children are unable to testify due to the trauma arising from the crimes committed against them. It is unclear why there is a difference in prosecution rates in California cases (9.2%) versus non-California cases (23.1%), even though more California children received Victims of Crime funding (19.7%) than non-California children (7.3%). It is likewise unclear why more California attorneys for children failed to zealously advocate their clients (96.2%) than non-California attorneys (87.7%). It would be important to investigate these differences in a further study.

Mediators. All litigants with custody or visitation disputes are sent to mandatory court mediation in California. Mediators in approximately half of California counties provide custody and visitation recommendations, which tends to make them *de facto* decision-makers. 59.1% of California mothers lost custody based on mediators' recommendations, versus 32.8% of non-California mothers.

California mediators who make recommendations are called "child custody recommending counselors."^{xxiii} Judicial officers read the mediators' reports prior to each hearing, which is likely to create a bias toward the recommended outcome, just as a jury would be biased if a recommendation on guilt or innocence were made by a mental health professional before a criminal trial had commenced.

Although government data on how often courts adopt their mediators' recommendations was not located, it is assumed that courts are inclined to adopt mediator recommendations *unless* litigants can successfully argue against them. This creates a lower likelihood that courts would weigh direct testimony of witnesses equitably during a hearing, negating the concept of judicial neutrality.

The practices of mediating domestic violence and child abuse crimes, requiring mediation for such cases, and allowing mediators (regardless of their titles) to make recommendations prior to judicial hearings need to be closely reviewed and challenged.

Custody evaluators. California courts commonly require cases to be evaluated when custody is contested in families with financial resources. 73.1% of California mothers lost custody based on private court-appointed evaluators' recommendations versus 64% of non-California mothers.

Family court evaluators/investigators are supposed to be appointed under either California Family Code Section 3111 or Section 3118 when child sexual abuse is at issue. The court pays the evaluators/investigators under California Family Code Section 3112, and is repaid by litigants if the litigants have resources.

Courts routinely circumvent these requirements and instead appoint evaluators under California Evidence Code Section 730. This code is for expert witnesses. Professionals appointed under Evidence Code 730 are not regulated nor are their fees capped. There is no requirement for them to have specific experience or in-depth training or expertise on child sex abuse. The role of an expert witness is to educate the court on a subject about which the court needs more information. To be deemed an expert in court, one needs have special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates.^{xxv} Expert witnesses are called in a trial or hearing to discuss their areas of expertise.

It is unclear what area of expertise, if any, child custody evaluators have. Evaluators opine on cases and write reports with specific recommendations for custody and visitation when there are allegations of domestic violence, child

sexual abuse, and substance abuse, without being experts in any of those distinct subject areas. Although they are required to have 56 hours of training in over 22 distinct subject matter areas to be a California child custody evaluator, this does not qualify them as experts. To be considered an expert in a specific subject, a professional should have years of experience working in the specialty area as well as being recognized and relied upon by peers as an expert in that area, having made a significant contribution as a leader in terms of research, and publishing and teaching in the area of their expertise.

Expert witnesses can charge litigating parties whatever the market will bear. Their fees range from \$1,500.00 up to \$60,000.00 or more per evaluation, depending on the financial resources of the parents.^{xxiv} This leads to predatory billing practices by certain unethical psychologists. If a family has liquefiable resources, the court may order these resources be sold to pay the evaluator and other professionals whom it can order the parties to hire. When hired, such professionals often recommend other colleagues to be appointed to the same case in various roles. All of these professionals bill the family until all financial resources have been exhausted.

Custody evaluators appointed under Evidence Code Section 730 in California also utilize psychological testing, yet they are not appointed under Code of Civil Procedure Section 2032.310 which governs and provides guidelines for physical and mental examinations.^{xxvi} Even though psychological testing is not designed to determine parenting ability nor can it help in identifying child abusers, evaluators perform such testing because they know how to do it and not because it renders relevant evidence regarding parenting.

Custody evaluators are making *de facto* judicial decisions through their custody and visitation recommendations for individual cases. Although the report is filed with the clerk of the court under Family Code Section 3111, not directly with the judicial officer, the courts' practice in California is to read the recommendations in advance of hearing witness testimony. Receiving expert recommendations in advance of testimony tends to bias the judicial trier of fact, just as it would bias a jury.

Because the court orders or appoints the evaluator, does not pay for the evaluation, and does not cap evaluators' fees, parents are unable to refuse or dispute such fees without prejudicing the court against them. It is difficult for litigants to impact this process, since court appointment under Evidence Code Section 730 gives custody evaluators quasi-judicial immunity from lawsuits, even when their services are substandard, shoddy, inadmissible, or clearly biased. This prevents litigants from holding professionals accountable and leaves room for predatory practices.

Conversely, professionals appointed under Family Code sections 3111 and 3118 can be expected to be reimbursed under Family Code Section 3112, which provides for the court to be reimbursed by litigants with financial resources. This provides cost containment and judicial oversight of the costs of the evaluations. It also reduces the chance that an evaluator would potentially be biased in favor of the party with financial resources who pays for the evaluation.

Further study needed. This preliminary research was based on a sample of convenience and could be improved upon in the next wave of study by using an internet sample. Individuals completing surveys may tend to portray themselves in a more favorable light; therefore, it would be important to include a request for documents that validate the information to the degree possible.

The survey did not ask for demographic information, which types of abuse had medical, physical or corroborative evidence, whether crimes committed by parents were violent or non-violent crimes, which types of crimes were prosecuted, what types of substances parents abused, whether the child welfare cases were investigated or substantiated, the physical and legal custodial arrangements, the types of domestic violence, or how often mothers reported these crimes to law enforcement. These would be important questions for future research.

Child sex abuse. The high incidence of reported child sexual abuse (over 60% of all reported cases in both groups) and placement of child victims with their accused perpetrators merits further investigation. Child sexual abuse

issues appear to set in motion the various factors we have identified in this study as system failure. Research shows that children rarely fabricate sexual abuse allegations and their allegations are no more likely to be determined false in custody and visitation disputes than in the general population. Furthermore, the rate of child sex abuse found in contested custody cases is less than 2%. Approximately 20 to 25% of the general population reports having been sexually abused in childhood, of which one third was perpetrated by biological parents or parental figures and 90 to 96% is committed by males. Courts could be considered to be enabling these crimes when they place children at risk of further abuse in the custody of accused perpetrators in cases when there is child disclosure, corroborative evidence, and identification of the perpetrator.

Child Welfare Services. The consistent lack of protection of children in divorce and separation situations by Child Welfare Services could be attributed to the fact that social workers most often work with families in which both parents pose a threat to the child,ⁱⁱⁱ and social workers only refer cases to the juvenile court when there is no safe parent available for the child. Juvenile courts can only make a child a ward of the court (take the child away from both parents) when neither parent is able or willing to keep the child safe. For this reason, almost all of the Protective Parents in this study had their cases adjudicated by the family courts rather than juvenile courts, despite having originally contacted social services in hopes of gaining protection for their children. Social services workers may also defer to family courts during their investigation, since the case is not in the juvenile court system and others may disbelieve allegations made in the context of divorce and separation.

Another confounding factor is that the overall rate of substantiation by Child Welfare Services throughout the nation decreased between 2009 and 2016, even though the number of referrals and children involved rose while the child population decreased. In California, the rate of substantiation of child physical and sexual abuse plummeted between 2000 and 2015. It would be important to investigate the reasons for the low rates of substantiation of child abuse and neglect to understand more clearly why this lack of protection is occurring in both systems.

United States

Category	2009	2010	2011	2012	2013	2014	2015	2016
Referrals	3,300,000	3,300,000	3,400,000	3,800,000	3,900,000	3,600,000	4,000,000	4,100,000
Children involved	6,000,000	5,900,000	6,200,000	6,300,000	6,400,000	6,600,000	7,200,000	7,400,000
Referred by professional	60.0%	60.0%	57.6%	58.7%	61.6%	62.7%	63.4%	64.9%
Percent screened in	61.9%	60.7%	60.8%	62.0%	60.9%	58.2%	60.7%	58.0%
Substantiated/confirmed	702,000	698,000	658,000	686,000	679,000	702,000	683,000	676,000
Percent confirmed	21.27%	21.15%	19.35%	18.05%	17.41%	19.5%	17.08%	16.49%
Died	1,770	1,537	1,545	1,640	1,520	1,580	1,670	1,750

<https://www.acf.hhs.gov/cb/research-data-technology/statistics-research> <https://www.childhelp.org/child-abuse-statistics/>
<https://www.childstats.gov/AMERICASCHILDREN/tables/pop1.asp> (The child population decreased in the United States from 74,100,000 in 2009 to 73,600,000 in 2016)

Substantiation rate of child physical abuse in California

Year	Reported	Substantiated	% Substantiated
2000	104,058	18,986	18%
2005	85,264	11,112	13%
2010	92,594	8,502	9%
2015	98,938	6,334	6%

Substantiation rate of child sexual abuse in California

Year	Reported	Substantiated	% Substantiated
2000	51040	10103	20%
2005	38587	6779	18%
2010	42434	5243	12%
2015	42364	3461	8%

www.kidsdata.org

Law enforcement. When there was no prosecution of the reported crimes, family courts proceeded under the mistaken assumption that the District Attorney must have investigated the matter thoroughly and determined that no abuse had occurred. However, the burden of proof for prosecuting a criminal case is high, “beyond a reasonable doubt” which means only cases with strong evidence are prosecuted. The burden of proof for protecting a child in civil court is “preponderance of the evidence” (i.e., it is more likely than not that the abuse occurred).^{xxvii}

It would be important to explore why law enforcement did not prosecute these cases, particularly child sexual abuse cases with disclosures, corroborating evidence, and clear identification of the perpetrator.

The custom of having court mediators and private mental health appointees investigate and evaluate domestic violence and child abuse crimes and make *de facto* judicial decisions through recommendations to the court needs to be closely reviewed and questioned.

Mothers from California and other states held the belief that the professionals on all levels were biased against believing them and had discriminated against them for trying to protect the children. Mothers also believed that professionals had unethical communication with each other and with the fathers. It would be important to investigate the reasons for these beliefs.

Finally, further investigation is needed into the type and quality of training provided to court personnel that produces such systemic negative responses to child abuse allegations and domestic violence in custody disputes and maintains a culture of denial.

Conclusions. Mothers in 39 states including California generally lost primary custody (primary parenting time) when they asked family court to protect children from violence and abuse. California mothers lost primary custody at a rate of 85.3% while mothers in non-California cases lost primary custody at a rate of 74.6%. Nearly all current systems in place failed to protect the children from continuing abuse. Services from child welfare, law enforcement, mediators, evaluators and attorneys for the children led to negative outcomes for child victims, and results for California children were even worse than for non-California children. It is recommended that the reasons for such extreme system failure be thoroughly investigated.

ⁱ <http://www.leadershipcouncil.org/1/pas/Meier.html> Janet R. Johnston et al, "Allegations and Substantiations of Abuse in Custody-Disputing Families," Family Court Review, Vol. 43, No. 2, April 2005, 284-294, p. 284.

Janet R. Johnston, "High-Conflict Divorce," The Future of Children, Vol. 4, No. 1, Spring 1994, 165-182, p. 167.

ⁱⁱ <http://www.leadershipcouncil.org/1/med/PR3.html>

ⁱⁱⁱ Another possible contributing factor to the low rate of child protection could be the decreasing substantiation rate of all types of child abuse, especially child sexual and physical abuse.ⁱⁱⁱ In California, the substantiation rate dropped from 20% for child sexual and physical abuse in 1998 down to only 8.2% for sexual abuse and 6.4% for child physical abuse in 2015 according to statistics taken from www.kidsdata.org, a program of the Lucile Packard Foundation ^{iv} Family Code Section 1810 et se seq

http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=5.&title=&part=1.&chapter=2.&article= v
Family Code 3181
http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=8.&title=&part=2.&chapter=11.&article=3.
vi Family Code 3113
http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=8.&title=&part=2.&chapter=6.&article= vii
CA Rule of Court 5.215 http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_215

ix <http://www.nytimes.com/2003/06/09/nyregion/richard-gardner-72-dies-cast-doubt-on-abuse-claims.html>

x Family Code Section 2030(a)(1) *“In a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party’s rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party’s attorney, whatever amount is reasonably necessary for attorney’s fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.”*

http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=6.&title=&part=1.&chapter=3.5.&article=
xi Family Code 216

http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=2.&title=&part=2.&chapter=&article= xii
 $x/100 = 12.1/82.1$, therefore, $x = 14.74$. $100 - 14.74 = 85.26$ percentage drop in primary custody.

xiii $x/100 = 20.4/80.3$, therefore $x = 25.4$. $100 - 25.4 = 74.6$ percentage drop in primary custody xiv

www.leadershipcouncil.org

xv <https://www.cdc.gov/violenceprevention/pdf/NISVS-infographic-2016.pdf>

Breiding MJ, Smith SG, Basile KC, Walters ML, Chen J, Merrick MT. Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011. *MMWR* 2014; 63(SS-8): 1-18

xvi Edleson, JL. “The Overlap Between Child Maltreatment and Women Battering.” *Violence against Women* (February 1999) 5:13454.

xvii Finkelhor, D., *A Sourcebook on Child Sexual Abuse*, Sage Publications, pp. 124-129, 1986; Greenfield, L., *Child Victimized: Violent Offenders and their Victims*, Jointly published by the U. S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics and Office of Juvenile Justice and Delinquency Prevention, p.10, 1996; Snyder, H., *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, U. S. Department of Justice, Bureau of Justice Statistics, p. 8, July 2000; Finkelhor, D., Hotaling, G., et al, *Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors*, *Child Abuse & Neglect*, 14, pp. 19-28, 1990 (1,374 women and 1,252 male respondents); Paveza, G., *Risk factors in father-daughter child sexual abuse*, *Journal of Interpersonal Violence*, 3(3), pp. 290-306, 1988; McCloskey, L.A., Figueredo, A.J. & Koss, M, *The effect of systemic family violence on children’s mental health*, *Child Development*, 66, 1239-1261, 1995. (365 respondents).

xxi Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation, *35 Law & Ineq.* 311 (2017), *GWU Law School Public Law Research Paper No. 2017-43*, *GWU Legal Studies Research Paper No. 2017-43*

xxii <https://eric.ed.gov/?id=EJ609472> Judicial Responses to the Protective Parent’s Complaint of Child Sexual Abuse, Neustein, Amy; Goetting, Ann, *Journal of Child Sexual Abuse*, v8 n4 p103-22 1999

“A study of 300 cases over a 10-year period in which the mother sought to protect the child from sexual abuse, found that 70% resulted in unsupervised visitation or shared custody; in 20% of the cases the mothers completely lost custody, and many of these lost all visitation rights.” <http://cavnetblog.blogspot.com/2014/10/judicial-responses-to-protective.html> xxiii

<https://www.governmentjobs.com/jobs/1778195-0/child-custody-recommending-counselor>

xxiv Personal communication xxv Evidence Code Section 720 <http://law.onecle.com/california/evidence/720.html>

xxvi http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=4.&part=4.&chapter=15.&article=3.

xxvii <https://legaldictionary.net/beyond-a-reasonable-doubt/>