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HOW DOMESTIC VIOLENCE BATTERERS USE CUSTODY PROCEEDINGS IN FAMILY COURTS TO ABUSE VICTIMS, AND HOW COURTS CAN PUT A STOP TO IT

Emmaline Campbell*

I. Introduction

Domestic violence batterers are master manipulators who find creative ways to abuse their victims, even after the relationship ends. Domestic violence is defined as "a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics."[1] Batterers' tactics "are more than physical violence and induce a penumbra of threats and actions to induce fear, humiliation, social isolation, and resource deprivation."[2] These tactics can include psychological and emotional abuse, destruction of property and harming of pets, forcing victims into isolation, creating economic abuse, and enforcing rigid expectations of gender roles.[3] All of these tactics have one purpose: controlling the victim.[4]

Batterers are often very angry when victims end a relationship. When the victim leaves, she exercises her autonomy and escapes the batterer's hold.[5] Many batterers react violently to this.

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[1] Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. For Soc. Just. 1053, 1058 (2011) (quoting Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. Davis L. Rev. 1107, 1116 (2009)).

[2] Andrea C. Farney and Roberta L. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 Juvenile and Fam. Ct. J. 35, 38 (2003).

[3] *Id.*

[4] *Id.*

[5] This article will use gender-specific nouns and pronouns, referring to victims of domestic violence with female pronouns and referring to batterers with male pronouns. This usage reflects that fact that the vast majority of victims of domestic violence are female, and the vast majority of perpetrators of domestic violence are male. *See* Shannon Catalano, *Intimate Partner Violence, 1993–2010*, U.S. Department of Justice Bureau of Justice Statistics, http://www.bjs.gov/

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Victims report increased and more severe violence after separation, referred to as "separation assault."[6] In one study, 35 percent of victims reported more severe violence after separation.[7] Some batterers even kill their victims after separation. A victim's risk of being killed by her batterer increases six-fold when she leaves her batterer.[8]

When a victim leaves her battering spouse and seeks to end the marriage, the batterer often does not willingly relinquish control over her. Instead, he takes advantage of the divorce and custody process as an avenue to continue his abuse. This paper will focus on the ways in which batterers take advantage of custody proceedings in family court to continue to abuse their victims.

The batterer's use of coercion during the custody process can take many forms. It can include demanding custody simply for the sake of staying involved in the victim's life; forcing the victim to return to court dozens of times to prolong contact; using court-mandated visitation or custody as an opportunity to commit physical violence against the victim; intimidating the victim into conceding joint custody during coercive mediation sessions; and refusing to pay child support to force the victim back into court.

This paper will address the many ways that batterers use the family court system to perpetuate abuse against their victims. At present, most family courts are unprepared to address batterers' attempts to use the court and the legal system as a tool of abuse.[9] This paper will offer recommendations for how family courts can stop batterers from manipulating the courts as a site of abuse.

II. The Context Of Abuse: Victim And Batterer Psychology

In order to understand how the family court system results in unfair outcomes for victims, it is necessary first to understand the psychological profiles of victims and abusers.

A. *Victim Psychology*

Abuse can make people react in unpredictable ways. Many domestic violence survivors "may present as angry, distrustful, and suspicious with all professionals related to the court proceedings."[10]

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content/pub/pdf/ipv9310.pdf.

[6] Jennifer Hardesty, *Separation Assault in the Context of Postdivorce Parenting*, 8 Violence Against Women 597, 600 (2002).

[7] *Id.*

[8] *Id.* at 601.

[9] Mo Hannah and Barry Goldstein, Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues 14 (2010).

[10] Peter G. Jaffe & Claire V. Crooks, *Understanding Women's Experiences*

This response is a normal reaction to the trauma of abuse. But many judges expect victims to appear "victimized or helpless."[11] When victims do not appear helpless but seem angry, the court may draw adverse inferences about these behaviors and assume the victim is purposefully acting uncooperative or difficult.[12] Based on these assumptions, judges may be sympathetic to the abuser and more readily believe his claims.

Battered women may also exhibit psychological symptoms that confuse judges. Many battered women suffer from post-traumatic stress disorder (PTSD), which can lead them to display "a strange lack of affect when discussing the violence, or to giggle inappropriately."[13] Trauma can also affect victims' memories, leading them to have difficulty articulating events in chronological order.[14] Courts may misinterpret these behaviors as a sign that the victim is lying or not credible.

B. *Batterer Psychology*

Batterers often have a psychological profile that creates a positive first impression. Batterers may present as "charming, charismatic, likeable, reasonable, generous, and even flexible."[15] Batterers can be highly manipulative and carefully craft their image.[16] Many batterers can be abusive at home in private, but to the outside world they appear to be caring and devoted family men.[17] When judges encounter batterers in court, they are often swayed by the batterers' accounts of events, which, in contrast to the victims' accounts, seem reasonable and rational, and thus more credible.[18]

Batterers often take advantage of their likeable façade to present false narratives to the court about the abuse. Many batterers are

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Parenting in the Context of Domestic Violence, VIOLENCE AGAINST WOMEN ONLINE RESOURCES 1, 9 (2005), http://citeseerx.ist.psu.edu/viewdoc/download?-doi=10.1.1.192.3729&rep=rep1&type=pdf.

[11] Przekop, *supra* note 1, at 1068.

[12] *Id.*

[13] Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. OF GENDER, SOC. POL'Y & L. 657, 691–2 (2003).

[14] James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME (Dec. 9, 2014), http://time.com/3625414/rape-trauma-brain-memory.

[15] Clare Dalton, Susan Carbon & Nancy Olesen, *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 16 (2003).

[16] Meier, *supra* note 13, at 706.

[17] Dalton, Carbon & Olesen, *supra* note 15, at 16.

[18] *Id.*

described by their own counselors as "skillfully dishonest."[19] Batterers often lie or distort facts about the abuse in court.[20] Batterers may also falsely accuse victims of infidelity or sexual promiscuity, in an effort to diminish the victim's credibility with the court.[21] Other batterers have falsely alleged that victims had mental health or drug problems.[22] Many batterers have claimed that the victim committed physical abuse against them, shifting the focus away from the victim and forcing the court to untangle the variety of abuse allegations in the case.[23]

Many batterers deny the abuse. Some counselors who work with batterers have noted that their clients give a "passionate and eloquent denial of the abuse and the impact of their own conduct on others."[24] Some batterers claim that their victims have manufactured the allegations of abuse in order to gain an advantage in their custody cases.[25]

When batterers do admit to committing abuse, they may use tactics to minimize the violence.[26] Batterers may allege that the fights the victim has described also included acts of violence committed by the victim.[27] In other cases, the batterer might admit to minor acts of violence, like shoving, in order to make the more serious and denied allegations seem less credible.[28]

Some batterers may even use their knowledge of the victim's psychology against her. Batterers may claim the victim's anger and assertiveness in court demonstrate that she is not a real victim and that her abuse allegations are false.[29] Other batterers focus on attacking the victim's emotional state. In custody proceedings, batterers often claim that victims are "too unstable" to care for children, even where the instability is temporary and a direct result of the abuse.[30]

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[19] Meier, *supra* note 13, at 690.

[20] Laurel B. Watson & Julie R. Ancis, *Power and Control in the Legal System: From Marriage/Relationship to Divorce and Custody*, 19 Violence Against Women 166, 177 (2013).

[21] *Id.*

[22] *Id.*

[23] Lundy Bancroft, Jay G. Silverman & Daniel Ritchie, Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 156 (2d ed. 2012).

[24] Meier, *supra* note 13, at 690.

[25] Przekop, *supra* note 1, at 1068.

[26] *Id.* at 1067.

[27] *Id.*

[28] *Id.*

[29] *Id*.

[30] Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 Hofstra L. Rev. 407, 424 (1985).

C. *Batterer-Victim Dynamics*

Batterers exert power over victims to undermine the victims' autonomy while increasing their own power. Where the victim is a mother, the batterer tends to challenge her parental authority and tries to create tensions between her and the children.[31] As a result, she may have difficulty controlling the children's behavior. Custody evaluators may find that domestic violence victims are not effective parents if they cannot control the children.[32] Evaluators may be persuaded by a father's portrayal of himself as a powerful figure, and the children may behave better in his care due to their fear of him.[33] Children may even request to be placed with the batterer as a result of traumatic bonding.[34] These behaviors often lead custody evaluators to recommend some amount of custody for the batterer.

Batterers may seem more credible than victims based on their psychological profiles. Many "judges and evaluators lacking in-depth knowledge about domestic violence and PTSD may easily be misled into trusting the calm, sincere-sounding accused's veracity more than the 'strange' or emotional purported-victim's."[35] When a judge must decide whether the batterer or the victim's account of abuse is true, the batterer's account may win out because of a perception that he is more credible.[36]

D. *How Batterer Psychology is Favored by Law: Friendly-Parent Provisions*

As discussed above, batterers often portray themselves as the reasonable and flexible parent.[37] In contrast, victims may appear rigid and uncooperative for being unwilling to maintain a co-parenting relationship with the batterer.[38] The National Council of Juvenile and Family Court Judges notes that "it is often legitimate for the partner of an abusive parent to try to protect the children from exposure to abuse, or to try to secure his or her own safety from the abusive partner by limiting that partner's contact with the children."[39]

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[31] Bancroft, Silverman & Ritchie, *supra* note 23, at 143.

[32] *Id.*

[33] *Id.*

[34] *Id.*; *see also* Wissink v. Wissink, 749 N.Y.S.2d 550, 552 (N.Y. App. Div. 2002) (recognizing that when a child expresses a preference to live with an abusive father, the court should order a comprehensive psychological evaluation to determine the effect the abuse has had on the child's preference).

[35] Meier, *supra* note 13, at 692.

[36] *Id.*

[37] Dalton, Carbon & Olesen, *supra* note 15, at 16.

[38] Bancroft, Silverman & Ritchie, *supra* note 23, at 150.

[39] Clare Dalton, Leslie M. Drozd & Frances Q. F. Wong, Nat'l Council

But unfortunately, many child-custody laws are built to favor "generous" batterers over "protective" victims. According to the American Bar Association, as of 2008, 32 states included "friendly-parent" presumptions as a factor in the analysis of the best interest of the child.[40] Friendly-parent presumptions assume that "in all child custody cases the parent who was the most generous in sharing the child with the other parent would have a greater ability to understand and provide for the child's needs."[41]

Some states, including California, have recognized that friendly-parent provisions should not be applied in domestic violence cases.[42] However, this does not fully resolve the problem. For friendly-parent provisions not to apply, the court must first make a finding of domestic violence.[43] If the court believes the batterer and not the victim, then the domestic violence exception does not kick in, and the friendly-parent provision still applies.

Unlike California, not all states have recognized that friendly-parent provisions should be inapplicable in domestic violence cases. "Although every state has made domestic violence ('DV') a factor that courts must consider in custody cases, and at least 24 have a presumption that batterers not be given custody, studies show that batterers still win custody in states with the [Friendly-Parent Provision] unless a statute clarifies that it does not apply when there is DV."[44] Friendly-parent provisions create risks for the children of domestic violence abusers and continue to be applied in many cases nationally, even when one parent has had a history of perpetrating domestic violence.

E. *How Batterers Exploit Victim Psychology: Parental Alienation*

Batterers can be adept at using the psychology of victims against them by arguing the victim has turned the children against the batterer. A widely discredited theory known as "parental

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of Juvenile and Fam. Ct. Judges, Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide 19 (2004), http://www.ncjfcj.org/sites/default/files/navigating_cust.pdf.

[40] *See* Am. Bar Ass'n Comm'n on Domestic Violence, Child Custody and Domestic Violence by State, Child Custody and Domestic Violence by State (Feb. 2008), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf.

[41] Leslie M. Drozd, Kathy Kuehnle, & Lenore E.A. Walker, *Safety First: A Model for Understanding Domestic Violence in Child Custody and Access Disputes*, 1 J. Child Custody 75, 82 (2004).

[42] Bancroft, Silverman & Ritchie, *supra* note 23, at 150; Cal. Fam. Code § 3170 (West 2013).

[43] Bancroft, Silverman & Ritchie, *supra* note 23, at 150.

[44] Joan Zorza, *The "Friendly Parent" Concept: Another Gender Biased Legacy from Richard Gardner*, 12 Domestic Violence Rep. 65, 75 (2007).

alienation" has been used by batterers to claim that the victim manipulated the children into disliking the batterer.[45] In parental alienation, a parent ostensibly "creates misrepresentations of the other parent in the child's head in the hopes that the child will alienate that other parent."[46] The National Council of Juvenile and Family Court Judges has noted that the scientific community has discredited parental alienation theory and it should not be admissible in court.[47]

Though parental alienation has been discredited, some courts continue to apply it or reference it. A recent decision in Connecticut notes that, "Like other jurisdictions, Connecticut has not passed on the issue of whether parental alienation syndrome is a reliable theory."[48] In one case in Louisiana, the court drew at length from a journal article on parental alienation, quoting, "The alienated parent typically is a 'good' parent who has no history or physical or emotional abuse of the child, and while there may be some 'kernel of truth' to the child's complaints about the rejected parent, the child's grossly negative views and feelings are a significantly distorted and exaggerated reaction."[49] Despite the fact that parental alienation has been discredited, its legacy lives on in the minds of some judges.

F. *Solutions*

Ruling on domestic violence allegations often proves uniquely challenging for judges. Judges cannot rely on their gut instincts about whether the victim or batterer is more credible. Instead, courts must engage in careful fact-finding to determine if accusations of domestic violence are true. Courts should consider looking to the following resources for further evidence: testimony from other family members or friends, service providers, counselors, police reports, criminal case records, restraining order records, medical records, and school records.[50]

III. Legal Areas Exploited by Batterers

A. *Mediation*

1. The Status of Mediation Today

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[45] Przekop, *supra* note 1, at 1069.
[46] *Id.*
[47] Dalton, Drozd & Wong, *supra* note 39.
[48] Eisenlohr v. Eisenlohr, 135 Conn. App. 337, 348 n.6 (Conn. App. Ct. 2012).
[49] Palazzolo v. Mire, 10 So. 3d 748, 774 (La. Ct. App. 2009).
[50] Dalton, Drozd & Wong, *supra* note 39, 47.

Mediation is often praised as a less adversarial way to handle divorce and custody cases. In mediation, an impartial third party (a "mediator") facilitates the resolution of divorce and custody disputes to reach agreement between the parties.[51] Supporters of mediation say that it is less costly, more efficient, and produces better outcomes than traditional custody litigation.[52]

However, mediation has come under significant criticism in cases of domestic violence. Mediation puts victims of domestic violence at a huge disadvantage in custody proceedings.[53] Because of the power imbalance in the batterer-victim relationship, victims often feel disempowered when the batterer is present and unable to voice their needs or the needs of their children during mediation.[54] The National Council on Juvenile and Family Court Judges recommends that judges consider not requiring mediation in cases involving domestic violence, where state law allows.[55]

Mediation can be voluntary or mandatory, depending on state law.[56] Each state determines whether all custody disputes in the state must be mediated, or whether there are opt-out provisions or other exceptions for domestic violence or other reasons.[57] Fortunately, the majority of states have banned mediation in domestic violence cases.[58] Other states allow victims of domestic violence to opt-out of mediation.[59] The American Bar Association reports that as of 2014, only eighteen states require domestic violence victims to

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[51] Nancy Ver Steegh, *Yes, No, Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women & L. 145, 170 (2003).

[52] Echo Rivera, April Zeoli, & Cris Sullivan, *Abused Mothers' Safety Concerns and Court Mediators' Custody Recommendations*, 27 J. Fam. Violence 321, 321, 323 (2012).

[53] Nancy Johnson, Dennis Saccuzzo, & Wendy Koen, *Child Custody Mediation in Cases of Domestic Violence*, 11 Violence Against Women 1022, 1024 (2005).

[54] *Id.*

[55] Jerry J. Bowles et al., Nat'l Council of Juvenile and Fam. Ct. Judges, A Judicial Guide to Child Safety in Custody Cases 25 (2008), http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf.

[56] Mary Mentaberry & Maureen Sheeran, Nat'l Council of Juvenile and Fam. Ct. Judges Managing Your Divorce: A Guide for Battered Women 10 (1998), http://www.ncjfcj.org/sites/default/files/pro_se_web.pdf.

[57] *Id.*

[58] *See* Am. Bar Ass'n Comm'n on Domestic Violence, Mediation in Family Law Matters Where DV is Present (2014), http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/2014%20Mediation%20Statutory%20Chart.authcheckdam.pdf.

[59] *Id.*

engage in mediation (with five states leaving it up to the discretion of the court), without allowing them to opt out.[60]

Unfortunately, California is one of those states.[61] In California, mediation in custody disputes is mandatory even in cases of domestic violence.[62] California adopted mandatory mediation in 1981 because custody cases in need of litigation heavily overburdened the family courts.[63] In mandatory mediation, the judge plays a significantly more limited role in custody proceedings. Instead, the mediator spends time with the parties discussing arrangements. This delegation saves the court a substantial amount of time.

The Judicial Council of California has examined the problems of mediation for victims of domestic violence, but determined that mandatory mediation is an essential part of keeping the family courts running in California. The Council wrote, "To suggest that mediation be made voluntary has the potential of crippling a severely burdened court system. When family law judges already report that they have insufficient time to handle grueling calendars, a suggestion that would increase that caseload by a large margin is untenable."[64] This is California's position despite the fact that in the majority of other states, courts are able to manage their family law caseloads without requiring victims of domestic violence to enter mediation. California should reconsider whether the efficiency of mediation outweighs the disadvantages of forced mediation for victims of domestic violence.

2. Victims and Batterers Cannot Negotiate on Fair Terms

Mediation, by its nature, is likely to produce better outcomes for batterers than for victims. The National Council of Juvenile and Family Court Judges notes that an abuser may favor mediation because the abuser knows he can coerce the victim more easily during the process of mediation than in traditional litigation.[65] This is because in relationships with a history of violence, even after the relationship ends, the victim may feel unable to assert her

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[60] *Id.*

[61] *Id.*

[62] Cal. Fam. Code § 3170 (West 2013).

[63] Charlotte Germane, Margaret Johnson, & Nancy Lemon, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 Berkeley Women's L.J. 175, 178 (1985).

[64] Gay Danforth & Bobbie L. Welling, Judicial Council of Cal. Advisory Comm. on Gender Bias in the Cts., Achieving Equal Justice for Women and Men in the Cal. Cts. 167 (1996), http://www.courts.ca.gov/documents/f-report.pdf.

[65] Bowles et al., *supra* note 55, at 26.

interests.[66] The victim may feel compelled to capitulate to the batterer's custody demands, even when the demands are contrary to the best interest of their child.[67] The victim may fear that the abuser will retaliate if she stands up for herself—perhaps by physically attacking her after the mediation session.[68] These fears are not unreasonable; many women report being battered after attending mediation with their abusers.[69]

The egalitarian principles of mediation cannot overtake years of reinforced behavioral patterns. "Throughout the abusive relationship, the abused spouse has been conditioned to relent, compromise, and conform to be safe from [violence]. This learned pattern of dealing with her abuser cannot be easily broken, especially in a process that requires compromise."[70] These patterns make it difficult for a victim to assert herself for the first time during mediation.[71]

Mediation is also concerning for victims because they are often not represented by an attorney in the proceedings.[72] In traditional litigation, a victim could hire an attorney and allow the attorney to advocate on her behalf. In mediation in California, the parties' attorneys may attend at the discretion of the mediator, but are not allowed to speak for their clients.[73] Mediators have a right to remove attorneys from the room if the attorney attempts to participate in the mediation.[74] In mediation, attorneys are not allowed to support victims in the way that litigation allows.

For these reasons, many people support ending the requirement for mediation in domestic violence cases.[75] The National Council of Juvenile and Family Court Judges has recommended

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[66] Nancy Ver Steegh & Gabrielle Davis, *Calculating Safety: Reckoning with Domestic Violence in the Context of Child Support Parenting Time Initiatives*, 53 Fam. Ct. Rev. 279, 285 (2015).

[67] *Id.*

[68] *See id.*

[69] Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 Clearinghouse Rev. 1113, 1121 (1995–96).

[70] Johnson, Saccuzzo, & Koen, *supra* note 53, at 1024–25.

[71] Lisa Newmark, Adele Harrell & Peter Salem, *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 Fam. & Conciliation Cts. Rev. 30, 31 (1995).

[72] *See* Cal. Fam. Code § 3182(a) (West 2013) ("The mediator has authority to exclude counsel from participation in the mediation proceedings pursuant to this chapter if, in the mediator's discretion, exclusion of counsel is appropriate or necessary.").

[73] Cal. Fam. Code § 6303(c) (West 2013).

[74] *Id.*

[75] *Id.*

that mediation "not be mandated or referred in cases in which [domestic violence] has been alleged."[76]

3. Mediators are Unequipped to Handle Domestic Violence Cases

Mediators are frequently not well trained on domestic violence issues, and they are typically not equipped to address the unique needs of a domestic violence victim in mediation. Certification for mediators may require very minimal training on domestic violence.[77] In California, mediators must receive only 16 hours of training in their first year of work and subsequently receive update training for 4 hours per year.[78]

Mediators may be unable to properly screen for domestic violence and may overlook many cases in which domestic violence is present. In a study of mediation reports in San Diego, researchers found that the mediator only accounted for domestic violence in 43.1 percent of cases where the screening form filled out by the client had an explicit domestic violence allegation.[79] Even in cases where a temporary restraining order had been issued and was documented in the screening form, the mediator addressed domestic violence in the mediation report only 49.4 percent of the time.[80] Other studies have similarly found that mediators are frequently unable to identify cases involving domestic violence.[81]

Some mediators are even hostile to claims of domestic violence. In one study, researchers found that "women who informed custody mediators that they were victims of domestic violence often received less favorable custody awards."[82] Mediators may suspect that women who report domestic violence are manufacturing the allegations for custody purposes, and they may punish women who make allegations of domestic violence based on this belief.

Mediators also fail to recommend taking custody away from batterers. In the San Diego study, mediators recommended joint custody in 91.4 percent of domestic violence cases, a rate even higher than their average of 90 percent joint custody recommendation for non-domestic violence cases.[83] Even when the father was clearly

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[76] Johnson, Saccuzzo, & Koen, *supra* note 53, at 1025.

[77] Mentaberry & Sheeran, *supra* note 56, at 12; Cal. Fam. Code § 1816 (West 2013).

[78] Cal. Ct. R. 5.215(j)(2).

[79] Johnson, Saccuzzo, & Koen, *supra* note 53, at 1033.

[80] *Id.*

[81] Rivera, Zeoli, & Sullivan, *supra* note 52, at 3.

[82] Dennis P. Saccuzzo & Nancy E. Johnson, *Child Custody Mediation and Domestic Violence*, 251 Nat'l Inst. Just. J. 21, 21 (2004).

[83] Johnson, Saccuzzo, & Koen, *supra* note 53, at 1035.

a perpetrator of abuse, he received at least some physical custody in 96.8 percent of cases.[84]

Courts will enforce mediators' recommendations, even when they conflict with the law. In *In re Marriage of Fajota*, the mediator's report explicitly acknowledged the father's history of domestic violence yet still made a joint custody recommendation, and the trial court followed this recommendation and granted joint custody.[85] The court's custody grant was later overturned on appeal for its failure to address the domestic violence issue.

Mediators also may be unprepared to detect abusive behaviors during a mediation session. Within a mediation session, an abuser may threaten the victim through certain coded phrases or body language.[86] Because of her history with the abuser, the victim understands that she is being threatened, while the mediator remains oblivious.[87] Not only can this continuation of abuse further traumatize the victim, it may intimidate her to cede ground to the batterer when negotiating her custody requests.

4. Solutions

States should allow victims of domestic violence to opt out of mediation. The majority of states already allow this.[88] However, a number of states, including California, have not implemented this policy.[89] California has tried to address the concerns of victims in mediation by allowing victims to meet separately with mediators.[90] While this is a positive step towards protecting the safety of victims, it is insufficient. The batterer frequently knows where to find the victim; if he wants to retaliate and attack her, he will be able to do it. Separate meetings do not negate the potential for future attacks.

Additionally, even if the parties meet separately, the goal of mediation is for the parties to agree on some terms. When the mediator meets with the batterer, and says, "Your partner is seeking sole custody," there is no mystery about the victim's request. The batterer will know that the victim went against his wishes, and he can retaliate against her at a later time. In some cases, even with separate meetings, the victim may be too afraid to ask for what she and her children need, out of fear that the request will anger the batterer.

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[84] *Id.* at 1038.
[85] *In re* Marriage of Fajota, 230 Cal. App. 4th 1487, 1492–94 (2014).
[86] Rivera, Zeoli, & Sullivan, *supra* note 52, at 4.
[87] *Id.*
[88] *See* Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 58.
[89] *Id.*
[90] Cal. Fam. Code § 3181(a) (West 1994).

If mediation is going to be conducted with couples with domestic violence histories, it is essential that mediators be highly trained on power differentials. Some advocates believe that a mediator can deal with power imbalances by exercising his or her own power in the mediation.[91] Under this model, the mediator lays out ground rules, chooses the topics of discussion, decides who may speak and for how long, and determines which spouse may present a proposal to the other.[92] These mediators are trained to watch for specific behaviors indicative of power imbalances, such as threats, insults, glaring, and passivity.[93] With proper training, it is possible for mediators to become more adept at working with couples with histories of domestic violence.

Another way to moderate power imbalances in mediation is to allow the victim to bring an attorney to advocate on her behalf. "Research in Maine has shown that the presence of attorneys moderates power imbalances and decreases the likelihood of unfairness. The attorney can act as a support person and as a spokesperson for the victim."[94] Under the California Family Code, attorneys are not allowed to advocate for their clients during a mediation, and can be excluded from mediation by the mediator.[95] This provision should be changed to allow for attorneys to attend mediation sessions and speak on behalf of their clients, especially in cases of domestic violence.

B. *Litigation Abuse*

While mediation poses problems for victims, litigated custody battles also create opportunities for abuse. "Litigation abuse" is defined as the batterer's use of the court system as a tool of coercive control over the victim.[96] Batterers often pursue litigation abuse as a tactic for several reasons: it is one of the few remaining ways that they can control a victim after separation, it can drain the victim's financial resources, and family courts allow for parties to demand many hearings.

1. Litigation as the Only Contact Left

Litigation abuse is a common tactic for batterers because it is often the only way left for batterers to stay in contact with their victims.[97] After the end of a relationship, a victim typically try to put

[91] Ver Steegh, *supra* note 51, at 186.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 200.
[95] Cal. Fam. Code § 6303(a) (West 2013).
[96] Bowles et al., *supra* note 55, at 22.
[97] Przekop, *supra* note 1, at 1061.

distance between herself and the batterer. But when a batterer files a motion in court, the victim is forced to respond.[98] Even if a victim has a restraining order or criminal protective order against the batterer, if the batterer files a motion to modify custody or visitation, then the batterer may get the chance to see the victim in court.[99]

2. Financial Motives for Litigation Abuse

Litigation is expensive. Batterers may pursue custody litigation in order to financially drain their victims, as custody litigation is costly.[100] A study of custody expenses for battered women found that their average court-related costs exceeded $90,000.[101] These expensive proceedings are often a hardship for battered women, as women's income tends to decrease significantly after divorce. "[O]ne study noted that the average post-divorce per capita income of wives and children approximates 68 percent of their before-divorce per capita income; whereas, the per capita income of husbands increased by 182 percent after divorce."[102] Victims of domestic violence are also likely to face even more dire economic conditions than other women going through divorce. Victims of domestic violence may also have suffered from economic abuse throughout the marriage, where the abuser prevented the victim from having money of her own or hid the family's money from her.[103] By the time of divorce, she may have very limited financial resources left.

When abused women are forced to spend all of their resources on fighting custody proceedings, it may seriously impact their ability to stay away from the batterer. Some research has found that when victims have limited resources to pay for legal representation, they may return to their abusive relationships at a rate of around 50 percent.[104] Batterers may thus coerce victims into returning to the relationship by draining them of economic resources, leaving victims without other options for financial stability.

Victims may also lose their jobs as a result of litigation abuse. If the victim is constantly required to appear in court to attend hearings, she may miss many days of work.[105] While most employers

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[98] *Id.*

[99] *Id.*

[100] Bancroft, Silverman & Ritchie, *supra* note 23, at 141.

[101] Hannah and Goldstein, *supra* note 9, at 14–24.

[102] Przekop, *supra* note 1, at 1062–63 (referring to Marsha Garrison, *Equitable Distribution in New York: Results and Reform*, 57 Brook. L. Rev. 621, 720 tbl.55 (1991)).

[103] Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, 83 N.Y. St. B.A. J. 40, 41 (Feb. 2011).

[104] Jaffe & Crooks, *supra* note 10, at 10.

[105] Przekop, *supra* note 1, at 1083.

will excuse a few absences, if the victim continues to miss work for months on end, she may risk losing her job.[106]

3. Frequency of Motions Allowed in Family Court

Court processes are easy for batterers to exploit because family court proceedings typically lack finality and are susceptible to frequent motions for updates and changes.[107] In most areas of law, final judgments and settlements end litigation, but verdicts in family court are open to frequent modifications.[108] Because custody agreements are formulated based on the child's best interest and based on the situation of each parent, as the child's interests change or a parent's situation changes, opportunities to revise the custody agreement arise.[109] Batterers may petition for changes to custody every time there is a minor change in the child or parent's situation.

4. Power Differentials in Representation

While batterers commonly hire attorneys to represent them in custody proceedings, most victims do not.[110] Many victims cannot afford to hire an attorney.[111] This places victims at a serious disadvantage in custody proceedings. Parents represented by attorneys are more likely to be awarded custody than parents who are not so represented.[112] Without an attorney, victims may have trouble navigating the court system and understanding court rules and procedures.[113]

Even if neither parent can afford an attorney, the batterer can use the power differential between himself and the victim to his advantage in court. When both parents proceed *pro se*, the batterer is allowed direct access to the victim in and out of court.[114] The batterer negotiates custody directly with the victim, which allows him a substantial amount of contact. The batterer may also be able to cross-examine the victim on the witness stand in court, often a traumatic experience for the victim.

5. Tactics of Litigation Abuse

Litigation provides many opportunities for batterers to abuse victims.[115] "Such measures [have] included requests for emergency

[106] *Id.*
[107] *Id.* at 1063.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1062.
[111] *Id.*
[112] Ver Steegh, *supra* note 51, at 167.
[113] Przekop, *supra* note 1, at 1063.
[114] Bowles et al., *supra* note 55, at 26.
[115] Watson & Ancis, *supra* note 20, at 176.

hearings, multiple charges of contempt, failing to supply appropriate documents, and accusations against the participants."[116] The National Council of Juvenile and Family Court Judges notes that abusive parents frequently make multiple appearances "seeking to undo orders that they perceive to be unfavorable to them, even in the absence of any change in circumstance between hearings."[117] Batterers may request continuances or otherwise seek to postpone final judgment.[118] Each time the batterer files a motion, he has another opportunity to continue his reach into the victim's life.

6. Solutions

Family courts can, on their own authority, order the party bringing excessive motions to pay the attorney's fees and costs of the opposing party.[119] Courts also have other options to discipline a batterer who files excessive motions. Courts can ban the batterer from filing any further actions or motions against the victim without permission from the court, find the batterer in contempt of court, or refer the batterer's attorney for disciplinary action.[120] In one such case, the California Court of Appeal wrote that the batterer's appeals were "[T]otally devoid of merit and were brought merely to continue an ongoing harassment of his ex-wife over custody of their child. . . . His actions are a sham, frivolous in nature, an abuse of the court system and deserving of an appropriate sanction."[121] The court imposed financial sanctions on the batterer and ordered him to pay attorney's fees to the victim.

If the batterer files frivolous actions against the victim in another civil court, victims have the option to fight back through their own legal processes. If a batterer files a frivolous motion against a victim in a federal court, the victim can ask the judge to sanction the batterer under Rule 11 of the Federal Rules of Civil Procedure.[122] This rule allows judges to deter abusive conduct in the courts and can result in monetary damages being awarded to the victim of the litigation abuse.[123]

Most batterers' claims against victims are filed in state courts, and thus the Federal Rules of Civil Procedure do not apply. However, some state legislatures have enacted analogous provisions.[124]

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[116] *Id.*

[117] Bowles et al., *supra* note 55, at 22.

[118] *Id.*

[119] *Id.* at 23.

[120] Hannah & Goldstein, *supra* note 9, at 14–27.

[121] *In re* Marriage of Kim, 208 Cal. App. 3d 364, 373 (1989).

[122] Przekop, *supra* note 1, at 1088.

[123] *Id.*

[124] *How Anti-SLAPP Laws Work*, Domestic Shelters (Nov. 4, 2015), https://

Twenty-eight states, including California and Massachusetts, have enacted "anti-SLAPP" (Strategic Litigation Against Public Participation) laws, which protect individuals from being sued frivolously.[125] For example, the Supreme Judicial Court of Massachusetts applied the Massachusetts anti-SLAPP law in a 2002 case. In that case, the court sanctioned an ex-boyfriend who filed a civil complaint against his ex-girlfriend to retaliate against her after she filed for a restraining order.[126] Applying the state's anti-SLAPP provision, the court determined that the burden shifted to the ex-boyfriend to demonstrate, by a preponderance of the evidence, that the ex-girlfriend's petition was "devoid of any reasonable factual support or any arguable basis in law."[127] The court, finding no such evidence, ordered the ex-boyfriend to pay the ex-girlfriend's costs and attorney's fees.[128] More courts can take advantage of these provisions to deter batterers from committing litigation abuse.

C. *Custody*

Custody is the area of family law most susceptible to abuse from batterers. Because of the high stakes for the victim and children in custody proceedings, batterers can take advantage of the victim's fear and demand significant custody rights for the purpose of staying involved in the victim's life indefinitely.

1. Batterers' Threats About Custody

Even before the first court appearance in a dissolution proceeding, the batterer may have already made threats about custody to abuse and control the victim. Many batterers threaten that if the victim leaves, the batterer will be able to take the children away through a custody action. This is one of several common threats that batterers make to try to stop their victims from ending the relationship. "In a pilot study of 94 battered women's experiences with child custody, batterers' threats to keep the women from leaving included hurting the children (25 percent), kidnapping the children (25 percent), and taking the children through a custody action (35 percent). In this sample, 20 percent of the women reported returning to the batterers at least once because of these threats."[129] Batter-

www.domesticshelters.org/domestic-violence-articles-information/how-anti-slapp-laws-work#.Vv7aAZMrLfZ. [https://perma.cc/Q6N3-GCXF].

[125] *Id.*

[126] Fabre v. Walton, 436 Mass. 517, 524 (2002); *see also* S.A. v. Maiden, 229 Cal. App. 4th 27 (2014).

[127] *Fabre*, 436 Mass. at 524.

[128] *Id.* at 525.

[129] Marsha B. Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in Battering and Family Therapy: A Feminist Perspective 175, 181–

ers make threats involving custody because such threats effectually scare victims into staying with the batterer.

2. Custody Does Go to Batterers

Batterers' threats about custody are not hollow; custody does frequently go to batterers. While in many cases victims do receive full custody, many batterers continue to receive joint custody.[130] A project in Massachusetts found that out of 40 men who had abused their wives and children, 15 were granted sole or joint physical custody by the courts.[131]

Batterers are more likely to seek custody of children than non-batterer fathers.[132] Some researchers have found that men who abuse their partners contest custody at least twice as often as non-batterer fathers.[133] Batterer fathers tend to stay highly involved in children's lives after divorce, in contrast to the general trend of fathers gradually disengaging from their children following divorce.[134]

Despite laws that require judges to consider domestic violence in their decisions, many judges still wish to give some amount of custody to batterers. A general belief exists in some courts that joint custody is in the best interest of children, despite the fact that no studies have shown that joint custody leads to better outcomes for children in families with a history of domestic violence.[135] Other scholars suggest that courts continue to give joint custody to batterers to reassure the batterer he "still has a central role to play in the child's life."[136] This prioritization of the batterer's needs over the needs of the children and victim is highly troubling and pervasive.

3. Custody Gives Batterers a Tool for Abuse

When batterers are granted custody, they can use the children as a mechanism to stay involved in the life of their victims.

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82 (Marsali Hansen & Michèle Harway eds., 1993).

[130] Daniel G. Saunders, *Research Based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence*, 12 J. OF CHILD CUSTODY 71, 82 (2015).

[131] DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, RATES AT WHICH ACCUSED AND ADJUDICATED BATTERERS RECEIVE SOLE OR JOINT CUSTODY (2013), http://www.dvleap.org/LinkClick.aspx?fileticket=97ddo5pFEso%3D&tabid=1118 [https://perma.cc/S3C4-DU25].

[132] *Id*.

[133] *Id*.

[134] Jennifer L. Hardesty & Lawrence H. Ganong, *How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands*, 23 J. OF SOC. & PERS. RELATIONSHIPS 543, 554 (2006).

[135] BANCROFT, SILVERMAN & RITCHIE, *supra* note 23, at 150.

[136] Dalton, Carbon & Olesen, *supra* note 15, at 22.

In one study, 70 percent of domestic violence victims interviewed reported that batterers used the children to stay involved in the victims' lives.[137]

Batterers granted joint custody often use custody as an excuse to stay in communication with the victim. Because of the history of the power dynamics between the couple, batterers "tend to use the power of joint parenting to exert control over the other parent."[138] Batterers may "gain access to victims by manufacturing reasons to 'discuss' child rearing or by insisting upon joint attendance at school events, parent-teacher meetings, or medical appointments. They can also withhold consent for a child's counseling, medical procedures, and extra-curricular school events."[139] In this way, batterers stay involved in the victims' lives and continue to abuse them.

Batterers can use custody as an opportunity to pass threatening messages through children and back to their mothers.[140] One victim reported that her child told her, "Daddy is going to kill me with a gun. He's told me that he bought a book of 1001 ways to murder somebody."[141] Another victim reported that the batterer "used his 3-year-old to deliver threats: 'Does mommy have a boyfriend? Tell mommy I'll kill her if she has a boyfriend.'"[142]

Other batterers manipulate victims through disrupting child care routines. In some cases, batterers deliberately upset family routines to punish victims for the separation. In one case, a mother reported that the batterer would show up in the middle of the child's nap time in order to disturb the family.[143] Other batterers have frequently failed to appear for scheduled visits or arrived late.[144] These disruptions disturb the family routine and leave the mother and children feeling disoriented. One mother described such disruptions, stating, "We were splitting up, but he was still controlling my life."[145] One author notes that such disruptions contain "a powerful message about the abuser's ability to continue to

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[137] Ruth E. Fleury-Steiner et al., *"No Contact, Except . . .": Visitation Decisions in Protection Orders for Intimate Partner Abuse*, 11 Feminist Criminology 3, 4 (2014).

[138] Saunders, *supra* note 130, at 82.

[139] *Id*. at 82–83.

[140] Judith Wuest et al., *Intrusion: The Central Problem for Family Health Promotion Among Children and Single Mothers After Leaving an Abusive Partner*, 13 Qualitative Health Res. 597, 602 (2003).

[141] Hardesty & Ganong, *supra* note 134, at 555.

[142] Wuest et al., *supra* note 140, at 602.

[143] *Id.* at 605.

[144] *Id.*

[145] *Id.*

disrupt his or her partner's life, and the necessity that it be arranged around the abuser's needs."[146]

4. Solutions

Courts should seriously consider the risks of granting any amount of custody to a batterer. All states have enacted statutes that require courts to consider domestic violence evidence in custody cases, and about half have a rebuttable presumption against giving custody to a batterer.[147] In California, Family Code Section 3044 reads: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to [Family Code] Section 3011. This presumption may only be rebutted by a preponderance of the evidence."[148]

Rebuttable presumption statutes provide an excellent way to prevent abusive parents from obtaining custody of children. This presumption is triggered if one parent was convicted of domestic violence against the other parent or if any court has found that the parent committed domestic violence against the other parent or the children.[149] One study found that in states with a rebuttable presumption statute, more custody orders were granted to the victim-mothers, and the batterer-fathers' visits were limited through restrictive conditions and a structured schedule.[150]

If a batterer does receive some form of custody, courts can still work to protect the victim from excessive in-person contact with him. To avoid unnecessary and potentially abusive communication between the victim and the batterer, courts can work out a custody plan in advance that contains a very detailed and precise visitation order, so there is no need for ongoing interpretation.[151] A detailed visitation order will prevent the batterer from exploiting

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[146] Dalton, Carbon & Olesen, *supra* note 15, at 22.

[147] *See* Am. Bar Ass'n Comm'n on Domestic Violence, *supra* note 40.

[148] Cal. Fam. Code § 3044 (West 2004).

[149] *Children and Domestic Violence*, Cal. Cts., The Judicial Branch of Cal., http://www.courts.ca.gov/1268.htm [perma.cc/8FZT-A2R9].

[150] Allison Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 Violence Against Women 1076, 1101 (2005).

[151] Dalton, Carbon & Olesen, *supra* note 15, at 28–9.

any vagueness for the purpose of contacting the victim or bringing the victim back to court to resolve the dispute.[152]

Courts should also consider implementing supervised exchange agreements. In a supervised exchange agreement, the abuser does not collect the child directly from the victim, but instead from a third-party, such as the child's school.[153] This remedy can be excellent when the abuser does not pose a threat to the child directly, but direct exchanges with the victim could be problematic and conflict-provoking.[154] This method also avoids re-traumatizing the victim by lessening the constant in-person contact between her and the abuser and reducing the chance that children will witness physical abuse.[155]

D. *Supervised Visitation*

1. The Uses of Supervised Visitation

Sometimes a judge does not feel that it would be safe for a child and a batterer to be alone together, but the judge still wants to keep the batterer involved in the child's life.[156] In these cases, courts may assign supervised visitation.[157] Supervised visitation is contact between a child and a parent that takes place in the presence of a third party, who monitors safety during the contact.[158]

Supervised visitation is common in cases of domestic violence. Studies have found that many batterers are granted supervised visitation with children, even when there is a substantiated claim of domestic violence.[159] One study found that 80 percent of fathers with a known history of domestic violence still received visitation.[160]

Supervised visitation can encompass a range of services, including, at its most intensive level, one-to-one supervision with a trained observer present at all times.[161] There are also less intensive options for supervision available, including exchange supervision,

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[152] *Id.* at 29.

[153] Peter G. Jaffe, Claire V. Crooks & Frances Q.F. Wong, *Parenting Arrangements After Domestic Violence*, 6 J. OF THE CTR. FOR FAMS., CHILDREN & THE CTS. 95, 104 (2005).

[154] *Id.*

[155] *Id.*

[156] Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 229 (1995).

[157] Jaffe, Crooks & Wong, *supra* note 153, at 103–04.

[158] Straus, *supra* note 156, at 229.

[159] Fleury-Steiner, *supra* note 137, at 7.

[160] *Id*.

[161] Straus, *supra* note 156, at 234–35.

under which only the transfer of children at the start and end of visits is monitored.[162]

Supervised visitation can be a good resource for courts that wish to keep a batterer in the child's life. Supervised visits occur in a safe setting, where the batterer cannot physically harm the child.[163] If the batterer initiates aggressive or manipulative behaviors, the supervisor can intervene.[164] Supervised visits can also reduce a victim's anxiety about the child's contact with the batterer, because the victim knows that the batterer is being carefully monitored.[165] Battered women report feeling less anxiety after the court has instituted supervised visitation.[166]

Supervised visitation still has its limitations. First, there are concerns that many supervisors at supervised visitation centers have not been well-trained in detecting abusive behaviors.[167] A supervisor must be trained to be vigilant to not only signs of physical abuse, but also verbal or emotional abuse.[168] Second, supervised visitation is not a universal solution that works for every case. Advocates worry that courts assign supervised visitation too readily, without addressing fundamental questions about whether it is in the best interest of the child to continue to have contact with the batterer.[169] Third, supervised visitation is always a temporary measure, and courts must have a plan for what will happen when the supervised visitation period ends.[170] Courts should continuously evaluate the batterer's progress throughout supervised visitation and ensure total compliance before awarding the batterer any custody.[171] Courts should not transition a batterer from supervised visitation to unsupervised visits merely because the cost of supervised visitation is high; the court should only end supervised visitation when there is evidence that it is safe for the batterer to be alone with the child.

2. The Risk of Supervised Visitation Becoming a Tool of Abuse

Sadly, though many parents use supervised visitation as a chance to reconnect with their children, some batterers use

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[162] *Id.* at 234.
[163] *Id.* at 238.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 239.
[167] Jaffe, Crooks & Wong, *supra* note 153, at 103–04.
[168] *Id.*
[169] Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J.L. & FAM. STUD. 201, 205–06 (2007).
[170] Jaffe, Crooks & Wong, *supra* note 153, at 103.
[171] *Id.*

supervised visitation as an opportunity to continue to abuse their ex-partners.

While supervised visitation centers address some of the problems of batterer abuse, some forms of abuse are still possible inside the visitation center.[172] Even though a batterer may not be able to physically hit the child in the visitation center, he may be able to exhibit other abusive behaviors. Some batterers have passed threatening notes to their children at supervised visitation centers.[173] Some batterers have whispered threats to their children, out of hearing range of visitation center staff.[174]

Some batterers do not use supervised visitation to focus on the children at all, but instead remain focused on their victims. For example, some batterers use visitation as a chance to gather information about victims to plan an assault or stalking by asking the children about their mother's address, job, or routines.[175] In addition, the visitation center itself can give the batterer an opportunity to attack. The batterer knows that his victim will be present at the supervised visitation center to drop off her children. He can plan an assault accordingly, or follow her home after a visit. In one case, a woman was murdered in the parking lot of a supervised visitation center while bringing her child for visitation.[176]

3. Solutions

Courts should consider assigning supervised visitation only in cases where it would be healthy for the child to continue to have contact with the batterer. In cases where the batterer has a history of using manipulation or emotional abuse, child-parent conversations must be actively monitored by a trained supervisor. Courts should receive status updates on how supervised visitation is going and not hesitate to end visitation if the batterer behaves inappropriately.

Supervised visitation centers must ensure their facilities and parking lots are safe for domestic violence victims and their children. Extra security guards should be stationed in the parking lots when domestic violence victims will be dropping off their children. Visitation centers also must take care to ensure a batterer is not able to follow a victim home after pick-up at the visitation center.

E. *Child Support*

1. Child Support as a Tool of Abuse

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[172] Bancroft, Silverman & Ritchie, *supra* note 23, at 138.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 136.
[176] *Id.*

For many families, court-ordered child support is an important tool to help families stay financially stable after divorce. But in domestic violence cases, child support payment disputes can give batterers another opportunity to try to exert control over their victims.[177]

Many victims, out of fear of the batterer, are afraid to file for the child support that their children need. One victim said that going after child support from her batterer "would be like poking a stick at a snake."[178] Many women report lowering or waiving their requests for child support because they feared further physical violence.[179] Research on child support awards indicates that the more fear a mother has of the father, the lower the child support award will be.[180] After an initial award of a low amount of child support, many women are afraid to return to court to ask for an increase, even if their children's needs have increased since the award.[181]

Batterers may use child support disputes as a bargaining chip in their divorce arguments with their victims. Batterers often focus on the balance between child support and custody.[182] When a father takes on a larger share of the custody, often his child support obligation is reduced.[183] Some batterers may petition the court for custody, even though they do not want custody. They do so solely in order to reduce their child support payments.[184] These custody requests often make victims afraid for their children's safety, and may make victims more likely to acquiesce on other demands.[185] Some batterers may even ask for custody specifically to retaliate against the mother, because she requested child support.[186]

A batterer may also use child support obligations as an excuse to stay very involved in the victim's life.[187] Some batterers may feel that paying support gives them a right to dictate how the victim should live.[188] Batterers may ask the children questions about the

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[177] Watson & Ancis, *supra* note 20, at 176.

[178] Tyra Lindquist, *Child Support and Domestic Violence*, Wash. St. Coalition Against Domestic Violence 1, 5 (June 2006), http://wscadv.org/wp-content/uploads/2015/06/Child-Support-and-Domestic-Violence.pdf [https://perma.cc/RCN2-Q9C3].

[179] Hardesty, *supra* note 6, at 606.

[180] *Id.*

[181] *Id.* at 610.

[182] Bancroft, Silverman & Ritchie, *supra* note 23, at 142.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] Przekop, *supra* note 1, at 1071.

[187] Lindquist, *supra* note 178, at 5.

[188] Wuest et al., *supra* note 140, at 606–07.

victim's lifestyle, in order to look for reasons to bring her back to court for a proceeding seeking a reduction in child support.[189]

Even when mothers do file child support claims against batterers and win, the batterers often fail to pay.[190] According to some research, batterers are more likely than non-batterers to fail to pay child support.[191] Batterers may lie to the court about their income or move from job to job frequently to avoid being forced to pay child support.[192] Denying child support to victims is a form of economic abuse that leaves the victims without the means they need to take care of their children.[193] Some victims have reported that batterers use this form of financial abuse as a revenge tactic.[194] Batterers may know that in order for child support awards to be enforced, "on a practical level, women are required to initiate proceedings first to locate the father and then to seek legal redress."[195] Many victims may be afraid to push the batterer to pay child support, out of fear that he may physically harm them or otherwise retaliate.[196]

2. Solutions

Child support in cases of domestic violence requires the court to carefully consider the appropriate amount of child support that should be awarded. Even if the victim is requesting a low award of child support, the court should consider the possible factors in her decision and make an independent judgment about the appropriate award.[197]

When batterers fail to pay child support, the court must strictly enforce the child support obligation. Batterers may avoid paying child support in order to prolong the court case and require the victim to initiate further proceedings. Courts should take the first instance of a failure to pay child support seriously and not hesitate to find batterers in contempt of court.[198]

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[189] *Id.*

[190] Bancroft, Silverman & Ritchie, *supra* note 23, at 139.

[191] Przekop, *supra* note 1, at 1060.

[192] *Id.* at 1071.

[193] *Id.*

[194] Watson & Ancis, *supra* note 20, at 176.

[195] Wuest et al., *supra* note 140, at 606.

[196] Bancroft, Silverman & Ritchie, *supra* note 23, at 139.

[197] *See* Cal. Fam. Code § 4065 (West 2013) (allowing courts to accept a lower-than-usual child support amount by stipulation of the parties, but requiring the court to consider certain factors first).

[198] *See* Cal. Fam. Code § 290 (West 2013).

IV. Conclusion

The ease and frequency with which batterers take advantage of the custody process to bully and abuse their victims is deeply troubling. Family courts must take a proactive role in preventing abuse through the legal system. Family court judges and mediators should attend trainings on the psychological profiles of batterers and victims, so they are more capable of identifying domestic violence histories in court or in mediation sessions. Family court judges and mediators should vigilantly watch for abuse throughout the mediation process, and all states should allow domestic violence victims to opt out of mediation. In litigation, judges should remain aware of the possibility of litigation abuse, and sanction batterers who file frivolous motions. Courts should be wary of granting custody or visitation to batterers, and if they do, courts should carefully structure all agreements to decrease the need for contact between the parties. When courts award child support in domestic violence cases, judges should ensure that the batterer does in fact pay and that victims do not have to repeatedly face the batterer to enforce payment. Steps like these will help family courts ensure greater access, fairer outcomes, and increased safety for victims of domestic violence and their children.