

HOW DO WE KNOW CUSTODY COURTS ARE SENDING CHILDREN TO LIVE WITH ABUSERS?

TEN WAYS TO KNOW THE CUSTODY COURT SYSTEM IS BROKEN

by Barry Goldstein

Mothers and domestic violence advocates have been complaining for many years about problems in the custody court system that have resulted in large numbers of children being sent to live with abusive fathers while safe, protective mothers are denied any meaningful relationship with their children. Courts have tended to dismiss the complaints by referring to the mothers as “disgruntled litigants.” As more concern about the problem has been expressed and more research performed, the mothers’ complaints have been confirmed. Early in 2010, a new book co-edited by Dr. Maureen T. Hannah and Barry Goldstein, *DOMESTIC VIOLENCE, ABUSE and CHILD CUSTODY* will be published and end any doubts that there is a pattern of mistakes made in the custody court system. These mistakes have caused thousands of cases to be mishandled and placed the lives and well being of battered women and their children in jeopardy. The book includes chapters by over 25 of the leading experts in the United States and Canada including judges, lawyers, psychiatrists, psychologists, sociologists, journalists and domestic violence advocates. Although these experts come from different disciplines and approached the issue from different directions, there is a remarkable consensus about the problem and the solution. The up-to-date research and information now available makes it clear that the present practices can no longer be justified and the custody court system must create the necessary reforms to protect the safety of children and protective mothers in domestic violence custody cases. This article will discuss ten reasons we know the custody court system is broken and must be reformed.

1. **Mothers’ Complaints:** The problem this article seeks to discuss are cases in which a mother who has been the primary caregiver and makes allegations of domestic violence and/or child abuse loses custody to the alleged abuser and receives supervised visitation or no contact with her children. These cases have increased since federal laws designed to increase enforcement of child support orders were passed. Male supremacist groups have encouraged abusive fathers to seek custody as a way to avoid paying child support, to pressure his partner to stay or punish her for leaving. The courts and the often inadequately trained professionals they rely on, glad to see the involvement of fathers in children’s lives often fail to recognize the tactic and motivation. Courts tend to look at each case separately and so fail to see the patterns of mistakes in these cases. Demonizing their victim is a common strategy employed by abusers so a court could believe there was something profoundly wrong with an individual mother to justify the extreme outcome. When experts look at the pattern of these cases it is evident that the unusual circumstances needed to justify a particular outcome cannot be as common as the results would suggest. Women and children make deliberately false allegations of abuse between one and two percent of the time, but the court decisions support the myth that such deliberate false allegations are

common. Furthermore, domestic violence allegations are painful and embarrassing to make and require the victims to speak about uncomfortable issues and questions. Research demonstrates that allegations of domestic violence and child abuse make women less likely to obtain custody. We can't know that an individual case was improperly decided without careful review of the case, but we know the frequency of outcomes that give custody to alleged abusers cannot possibly be based on objective facts.

2. **Available Research:** The modern movement against domestic violence is only about thirty years old and there was little research available when it started. We now have extensive research to demonstrate common mistakes courts and the often-unqualified professionals they rely on use in domestic violence custody cases. Studies show that while evaluators believe they are considering domestic violence in their investigation of the family, in fact most fail to do so. We have many studies proving widespread gender bias against women in the approaches used by the courts. Evaluators regularly use psychological testing that has little or no relevance to the issues before the court and is gender biased. Psychologists testifying before the courts rarely inform the judges that their results are based upon probabilities so that factors in the case that would reduce those probabilities can be considered. Most important to the present topic is research that considers the accuracy of the actual court decisions. Most custody cases (over 95%) are settled more or less amicably. The problem is with the minority of terrible cases that continue to trial and beyond. Courts often think of them as "high conflict" cases, but in reality these are mostly domestic violence cases. Research studies vary somewhat on the percentage of these cases that involve abusive fathers, but all agree the majority of such cases involve domestic violence. I believe the studies that found 90% of these contested custody cases are caused by abusive fathers because unqualified professionals frequently miss domestic violence. In any event, contested custody cases should be being decided overwhelmingly in favor of protective mothers because most of the fathers are abusive, but 70% of the cases result in custody or joint custody to the father. This does not tell us an individual case was wrongly decided, but does demonstrate that a large percentage of cases are being decided in a way that is harmful for the children.
3. **Battered Mothers Testimony Project and Research:** Several states including Massachusetts, Pennsylvania, California, Arizona and New York City have done studies based on questionnaires filled out by protective mothers. These surveys have demonstrated widespread problems in the custody court system, many common mistakes and outcomes that fail to protect battered women and their children. This is admittedly not scientific research as the participants are volunteers rather than randomly selected (much of the "research" cited by male supremacist groups comes from interviews with alleged abusers, but is often treated as if it were valid research). Sociologists, Sharon Araji and Rebecca L. Bosek went several steps further for their chapter in DOMESTIC VIOLENCE, ABUSE and CHILD CUSTODY. They performed a similar study in Alaska and then compared the results from the various states that interviewed protective

mothers. The authors found the responses similar across the several state surveys. They then compared the results of the surveys filled out by protective mothers to scientific research performed by a variety of researchers using accepted scientific methods. Significantly the findings from the protective mothers are strongly supported by the scientific research. In other words, the complaints by protective mothers that have been so often dismissed as coming from “disgruntled litigants” actually have substantial validity.

4. **Courageous Kids:** If a court system wanted to determine the validity and value of psychological evaluations, it would look for research that examined how the recommendations and approaches used by the evaluators worked out in the lives of the children. Without such research there is no way to determine if the time, money and results for evaluations are useful. In fact there is no such research and I would certainly recommend obtaining such research if evaluations were to continue to be used in child custody cases. The closest we have to such research is the Courageous Kids Network. The Courageous Kids are young adults who were forced to live with abusers by the decisions of the custody court. They are now old enough to have escaped their abusers and are speaking out about their experiences. The stories are painful to hear because they had to survive such awful abuse, but life affirming as they overcame the obstacles to support each other and help change the broken system. These heroes have spoken at judicial trainings, legislative hearings and domestic violence conferences. Their presentations are effective because it is all too easy to discredit protective mothers, but hard to discredit the children for whom the courts and the professionals are supposedly trying to help. Remember these children were forced to live with and be influenced by the abuser. In most cases they had to endure “therapy” designed to support the abuser and discredit the protective mother. There are many psychological, safety and other reasons to discourage such children from coming forward and speaking out. The fact so many Courageous Kids have spoken out demonstrates the courts are getting large numbers of cases tragically wrong.
5. **Review of Bad Cases:** The authors of the 25 chapters in the book have carefully reviewed hundreds if not thousands of these cases. In their book, FROM MADNESS TO MUTINY, Dr. Amy Neustein and Michael Leshner reviewed over 1000 cases. The Truth Commission listened to the testimony of 16 women and reviewed records from their cases. Many other experts have studied domestic violence cases where the alleged abuser received custody and the protective mother received little or no contact with her children. In these cases we have found widespread mistakes, bad practices, use of myths and stereotypes, the failure to use up-to-date research, gender bias and outcomes that place children at risk. The legal system works on the assumption that once a case is decided or facts determined that the findings are established and any further consideration should be based upon the assumption the court decided the case properly. This assumption will lead to misinformation and inaccurate research because there is strong evidence that most contested domestic violence custody cases and certainly

those that result in custody to the alleged abuser are wrongly decided. We are particularly concerned with the growing court practice of retaliating against protective mothers and professionals trying to help them for exposing court mistakes in these cases. Frequently a mother's refusal to believe an abuser is safe after the court fails to recognize his abuse is used to justify severe and extreme limitations on her access to her children without regard to the harm such rulings have on the children.

6. **Parental Alienation Syndrome:** PAS is a bogus theory created based on the personal biases of Dr. Richard Gardner. His books were self-published and never peer reviewed. It is used only in domestic violence custody cases to prevent or shorten investigations of the father's abuse. PAS assumes that if a child expresses negative feelings about the father or doesn't want visitation, the only possible explanation is that the mother alienated the child and the solution is to force the child to live with the abuser and have at most supervised visitation with the protective mother who has been the primary attachment figure for the child. PAS is not recognized by any reputable professional organization and does not appear in DSM IV, which contains recognized diagnosis. Dr. Paul Fink, past president of the American Psychiatric Association wrote a chapter for the book in which he demonstrates the invalidity of PAS. Dr. Fink points out that Richard Gardner made numerous statements complaining that society takes child sexual abuse too seriously and that sex between adults and children can be appropriate. This explains why PAS is so often used to give custody to fathers who have sexually abused their children. Dr. Fink points out that psychologists are starting to lose their licenses for using PAS in evaluations. They are, in effect diagnosing something that does not exist. Thousands of the cases in which alleged abusers won custody was based upon the discredited PAS or PAS by a different name. Any case in which "evidence" of PAS was allowed was likely wrongly decided.
7. **Gender Bias:** The Truth Commission recommended that rather than training professionals with general domestic violence information, all professionals should have training in Gender Bias, Recognizing Domestic Violence and the Effects of Domestic Violence on Children. This is because they found that many of the mistakes made in these cases were caused by a lack of understanding of these basic concepts. At least 40 states and many other districts and communities have created court-sponsored gender bias committees. They have found widespread gender bias and particularly in domestic violence custody cases. Among the common problems were blaming victims for their abuser's behavior, burdening women with higher standards of proof and giving fathers more credibility than mothers. Other research, including the chapter in the book by Molly Dragiewicz has made similar findings. In one New York case the court gave custody to an abuser and denied the protective mother any contact with the children after the evaluator used and the judge supported a certainty standard for the mother and probability standard for the father. Few litigants could win a case when faced with a certainty standard. At least 15-20 different judges were asked to review this clear example of gender bias (the different standards were stated in the

evaluator's report and repeatedly challenged in the transcript), but every judge failed to correct this obvious error. Lynn Hecht Schafran wrote a brilliant article "Evaluating the Evaluators" that illustrates the problem. The article describes a new psychologist asked to perform an evaluation on a young family. She went to the father's apartment and found it a complete mess with no food in the refrigerator. She wrote the father lives in a typical bachelor apartment. She went to the mother's apartment and found it to be somewhat messy, but not as bad as the father's. She had food in the refrigerator, but not as much as preferable. The evaluator wrote the mother lives in a messy apartment with inadequate food. The evaluator had a supervisor because she was new and the supervisor asked if she saw what she had done. The evaluator could not believe she had engaged in gender bias and quickly corrected the report. The article is valuable because it demonstrates that professionals acting in good faith (including women) can easily engage in gender bias without realizing it because of the sexism and stereotypes so prevalent in our society. How can anyone reasonably believe the courts are reaching fair decisions in domestic violence custody cases when gender bias is so common?

8. **Failure to Recognize Domestic Violence:** Many of the mistakes custody courts make have to do with failing to recognize domestic violence. In fairness some of the problem is caused because victims or their attorneys fail to present the necessary evidence. Unqualified professionals often discount allegations of abuse based upon information that represents a normal and reasonable response to his abuse. In the book, Judge Mike Brigner writes about training judges in domestic violence. They often ask him how to respond to all the cases where women are lying about domestic violence. When he asks what they mean, they cite cases where women go back to their abuser, withdraw petitions for a protective order, fail to file police complaints or don't seek medical care. In reality there are safety and other explanations for women's response to domestic violence and none of these examples should be used to assume her complaints are false. At the same time they use information of limited value to discount domestic violence, professionals fail to use helpful and relevant information to understand the pattern of domestic violence tactics. Too often the professionals are interested only in physical abuse. They fail to consider a variety of controlling and coercive tactics. They don't understand the significance of a woman's fear of her partner. Domestic violence advocates are the only professionals that work full time on domestic violence issues. The advocates receive more training and have more knowledge of domestic violence than the professionals relied on by the courts. Domestic violence agencies have very limited resources so they are forced to screen clients before providing services. Accordingly when a woman is receiving services from a domestic violence agency, it is a strong indication that she is a battered woman, but many professionals fail to consider this information. Although seeking custody to pressure a mother to return or punish her for leaving is a common abuser tactic, few courts consider why a father with limited involvement with the children prior to separation suddenly demands full custody. Similarly unqualified professionals often fail to consider evidence that a man

believes his partner has no right to leave is a strong indication of his motivation in seeking custody. How can courts be expected to decide domestic violence custody cases appropriately if they don't know what to look for when determining the validity of domestic violence allegations?

- 9. Effect of Domestic Violence on Children:** Every state has passed laws designed to promote greater consideration of the effects of domestic violence on children. Some states require domestic violence to be considered in making custody and visitation decisions and others create a presumption against custody for abusers (although often the laws or the courts require a level of proof or create other restrictions that limit the effectiveness of these laws). Prior to these laws, when a protective mother asked to limit the father's contact with the children because of domestic violence, the judge would ask some version of "Does he also abuse the child?" If the answer was no, the court treated the father as if he was just as appropriate for custody and visitation as the mother. The change in laws was based on overwhelming research that children witnessing domestic violence were harmed as much as children directly abused. The research found these children to be at substantially greater risk of a wide range of dysfunctional behaviors when they were older. In other words, domestic violence is a serious form of child abuse. We have found, however that courts frequently place greater reliance on other custody factors that have far less consequences to the safety and well being of children. In fairness, the courts are not solely to blame as legislatures have passed laws like "friendly parent" factors and failed to make domestic violence and safety the primary factors in custody determination. There is no research that "alienating" statements or attitudes by one parent to the children has the kind of serious long-term harm of domestic violence and yet many of the cases reviewed focus far more attention on alleged alienation. When mothers respond normally to their partner's abuse with fear or attempts to protect the children, courts frequently treat this as the most important issue in deciding custody. This is a common example of what was discussed in gender bias reports in that the mother is held responsible for her reaction to the father's abuse instead of holding the father responsible for his abuse. This type of mistake is at the heart of the common mistakes made by custody courts and does not serve the best interests of the children. If children are having problems as a result of the father's abuse, unqualified professionals often blame the divorce and separation instead of his abuse. They often recommend cooperation and interaction between abuser and victim that is the opposite of what is healthy for children, but often benefit the fathers' cases. When children appear to be doing well, inadequately trained professionals mistakenly assume this means the abuse allegations are false. Some children respond to abuse by trying to be perfect and take on adult responsibilities. Many years later the harm of the father's abuse comes out in debilitating ways. Similarly children will often behave well with abusers and act out with their mothers because they know she is the safe parent. This is often misunderstood and courts reach the false conclusion that the father is the better parent. As long as the courts fail to understand the long-term harm to children of

placing them with abusers, the courts will continue to make decisions that ruin children's lives.

10. **Extreme Results:** If a court were to give custody to a protective mother and limit the father to supervised visitation because of his domestic violence, it would be following the recommendations of up-to-date research. In other words there is a scientific basis for such an outcome. The researchers weigh the harm of restricting the children's contact with their father and the harm the father is likely to cause with unrestricted visitation and the message sent to the children by awarding normal visitation with someone they know abused their mother. Instead what we are seeing is alleged abusers receiving custody and protective mothers having supervised or no visitation. Obviously, in these cases the courts are assuming the mother's allegations of abuse are false. They justify the visitation restrictions by their concern the mother will continue to believe she was abused and say negative things about the father. Where is the research that the harm to the children of hearing such statements is greater than the harm of being denied a normal relationship with their mother? Even in intact families the children often hear negative comments about the other parent. In other words, these extreme court decisions are based upon the belief systems and biases of court professionals and not up-to-date research. Many children have been denied any contact with their mothers in these cases. Ironically fathers are often granted custody based on the belief they are the friendlier parent and will promote the relationship between the mother and children, but he proceeds to terminate all contact once he has control. Many courts that jumped all over mothers for requesting the court restrict the father's access have done nothing in the face of the father preventing visitation or other contact between mother and children. Rapists and even murderers frequently receive some supervised visitation and yet mothers who sought to protect their children from an abuser are completely cut off from their children. The extreme outcomes faced by protective mothers are unsupported by any research, but demonstrate serious flaws in the custody system.

Now That We Know the Custody Court System Is Broken

Now is not the time for blame or attacks. As the Schafran article demonstrates, it is all too easy for good and caring people to fail to understand and recognize gender bias and domestic violence. In the book, Judge Hornsby writes that in his 19th year on the bench he finally understood the proper way to handle requests for protective orders. The judge's humility, integrity and openness should serve as a model to the legal community as it responds to the clear information and research that the present court practices are mistreating protective mothers and their children. I was recently at a domestic violence conference in Hawaii where a court official was asked a question implying serious problems in the court system. She responded by saying if someone didn't like a decision they could appeal. To her credit she later acknowledged that many people don't have the money for such an appeal. This official fell into the trap of responding defensively to criticism. The challenge for the custody court system is to be open to the up-to-date

research even though it finds the courts have made widespread mistakes in its handling of domestic violence custody cases. The medical community faced a similar situation in responding to research that found avoidable mistakes were responsible for 100,000 deaths each year in our nation's hospitals. For years, fear of lawsuits, discipline and damaged reputation caused the medical profession to ignore, deny and seek to place blame on others. Finally they realized this was a losing strategy. Doctors, nurses and hospitals have now come together to correct the problems with more openness and accountability. Lives have already been saved from implementation of this approach and the campaign to prevent such avoidable errors. Rather than harm the medical community's reputation, this campaign has increased the respect for the medical community. I believe if the legal community makes a similar effort to apply the latest research and create a campaign to avoid the kinds of tragic mistakes that have ruined the lives of so many women and children, the campaign will improve the reputation of the legal system. The promotion of the safety of battered mothers and their children is not and should not be considered a partisan issue.

Every state and every court system has rules and laws against domestic violence. Although some fringe male supremacist groups object to these laws, society has spoken and there is no longer any legitimate dispute about whether domestic violence should be tolerated. If a community had a rash of arson fires and the courts and legislature wanted to figure out how to respond they would seek the expertise of the experts. The experts are the firefighting community because they know best how to recognize arson, prevent it and respond to arson. No one would ever accuse the firefighters of being partisan because they are always against arson. In responding to domestic violence the experts are the domestic violence community. They are the only profession working full time on domestic violence issues and know how to recognize domestic violence, the best ways to prevent it and the harm it causes. Too often the courts have failed to take advantage of this community resource because they viewed domestic violence advocates as partisans. The validity for this claim ended when society determined it would no longer tolerate domestic violence and passed laws to enforce this determination. The crimes of arson and domestic violence are treated differently because arson has always been a crime and domestic violence is a relatively new crime and most firefighters are men and most domestic violence advocates are women. In this still sexist society what women say is not treated with the respect and value that what men say is. The domestic violence community is an important and valuable resource that the court system can benefit from as it applies the up-to-date research to practices that are now discredited. The legal system must use this research to launch a re-evaluation of its response to domestic violence custody cases so that custody courts become a safe place for battered mothers and their children. We are ready to work with them to help accomplish society's goal of ending domestic violence.

Barry Goldstein is the author of SCARED TO LEAVE AFRAID TO STAY. He has been an instructor and supervisor in a NY Model Batterer Program for 10 years. He was an attorney representing victims of domestic violence for 30 years. He now provides workshops, judicial and other trainings regarding domestic violence particularly related

to custody issues. He also serves as a consultant and expert witness. His new book, DOMESTIC VIOLENCE, ABUSE and CHILD CUSTODY, co edited with Dr. Maureen T. Hannah will be published early in 2010. For more information, visit his web site at Barrygoldstein.net