

## Child Custody Mediation and Domestic Violence

*NIJ Research in Progress Seminar, "Child Custody Mediation's Failure to Protect: Why Should the Criminal Justice System Care?"* Dennis P. Saccuzzo and Nancy E. Johnson, grant number 99-WT-VX-0015, available on videotape from NCJRS (NCJ 196113).

California researchers interested in mandatory child custody mediation were surprised when attorneys who represented mothers at these proceedings said that they often advised their clients not to tell the mediator about domestic abuse. After looking at the results of such mediations, the researchers determined that the attorneys' advice may well be justified—women who informed custody mediators that they were victims of domestic violence (DV) often received less favorable custody awards.

### Custody Mediation

Used in nearly all States, child custody mediation is intended to save court resources, time, and money. Although mediation is generally thought of as a consensual, voluntary process, child custody mediation is mandatory in many States, including California. Custody mediation also differs from the usual mediation model in that the mediator often makes a recommendation to the court if the parties cannot reach an agreement.

The researchers looked at mediations in which the parties could not reach a mutual agreement. They compared 200 mediations involving charges of DV with 200 non-DV mediations. The DV group was identified based on answers to a pre-mediation screening form, the existence of a restraining order in the case file, and/or comments in the mediator's report.

The researchers asked two primary questions:

1. How well do mediators recognize and acknowledge domestic violence?
2. What are the outcomes of mediation, and what drives these outcomes?

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### Recognizing Domestic Violence

When domestic violence was expressly alleged on the pre-screening form, mediators directly addressed the issue less than half the time. This was true even when there was also a restraining order noted in the file. Other indications of violence increased the likelihood that the mediator would acknowledge domestic violence as an issue. Yet, the factor that most often correlated with the mediator's acknowledgment of domestic violence allegations was not associated allegations of child abuse or neglect, but rather allegations of property damage. Police involvement of any kind increased the likelihood that the mediator would include allegations of domestic violence in the final report to the court.

### Effect of DV Allegations on Custody Awards

Did it matter whether the mediator took note of abuse? In terms of awarding legal custody (the right to make decisions on behalf of the children), the answer was no. Joint legal custody awards were the norm in both the DV and non-DV groups. (Joint legal custody was awarded about 90 percent of the time.)

As for primary physical custody (defined in this study as having possession of the children more than 75 percent of the time), allegations of DV did make a difference—but not the difference that might be expected. Only 35 percent of the mothers who alleged domestic abuse got primary custody, compared to 42 percent in the non-DV group. Fathers who were accused of DV were given primary custody in 10 percent of cases; non-DV fathers got primary custody 9 percent of the time.

Domestic violence allegations affected not only the actual percentage of physical custody awarded, but also seemed to influence the mediators' perceptions of the amount of physical custody they were awarding. In non-DV cases, the mediators slightly overestimated awards of primary custody to the mother. They stated in 48 percent of their final reports to the court that primary custody should be given to the mother; yet when the number of hours awarded to the mother were counted up, primary custody for the mother was actually awarded in only 42 percent of cases. This discrepancy was much more pronounced in the DV group. In almost half of the DV cases (49 percent), the mediator's report summation informed the court that primary physical custody was recommended for the mother. By counting the number of hours awarded in the detailed parenting plan, however, the researchers determined that DV mothers actually got primary custody only 35 percent of the time.

The mediators also misperceived the extent to which they awarded physical custody to accused batterers. In about 60 percent of the DV cases, the mediators *said* that they were recommending that the children spend 20 percent or less of their time with their father. The specifics of the parenting plans did not reflect these recommendations. Indeed, in over 70 percent of the DV cases, the children were actually in the care of the father more than 20 percent of the time.

The reasons for the disconnect between the mediators' reports to the court and the actual award plans are still unclear. But given that judges almost always follow the recommendation of the mediator and may not calculate the actual award percentages

under the detailed parenting plan themselves, the misperception can lead to custody awards that are not what the mediator or the judge intended. And because the mediators in the study were three times as likely to say one thing in the report and do another in the plan when working on DV cases, battered mothers who withhold allegations of abuse might have a better chance of getting the parenting plan the mediator thinks they deserve.

### **Supervised Visitation and Protected Child Exchanges**

Alleging domestic abuse also appeared to negatively affect the chances of receiving the kinds of protections such allegations would warrant, such as supervised visitations with the alleged battering spouse and protected child exchanges (ordering transfers of the children at a police station or other public place).

For example, although supervised visitation was recommended in more DV cases than non-DV cases (22 percent vs. 16 percent), when police intervention in family disputes was noted by the mediator in non-DV cases, the mediators were twice as likely to recommend supervised visitation than in DV cases in which the police had been called. The researchers theorize that where the mother has not alleged violence in the home despite the clear intervention of law enforcement, the mediators might have a stronger sense that it was up to them to take action to protect the children.

Similarly, where the mediators noted evidence that threats had been made by the father but the mother alleged no DV, protected child exchanges were recommended twice as often. Those who were forthright with their DV allegations thus secured less protection for themselves and their children.

### **Is Domestic Violence a Distraction in Making Custody Decisions?**

Decision theory states that people rely on just a few factors when making decisions, even when they are presented with a great deal of information. It is possible, then,

that domestic violence allegations may only serve to obscure the importance of other factors (such as police intervention or spousal threats) presented to the mediators. The researchers also found that some factors, such as parental drug use, might overshadow any allegations of domestic violence.

The researchers continue to study how custody mediators recognize, acknowledge, and deal with domestic violence allegations. They are also looking at how well child

custody mediation addresses other factors that may be relevant to child custody decisions.

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**For more information**

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