

In Whose Best Interest? Custody and Parenting Time Decisions in the Context of Family Violence

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One in nine children are exposed to physical or psychological violence between their parents each year. Exposure to intimate partner violence may include witnessing the violence firsthand, seeing a parent's injuries afterward or overhearing a parent verbally abuse the other parent.

Justice for Children

When children are exposed to intimate partner violence, the effects are profound. Studies have found that children who witness domestic violence often experience negative health issues, such as depression and anxiety, and have difficulty in school. Further, when intimate partner violence is normalized within a household, children face an increased likelihood of engaging in violent behavior in their adult lives. Children may even become victims themselves, as there is a well-established connection between intimate partner violence and child abuse.

Family courts are uniquely positioned to assess and monitor family violence and its impact on children, and have an obligation to do so. In disputed custody and parenting time cases, the judge's decision must be guided by the minor child's best interests, commonly referred to as the "best interest" standard. As a result, the family court can intervene if the safety of a child is at risk. For instance, judges can suspend an abusive parent's visitation rights or implement child-centered safeguards, such as requiring parenting time to be supervised or ordering an abusive parent to attend domestic violence counseling.

All too often though, courts around the world fail to appreciate the seriousness of family violence and overemphasize the importance of a child having contact with both parents regardless of whether domestic abuse has occurred. When family courts prioritize the rights of an abusive parent over the well-being of a child, the consequences can be tragic.

Consider the story of Angela González Carreño, a citizen of Spain, who brought her case before the Committee on the Elimination of Discrimination against Women. Angela endured years of physical and emotional abuse at the hands of her husband. When Angela finally left her husband and filed for separation, the family court awarded Angela custody of her daughter but granted the husband supervised parenting time. Despite reported incidents of violence during parenting time visits and repeated violations of protective orders, the court later expanded the husband's parenting time and permitted him to have unsupervised visits. Following a hearing on Angela's motion to have exclusive use of the family residence, her husband threatened her. Later that day, when the husband failed to

return at the conclusion of his parenting time, it was discovered that he had murdered the parties' daughter and taken his own life.

The family court involved in Angela's case had numerous opportunities to intervene and protect Angela and her daughter from violence but failed to do so. As a result, the Committee found that Spain had infringed on the rights of Angela and her deceased daughter under the Convention on the Elimination of All Forms of Discrimination against Women (the "Convention"). As a party to the Convention and its Optional Protocol, Spain was legally obligated to comply with its provisions. Spain's failure to do so was a violation of international human rights law.

In reaching its decision, the Committee observed that at all stages of the family law proceeding, the judicial authorities, social services professionals and psychological experts involved in the case relied on a "stereotyped conception" of visitation rights – that visitation with both parents is always in the child's best interests.

In addition, the Committee noted that those involved in Angela's case were informed by gender based stereotypes and biases which negatively impacted how Angela was treated throughout the court process. Specifically, judicial authorities doubted Angela's credibility because of her status as a woman and as a victim of domestic violence – a reaction that is all in cases of domestic violence. As a result, the authorities underestimated the seriousness of Angela's allegations of family violence.

To ensure that future family law cases involving domestic violence are taken seriously, the Committee recommended that Spain require its courts to consider domestic violence in custody and parenting time determinations. In addition, the Committee recommended that Spain implement mandatory training for judges and court personnel on domestic violence and gender based stereotypes.

The Power of (and Problem with) Equal Parenting Time

Unfortunately, Angela's case is not an isolated incident and is not unique to Spain. It is the product of legal and social systems that presume a child having frequent contact with both parents is the best custodial arrangement regardless of reports of family violence.

For instance, Denmark has enacted the Parental Responsibility Act, which mandates that children have contact with both of their parents in disputed custody cases. The law has received harsh criticism for its impact on child custody cases involving allegations of domestic abuse. The Committee on Petitions on European Parliament issued a decree denouncing the law, which the Committee concluded appears to be "disproportionately hard on mothers" and "leads to the rights of the children not being respected."

In addition, a frequent complaint of the mothers who spoke to the Committee was that Danish law enforcement did not take their reports of domestic violence seriously. Law enforcement failed to take action, even when the mothers' domestic abuse claims were substantiated by other family members, educators and doctors. Again, the experience of these mothers demonstrates that questioning a victim's credibility has become commonplace in the context of intimate partner

violence.

Courts Can Collude with Abusers

It is no wonder why many women feel trapped in abusive relationships and fear that the authorities will doubt their experience as a victim. Women often stay with an abusive partner because they do not believe the judicial system or law enforcement will protect them. Further, in many cases, seeking the court's assistance only creates an opportunity for the abusive partner to further harass and attempt to control the victim. The most dangerous time for a victim is when she has finally chosen to leave her abusive partner, making her all the more vulnerable to harassment through the court process and all the more likely not to avail herself of it.

Australia's Family Law Council has called for a complete overhaul of its Family Law Act for this very reason. In its critique of the current law, the Council noted that abusive partners are using the family court system to further abuse their victims. The Council has called for amendments to make the law and the judicial process more child-focused and ensure that abuse is appropriately taken into consideration by the courts.

Lawmakers in the United Kingdom have similarly called for reform of their family court system. Specifically, lawmakers criticized the ability of violent spouses to use the judicial system as a means of re-victimization. For example, abusive parents can file frivolous actions for parenting time, and by doing so, force their victim to appear in court and be subjected to cross-examination by their abuser. Even if a victim of domestic violence can escape the abusive relationship, she cannot escape her abuser in the courtroom.

Another reason victims of domestic violence feel they have to stay with an abusive spouse is because they fear they will lose custody of their child in a divorce or separation proceeding. This is a legitimate fear. When making decisions about custody, many family courts are required to consider which parent will encourage frequent contact with the other parent, also known as a "friendly parent" statute. However, in cases of domestic violence, a friendly parent statute could result in a mother being penalized for keeping a child away from an abusive parent. The mother's conduct could be perceived by the court as parental alienation.

On the other hand, a mother can also lose custody if she fails to keep her child away from an abusive parent. In "failure to protect" cases, the parent who is the victim of intimate partner violence is criminally charged for failing to protect a child from witnessing or experiencing domestic violence. As a result, the child is either placed in foster care, or in some instances, with the abusive parent.

This places mothers who are victims of intimate partner violence in a difficult dilemma. Leaving an abusive spouse puts mothers at risk of losing their child in a custody proceeding, but staying with an abusive spouse can also be cause for losing custody.

Mandated Domestic Violence Considerations

In the United States, all states now require family court judges to consider domestic violence when making custody determinations. Some states, like Indiana, include domestic violence as one of the best interest factors the court must analyze when awarding custody. Other states, like Alaska and Minnesota, go a step further and have created a rebuttable presumption that joint custody is not in the child's best interest if domestic violence has occurred. This is a positive development as it places the burden on the abusive parent to show how the child's best interests will be served by a joint custody arrangement.

The recognition by lawmakers in various countries that a more robust judicial response to family violence is needed is also a step in the right direction. The more lawmakers and the experts involved in family law proceedings learn about the nuances of family violence, the better they will be able to protect and help the families who experience it.

Education, then Action

To create judicial systems that truly put the child's best interest first, advocates must share their expertise with those involved in the judicial process. For example, the Battered Women's Justice Project, a leading organization in the field of domestic violence, has issued practice guides for family court professionals. The purpose of the guides is to improve decision-making by those involved in custody and parenting time proceedings, particularly in cases where domestic violence has been reported.

Informing and educating the decision-makers and those involved in family law reform is key to counter the deeply rooted stereotypes and gender based assumptions surrounding family violence. That being said, it is also incumbent on courts to put this knowledge into practice. Courts must reevaluate their policies and procedures and ensure that they are meeting their obligations to women and children under international human rights law. Only then will justice be accessible for women and children who experience family violence.

**This article originally appeared on the Global Rights for Women website on December 8, 2016, and is republished with their permission. Global Rights for Women is a Minnesota-based nonprofit that collaborates with partners around the world to promote women's human rights to equality and freedom from violence through legal reform and systems change. You can learn more at www.globalrightsforwomen.org.*

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Practice Areas

Family Law