Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother

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This research evaluated the effectiveness of statutes mandating a presumption against custody to a perpetrator of domestic violence (DV) and judicial education about DV. Across six states, the authors examined 393 custody and/or visitation orders where the father perpetrated DV against the mother and surveyed 60 judges who entered those orders. With the presumption, more orders gave legal and physical custody to the mother and imposed a structured schedule and restrictive conditions on fathers' visits, except where there was also a "friendly parent" provision and a presumption for joint custody. The presumption is effective only as part of a consistent statutory scheme. Although 86% of judges had received DV education, they scored no better in knowledge or attitudes. More of their orders gave mothers sole physical custody, and knowledge was associated with maternal custody, yet fewer structured or restricted fathers' visitation. Quality of DV education is more important than statutory mandate.

Keywords: *child custody; domestic violence; visitation*

Adverse effects of domestic violence (DV) on children have been well documented. A review of studies between 1989 and 1996 (Fantuzzo & Mohr, 1999) found that children exposed to domestic violence exhibited more externalizing behaviors (aggression,

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temper tantrums, fights), internalizing behavior problems (depression, suicidality, anxiety, fears, phobias, insomnia, tics, bed wetting), and cognitive and/or academic deficiencies (impaired concentration; difficulty in schoolwork; lower scores on measures of verbal, motor, and cognitive skills; c.f. Holden, Geffner, & Jouriles, 1998) than children from nonviolent homes.

Although there are no precise statistics, one estimate suggested that 10 million American children may be exposed to DV every year (Straus, 1992, based on the study by Straus & Gelles, 1990). Another estimate indicated that as many as 17 million children may be exposed (Holden, 1998, based on a study by Silvern et al., 1995). Even if they do not view the violence, most children who live in households where DV exists will hear threats of injury, verbal assaults on their mother's character, objects hurled across the room, suicide attempts, beatings, and threats to kill (Pagelow, 1984; Phillips, Lukens, & Casriel, 1985; Rosenberg, 1987). Children have provided clinicians with detailed accounts of abuse their parents never realized they had witnessed (Jaffe, Wolfe, & Wilson, 1990).

Children are harmed by DV even when they do not directly witness or hear abuse. There is evidence that maternal stress is a mechanism by which DV affects child adjustment (Wolfe, Jaffe, Wilson, & Zak, 1985). Other effects of less direct exposure include development of hearing, speech, and learning difficulties (Penfold, 1982; Westra & Martin, 1981); teen alcohol and drug use (Roy, 1988); and impaired understanding of social situations and others' thoughts and feelings (Rosenberg, 1987).

In addition, children who live in households where there is DV are at risk of being abused directly by their mothers' abusers. Reviews of more than 36 studies indicate that 30% to 60% of children of abused mothers are also abused (Appel & Holden, 1998; Edelson, 1999). Female children whose fathers batter their mothers are 6.5 times more likely to be sexually assaulted by their fathers than are girls from nonviolent homes (Bowker, Arbitell, & McFerron, 1988).

Although battered mothers have often been blamed for "failure to protect" their children from the consequences of violence when they remain in the abusive relationship, those who try to leave face another set of difficulties. Leaving represents a direct challenge to the control exercised by the batterer, and he may

retaliate with threats, escalation of the violence, and even murder (Saunders & Browne, 1991). The battered mother also faces the risk of losing her children in a custody battle with the abusive father (Schechter & Edelson, 1999).

Studies have shown that between 25% and 50% of disputed custody cases involve DV (Chandler, 1990; Keilitz, 1997). Nearly all states have at least some provision concerning DV to guide judges in deciding child custody and visitation cases, and most include DV in a list of relevant criteria that must be considered in determining what is in the child's best interest (Family Violence Project, 1995; Hart, 1992). However, battered women are disadvantaged by other state laws that encourage or mandate the sharing of parental rights and responsibilities. Joint custody—an arrangement whereby both parents retain and share custody rights—appears to be an appropriate arrangement for parents who are committed to making it work out of love for their children, who are willing and able to negotiate differences, and who are able to separate their roles as spouses or partners from their roles as parents (Elkin, 1987). However, as Saunders (1994) points out, a parent who has a history of control and domination during the relationship is unlikely to comply with an egalitarian system of decision-making postdivorce. Furthermore, when battered women express willingness to share custody, this may be a result of coercion or not wanting to look bad in court when custody is to be decided (Davis & Hagen, 1988), especially if state law includes a "friendly parent" provision, which authorizes the court to consider a parent's ability to foster an open, loving, and frequent relationship between the child and the other parent in determining the best interest of the child.

Battered women may also be disadvantaged by judges' attitudes toward DV. Many judges are resistant to considering DV as a factor in custody adjudications (Klein & Orloff, 1993) and conclude that the adverse effects on children are not sufficient to warrant restricting the father's access (Hart, 1992). Additionally, a battered woman who is distraught because of past abuse and current fear of abuse may not appear in court to be the better parent, whereas a batterer may be adept at hiding personality disorders and substance abuse problems (Hamberger & Hastings, 1986). Some judges may believe that remarriage and/or a good income indicates that a batterer is no longer dangerous (Saunders, 1994),

despite evidence that most men who batter do so in more than one relationship (Dutton, 1995; Woffordt, Mihalic, & Menard, 1994).

Even when battered women are awarded full, or sole, legal and physical custody of their children, a batterer can use other parental rights, especially rights of access or visitation, to perpetuate control. Contact at the beginning and end of each visit provides repeated new opportunities. The safety of the child and the mother may be jeopardized at every contact. Yet practitioners report that many judges do not believe that risks to the mother are sufficient cause for imposing limitations or supervised visitation. Hence, mothers who, out of fear, were reluctant to meet their abuser to pass the child have been punished for contempt of court or lost custody. Requests for supervised visits or transfer via a third party have been made conditional on the battered woman providing the supervisor or consenting to a relative of the abuser (Hart, 1992).

In many cases the mother's safety requires that the batterer not know where she lives. Yet a batterer with joint custody or rights of access to records can use his rights as an avenue for discovering the woman's whereabouts.

THE MODEL CODE

In a 1990 report of the Family Violence Project, the National Council of Juvenile and Family Court Judges declares,

> Judges should not presume that joint custody is in the best interest of the children. . . . Court orders which force victims to share custody with their abusers place both victims and children in danger. . . . Continued aggression and violence between divorced spouses with joint custody has the most adverse consequences for children of any custody option. (Family Violence Project, 1990, p. **PAGE**)

In 1987, responding in part to reports of such problems, the National Council of Juvenile and Family Court Judges began to explore ways to develop a more effective system. In 1994, it promulgated the Model Code on Domestic and Family Violence. The Model Code was developed within 3 years by an advisory committee, steering Committee, consultants, and staff, who conducted exhaustive legal research and field research. It is intended

to represent the best current expertise concerning legal approaches to DV, although it may need periodic revision, and because the organization is comprised of judges, it may be more inclined to promulgate flexible guidelines than judicial mandates. State legislatures are free to adopt any or all provisions of the Model Code.

Custody and visitation. The Model Code contains the following provisions regarding custody and visitation in cases where domestic or family violence has occurred between the parents:

> § 401: Rebuttable presumption that it is detrimental and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence;
>
> § 403: Rebuttable presumption that it is in the child's best interest to reside with the parent who did not perpetrate family violence, in a location chosen by that parent;
>
> § 402: Requirement that, among factors in determining custody and visitation, the safety and well-being of the child and the parent who is the victim of domestic or family violence be primary;
>
> § 405: Requirement that visitation by a parent who committed domestic or family violence be awarded only if adequate provision can be made for the safety of the child and the parent who is the victim (a list of possible protective measures is set forth). (Conrad N. Hilton Foundation, 1994)

As of 2000, when this study began, only 15 states had enacted statutes that include the presumption that it is not in the best interest of a child for a battering parent to have sole or joint legal custody or primary residence. Few provided that safety of the child and parent override the "best interest of the child" standard in cases involving DV. Similarly, although many states enumerate a variety of orders that may be entered for the protection of the child and the battered parent when visitation is given to the perpetrator, only five specified that contact by the perpetrator be allowed only if the child and parent's safety can be adequately protected.

Judicial education. Given reports of problematic decisions in the absence of such statutory mandates, the success of statutes may

depend on how well the judiciary applies them. In 1990, the National Council of Juvenile and Family Court Judges recommended that all judges be trained on an ongoing basis in the dynamics of family violence and how to address it fairly and properly (Family Violence Project, 1990). The Model Code also recommends that judges and court personnel who have contact with either party in domestic or family violence cases receive continuing education concerning the nature, extent, and causes of domestic and family violence; practices to promote safety of the victim and other family and household members, including safety plans; resources available for victims and perpetrators; sensitivity to gender bias and cultural, racial, and sexual issues; and the lethality of domestic and family violence (Conrad N. Hilton Foundation, 1994, § 510).[1]

As of 2000, 16 states had enacted legislation to authorize or mandate DV education for judges and/or court personnel. They may or may not allocate funding for such education. Also, as of 2000, only three states had adopted Model Code provisions regarding both judicial education and custody and visitation, including the presumption against sole or joint custody by a perpetrator. This pattern suggests that a number of jurisdictions may consider these two schemes as alternative approaches to the same end. This possibility is reflected in the research design described below. To date, the effectiveness of these Model Code provisions has not been evaluated.

GOALS AND OBJECTIVES

The goal of this research was to assess the direct and indirect impact of two aspects of the Model Code on Domestic and Family Violence—provisions regarding child custody and provisions regarding judicial education—on custody and visitation orders in cases where the mother has been subjected to violence by the father.

Orders were evaluated for compliance with guidelines codified in the Model Code concerning child custody and visitation in two respects (described more fully in the Method section): (a) the extent of custodial rights granted to the perpetrator, that is, whether he was given joint or sole legal custody (referring, generally, to decision-making rights) and/or shared or sole physical

custody (referring, generally, to where the child resides) and (b) the extent to which the perpetrator's visitation rights, if any, were made contingent upon compliance with conditions designed to protect the safety of the child and/or battered woman and a structured schedule that specified visitation times.

The following predictors were examined: (a) whether the applicable statutes include the Model Code presumption against giving sole or joint legal or physical custody to a perpetrator of DV, (b) whether the applicable statutes mandate education on DV for judges, (c) whether the judge received any education about DV in the past 3 years, (d) the judge's knowledge about DV, (e) the judge's attitudes about DV, and (f) the judges' personal characteristics (age, experience, and gender).

This research investigated the following hypotheses:

1. Model Code provisions concerning child custody would have direct effects on the court orders concerning custody and visitation as follows:
   (a) In jurisdictions with the Model Code provisions on child custody, fewer orders will grant custodial rights (joint or sole) to a perpetrator of DV.
   (b) More orders will contain visitation restrictions to protect the safety of the child and battered woman (and orders will contain more restrictions).
   (c) Competing statutory provisions (e.g., a presumption in favor of joint legal custody with no explicit exception for DV) and a friendly parent provision will moderate effects of the Model Code provisions.
2. The Model Code provision mandating judicial education on DV will have indirect effects that are mediated by increased judicial education and improved knowledge and attitudes about DV:
   (a) More judges will receive education about DV in jurisdictions that mandate judicial education about DV than in jurisdictions that do not mandate judicial education about DV.
   (b) Judges who have received education about DV will have greater knowledge and more enlightened attitudes about DV than judges who have not received education about DV.
   (c) Judges who have received education about DV will issue orders granting more limited custodial rights to perpetrators of DV and containing more provisions to protect the safety of the child and battered woman. They will also be more likely to order protection of the mother's address and be less likely to order the mother to receive counseling.
   (d) Judges with greater knowledge and more enlightened attitudes about DV will issue orders granting more limited custo-

dial rights to perpetrators of DV and containing more provisions to protect the safety of the child and battered woman. They will also be more likely to order protection of the mother's address and less likely to order the mother to receive counseling.

METHOD

SELECTION OF COURTS

The process to select the courts in six states (see Table 1) was as follows: All states were categorized on a 2 × 2 grid according to whether the laws included (a) a presumption against giving custody to a batterer (Conrad N. Hilton Foundation, 1994, § 401),[2] and (b) mandatory judicial education on DV (Conrad N. Hilton Foundation, 1994, § 510). Although the language of each state's statute varied, states were excluded only if the wording was deemed substantially weaker than the Model Code. (Massachusetts' requirement of a "pattern or serious incident" of DV was not deemed to weaken the provision enough to exclude it.) States were also excluded if the pertinent statute had been enacted recently (since 1998), as were states that had been designated by the National Council of Juvenile and Family Court Judges as "Model Code States" even though lacking one of the two provisions.

From the remaining states in each quadrant, we contacted state court administrators in two or three states where data collection would be most feasible in terms of geographic proximity and concentration of population. We elected to collect data in the first state in each quadrant that agreed to collaborate. The specific court in each state was chosen in consultation with the administrator, based on likely ease of data collection (e.g., "traffic," computerization, acceptance by registry personnel). The goal was to collect data on 75 to 100 cases in each quadrant. In three states, cases were collected from two courts in different counties. When it became apparent that in two quadrants data would be needed from more than one court, an additional state was added to each of those two quadrants.

TABLE 1
Statutes, Number of Orders Abstracted, and Judges Surveys, by State

Statutes	*Delaware*	*Florida*	*Kentucky*	*Massachusetts*	*Minnesota*	*Rhode Island*
Model Code provisions						
Mandatory judicial education re domestic violence (§ 510.3)	No	Yes § 5.25.385 (1994)	Yes § 4.21A.170 (1996)	No	Yes § 480.30 (1997)	No
Presumption against sole or joint legal or physical custody to a perpetrator of family violence (§ 401)	Yes § 705a (1994)	Yes § 6.61.13(2)(b)2 (1984)	No	Yes §§ 208.31A & 209A (1998)	Yes §§ 518.17 & 518.179 (1990)	No
Visitation to a perpetrator only if adequate provision for the safety of the child and parent victim (§ 405.1)	Similar but weaker language § 708A	Similar but weaker language § 6.61.13 (2)(b) 2	Similar but weaker language § 403.320 (2)	Yes § 208.31A	No	Similar but weaker language §15-5-16(g)(1)
Exchange in a protected setting; supervised visitation (§§ 405.2a & 405.2b)	No	No	No	Yes § 208.31A	Yes § 518.175.5	No
Perpetrator to attend intervention program or counseling, substance abuse treatment (§ 405.2c)	In some cases § 707A	No	No	Yes § 208.31A	Yes § 518B.02	Yes § 15-5-16(g)(2)

(continued)

TABLE 1 (continued)

Statutes	*Delaware*	*Florida*	*Kentucky*	*Massachusetts*	*Minnesota*	*Rhode Island*
Competing provisions						
Presumption in favor of joint custody	No	Yes (mandatory unless detrimental) § 6.61.13(2)(b)2	No	No (yes but not at trial on merits) § 208.31	No (Yes but reverse if DV) § 518.17.2	No
"Friendly parent" a factor in awarding custody	No	Yes § 61.13(3)(a)	No	No	No (yes but exception if DV) § 518.17.1	No
Orders						
Total number of orders abstracted (by male or female judges)	54 (22/32)	31 (23/8)	84 (67/17)	44 (8/36)	70 (51/19)	104 (83/21)
Judges						
Number of judges completed survey (number male or female)	7 (3/4)	7 (5/2)	13 (7/6)	12 (3/9)	12 (7/5)	9 (7/2)
Number of orders per judge (per male or female judge)	7.7 (7.3/8.0)	4.4 (4.6/4.0)	6.5 (9.6/2.8)	3.7 (2.7/4.0)	5.8 (7.7/3.8)	11.5 (11.8/10.5)

NOTE: DV = domestic violence.

DATA ON STATES

For each of the selected states, in addition to the data required for selection, we reviewed the statutes pertaining to child custody and visitation in divorce and paternity or parental rights cases to identify certain other statutory provisions likely to affect custody and visitation orders in cases where one parent has abused the other. These provisions are itemized on Table 1. When a statute creating a presumption in favor of joint custody or a friendly parent provision had an explicit exception for DV, it was not classified as competing; it was deemed to be a "competing" provision when the exception required conviction of a felony, posing a relatively high threshold.

SELECTION OF CUSTODY OR VISITATION ORDERS

The criteria for selecting eligible orders were as follows: A restraining order or protection from abuse order had been issued against a man in favor of a woman. (We did not include restraining orders against women because it was not feasible to find the number of cases needed to consider gender differences in the analyses.) Within 3 years after the date of the restraining order, the same man and woman were parties to a contested hearing on custody and/or visitation of their child or children. The custody-visitation dispute was either a divorce or paternity or parental rights case (i.e., not part of an abuse case or protective custody sought by the state or a third party). Eligible orders could be for a temporary order pending divorce, an order at final hearing, or a postdecree modification. Cases were excluded whenever it could be determined that no evidence was taken, as when a party defaulted (failed to appear), or an agreement was reached and incorporated into the decree. A recitation that hearing was had was interpreted as an indication that evidence was taken. When there was more than one eligible order in a case file, the most recent order was selected.

Although the order selection criteria were consistent across all states, our method for matching abuse decrees with custody and visitation decrees varied (even between different courts in the same state) according to the degree of computerization, amount

of detail set forth in docket entries, and the extent and thoroughness of cross-referencing by court personnel.

In spite of the selection criteria, we could not systematically assess whether the presiding judge actually knew of the prior restraining order, unless he or she happened to mention it in the custody or visitation decree. In some cases, knowledge could be presumed—for instance, if the victim requested to keep her address confidential, or the Uniform Child Custody Jurisdiction Act (now the Uniform Child Custody Jurisdiction Enforcement Act) affidavit revealed prior custody or visitation litigation. However, many affidavits did not mention the protection from abuse or restraining order case, either because it did not address custody or visitation, or perhaps because those issues were not fully litigated. Wide variation in cross-referencing practices made it impossible to quantify the likelihood of the judge discovering this information by other means. In some courts, the existence of the other case file was obvious because they were filed in the same folder. (This practice had changed during the year before data collection.) In others, it was required to be noted in a pretrial conference form. In still others, it may have been surmised because it was noted on the case jacket, although this practice was not found to be consistent.

Usually, the abstractor began with cases starting January, 1, 1999, and worked forward in time. If all eligible cases were found to date and more were still needed, the abstractor would move to 1998, then to 1997, and so forth.

DATA ABSTRACTED FROM CUSTODY-VISITATION ORDERS

In addition to the information required to establish eligibility of an order, the following information was abstracted: legal custody (sole to father, joint or shared, sole to mother) and physical custody (sole to father, primary to father, joint or shared, primary to mother, sole to mother). Dichotomous versions of the custody variables were used for some analyses: sole or primary legal custody to the mother (no or yes) and sole physical custody to the mother. In orders where primary or sole physical custody was given to the mother, abstractors recorded the extent of father's visitation—whether it was open ended or "reasonable," as

opposed to limited in amount or structured by specific time schedule—and the number and type of any conditions on the father's visitation. Additional information included whether the parties were ordered to mediation, other pretrial orders (custody evaluation, guardian ad litem), and whether the address of the mother was protected.

SELECTION OF JUDGES

Once case abstraction neared completion, we made a list of every judge (including magistrates and commissioners) who had issued an eligible order. If an order signed by a judge clearly indicated that a commissioner or magistrate heard the evidence and their decision was adopted in toto, then the order was attributed to the commissioner or magistrate. On the other hand, when an order incorporated or reaffirmed a previous order after a new hearing, it was attributed to the latter judge. We mailed a survey to each listed judge, along with a cover letter from the state court administrator or chief judge, a consent form, and a return envelope. If a judge had retired, the state court administrator mailed the survey.

SURVEY DATA FROM JUDGES

The survey was initially piloted with 56 judges who had attended training sessions on family law conducted by the National Council of Juvenile and Family Court Judges. Scale properties were examined and items refined. The survey included sections on evaluation of evidence, relative importance of resources, knowledge about DV, views on child custody or visitation when there has been DV, and background information. It took about 15 min to complete.

The DV education was determined by self-report. Respondents were asked whether they had received education about DV before becoming a judge and within the past 3 years. If they had, they were asked the name, sponsor, and year of each training and which topics were covered (from a checklist of topics recommended in the Model Code).

Respondents were asked to report the following characteristics: sex, age, occupation or type of appointment, years in that

occupation, type of court, and years in that type of court. Knowledge about DV was measured using a 25-item true-false test based on an instrument developed by Mechanic (2000). Based on Mechanic's initial findings, we deleted items that more than 90% of law students answered correctly. Several additional items were added, drawn from the DV curriculum of the National Council of Juvenile and Family Court Judges. Sample items were "Batterers often hit their victims in hidden places where bruises are not easily seen" and "Women rarely require medical treatment for injuries received from their husbands or boyfriends." Cronbach's alpha was .89.

Four attitudes were measured. Because of a paucity of attitudinal measures on the topics under investigation, the researchers developed measures for use in this study, drawing from published literature wherever possible.

The survey set forth a hypothetical scenario of a custody case between parents in which, 6 months previously, the father had physically assaulted the mother in the home and the mother had obtained a restraining order. Elements of the scenario were carefully designed to correspond to elements that judges in a study by Ballou et al. (1999), using procedures similar to Ballou et al. (2001), indicated would be important considerations in deciding whether to renew a restraining order. These elements, reflected in the scenario, in addition to the violent incident in the home, included other aggressive behavior, threats and stalking, domination and attempts to control, other credible reports of child abuse and abuse of a subsequent mate, and ownership of weapons. To assess the weight given to evidence of danger, respondents were asked to underline the information in the scenario that would be highly relevant to their decision about custody and visitation. Answers were scored by counting how many of the restraining order considerations were underlined. The maximum possible score was 13. Cronbach's alpha was .93.

To assess their view of the danger or likelihood of future abuse, respondents were asked the following hypothetical question in the scenario: "If the restraining order were to expire, how likely is it [on a scale from 0% to 100% in increments of 10%] that Mr. Doe would again abuse Mrs. Doe?"

To assess how respondents would balance competing concerns for a father's rights of visitation against protection of the mother's

safety, respondents were asked the following: "Can you envision a situation [no or yes] in which you would deny visitation to a father based on concerns for the mother's safety?"

Views about child custody in cases involving DV were measured by asking respondents their opinion, on a 4-point Likert-type scale from 1 = *strongly disagree* to 4 = *strongly agree*, on six statements about conditions that might justify restricting a batterer's custody and visitation rights (e.g., "If there is no evidence that a batterer has directly abused his/her child, restricting his/her contact with the child is not justified"). A factor analysis led us to drop three of the items. Responses were averaged; reliability was .61.

ANALYSES

Preliminary analyses (chi-square and student's *t* test and analysis of variance) were conducted to identify any systematic differences by statutes (presumption against custody to a perpetrator of DV, competing statutory provisions about custody, and mandatory judicial education about DV) in the characteristics (gender, age, years of experience) of the judges who answered the survey and had issued orders that were selected. Additional bivariate analyses examined association among the four primary outcomes (legal and physical custody, structured visitation, and visitation conditions).

To test for direct effects of the Model Code provision on child custody, chi-square analyses were used to assess whether custody and visitation orders differed between states with and without those statutes, taking into consideration also competing statutes regarding custody. Analysis of variance was used to compare the number of visitation conditions imposed in orders from states with and without the pertinent statutes.

To test for indirect effects of the Model Code provision mandating judicial education on DV, (a) Fisher's exact test was used to assess whether more judges received education about DV during the past 3 years in states having those statutes, (b) the Wilcoxon test was used to compare knowledge and attitude scores of those judges who did and did not receive education about DV, (c) Fisher's exact test and the Wilcoxon test were used to compare custody and visitation orders entered by judges in each group,

and (d) student's *t* test was used to assess whether the knowledge and attitudes differed between judges who ordered greater versus more limited custodial and visitation rights to perpetrators of DV.

RESULTS

STATUTES, ORDERS ABSTRACTED, AND SURVEY PARTICIPANTS

The selection procedures described above resulted in a total of 393 cases decided by 60 judges. These numbers do not include orders by judges who failed to complete the survey or surveys from judges with no order abstracted. The numbers of orders abstracted and surveys returned are set forth in Table 1 by state and gender, along with the pertinent statutory provisions in each state as of January 1, 2001.

The characteristics of the judges who had decided cases and returned the survey are set forth in Table 2. There were no systematic differences by state or gender in characteristics of judges, except with regard to the number of orders per judge: In the states that did not have the statutory rebuttable presumption against custody to a perpetrator of family violence (hereinafter referred to as *the presumption*), more orders per judge were selected and more of the selected orders were entered by the male judges (average 17.2 per male judge and 10.2 per female judge), compared to the states with the presumption (7.0 per male judge and 5.3 per female judge; $p = .002$).

EFFECTS OF MODEL CODE PRESUMPTION AND COMPETING STATUTES ON CUSTODY AND VISITATION ORDERS

The first hypothesis concerning the impact of both the presumption and competing statutes was confirmed with respect to legal custody: As shown in Table 3, in states with the presumption and no competing statutes, orders granting legal custody to the parents jointly were less common than orders granting sole legal custody to the mother. In states without the presumption, by comparison, orders granted joint legal custody more than 2 times as

TABLE 2
Judges' Characteristics (*N* = 60)

	M	SE
Age (39 to 73 years)	53.6	1.09
Years in current position (2 to 27 years)	11.27	0.88
	%	n
Position		
Judge	83	50
Commissioner, magistrate	17	10
Type of Court		
Family court	87	52
General jurisdiction or other	12	8
Gender		
Male	53	32
Female	47	28
Education before became judge		
Family law	75	45
Domestic violence	52	31
Education since becoming judge		
Family law	98	59
Domestic violence	98	59
Domestic violence education in past 3 years	87	52

NOTE: Number of hours (range: 1 to 40), (n = 28): M = 6.79, SE = 1.60, Median = 3.5.

often as sole legal custody to the mother; and in the state with competing statutes, orders granted joint legal custody 4 times as often as sole legal custody to the mother.

With regard to awards of physical custody, the presumption had no effect, but the competing provisions had a strong effect in favor of fathers: Without the competing provisions, about two thirds of orders gave sole physical custody to the mother irrespective of the presumption, and shared or primary physical custody to the mother was the exception. With the competing provisions, only one order (4%) gave sole physical custody to the mother, whereas 82% gave shared or primary physical custody to the mother.

With regard to the father's visitation when he did not receive physical custody, there was no difference in the percentage of orders granting or denying visitation to the father. However, in states without the presumption, fewer visitation orders (54%) were structured in terms of specific times of the father's visitation. In states with the presumption, more visitation orders (69% to 70%) were so structured. Furthermore, in states with the

TABLE 3
Orders by Custody Statutes

	Presumption Without Competing Provisions		*No Presumption*		*Presumption Plus Competing Provisions*		
	%	n	%	n	%	n	p (χ^2)
Legal Custody							< 0.0001 (column 1 vs. 2, $p < .0001$)
Father	8	11	2	4	0	0	
Joint	40	53	67	111	81	18	
Mother	52	70	31	50	19	5	
Physical Custody							< .0001 (column 1 vs. 2, $p = 0.13$)
Father sole or primary	15	20	8	13	14	4	
Mother primary or shared	21	28	25	24	82	23	
Mother sole	64	86	67	110	4	1	
Father's visitation							
Visitation granted (yes)	92	126	93	167	85	23	0.34
Structured (yes)	69	87	54	90	70	16	0.02
Any condition (yes)	66	83	49	81	19	9	0.004
	%	n	%	n	%	n	p *(Fisher's Exact Test)*
Other orders							
Protection of mother's address	5	8	0	0	6	2	.001
Mother referred to counseling	10	16	1	2	10	3	.001

NOTE: Legal custody: Presumption Without Competing Provisions ($n = 140$), No Presumption ($n = 167$), Presumption Plus Competing Provisions, ($n = 30$); Physical custody: Presumption Without Competing Provisions ($n = 134$), No Presumption ($n = 165$), Presumption Plus Competing Provisions ($n = 28$); Father's visitation = Presumption Without Competing Provisions ($n = 137$), No Presumption ($n = 179$), Presumption Plus Competing Provisions ($n = 27$); Other Orders: Presumption Without Competing Provisions ($n = 167$), No Presumption ($n = 195$), Presumption Plus Competing Provisions ($n = 31$).

presumption and no competing statutes, more orders (66%) included conditions on those visits compared to those in states without the presumption (49%) and those in states with competing statutes (19%). Specifically, significant differences pertained to supervision of visits ($\chi^2 = 10.0$, $p = .007$), requirement that the father attend counseling or a batterer intervention program ($\chi^2 = 8.0$, $p = .02$), and additional conditions related to safety ($\chi^2 = 10.8$, $p = .005$). Orders also included more conditions.

Finally, the presumption increased the likelihood of both types of ancillary orders affecting the mother: In states with no presumption, no orders protected the mother's address, compared to 5% to 6% in other states. Additionally, in states with no presumption, 1% of orders referred the mother to counseling, compared to 10% in other states.

Post hoc chi-square analyses revealed a strong association between legal and physical custody (Table 4; $\chi^2 = 50.9$, $p < .0001$). Except in the state with competing statutes, where all but one of the orders awarded primary physical custody to the mother, irrespective of legal custody, the prevailing pattern was as follows: When sole legal custody was given to the father, he always received sole physical custody. When sole legal custody was given to the mother, she received sole physical custody in about 90% of the cases. When legal custody was awarded jointly, sole physical custody was given to the mother in about half the cases.

In states with the presumption and no competing statutes, judges were more likely to impose conditions limiting fathers' visitation when they awarded sole legal custody to the mother (73%) than when they awarded joint custody. On the other hand, in states with no presumption, judges were less likely to impose conditions on fathers' visitation when they awarded sole physical custody to the mother (28%) than when they awarded joint custody. Additionally, in states with no presumption, judges were less likely to structure fathers' visitation when they awarded sole custody to the mother (39%) than when they awarded joint custody (63%).

TABLE 4
Patterns of Legal and Physical Custody Orders[a] by Custody Statutes

		Presumption Without Competing Provisions		*No Presumption*		*Presumption Plus Competing Provisions*		
Legal Custody	*Physical Custody*	%	n	%	n	%	n	p(χ^2)
Father								NA
	Father sole or primary	100	11	100	4	NA	NA	
	Mother primary or shared	0	0	0	0	NA	NA	
	Mother sole	0	0	0	0	NA	NA	
Joint								< .0001 (column 1 vs. column 2, $p = 0.51$)
	Father sole or primary	10	5	8	9	6	1	
	Mother primary or shared	41	21	34	36	94	16	
	Mother sole	49	25	59	64	0	0	
Mother								< .0001 (column 1 vs. column 2, $p = 0.60$)
	Father sole or primary	2	1	0	0	0	0	
	Mother primary or shared	11	7	8	4	100	4	
	Mother sole	88	58	92	46	0	0	

NOTE: Father: Presumption Without Competing Provisions ($n = 11$), No Presumption ($n = 4$), Presumption Plus Competing Provisions ($n = 0$); Joint: Presumption Without Competing Provisions ($n = 51$), No Presumption ($n = 109$), Presumption Plus Competing Provisions ($n = 17$); Mother: Presumption Without Competing Provisions ($n = 66$), No Presumption ($n = 50$), Presumption Plus Competing Provisions ($n = 4$).
a. In cases where both legal and physical custody were indicated.

EFFECTS OF MODEL CODE MANDATORY JUDICIAL EDUCATION ON DOMESTIC VIOLENCE

Effects of the Model Code on education. More than 86% of the judges reported having received education on DV within the past 3 years. As a first step in examining potential indirect effects of mandatory judicial education, we compared the number of judges in states with and without a legislative mandate who took part in judicial education on DV in the past 3 years (Hypothesis 2a in the Goals and Objective section). There was no significant difference (Fisher's Exact $p = 0.72$). In fact, in Rhode Island, which does not have a statutory mandate, 100% of respondents reported having received education on DV.

Effect of education on knowledge and attitudes about domestic violence. On average, judges answered 12.2 of the 17 knowledge questions correctly ($SD = 4.3$; see Table 6). The following questions were answered correctly by the greatest number of respondents: "More than 5% of women in the U.S. are battered by their intimate partners" (true) and "A man who has been violent towards his wife is more likely than others to abuse future wives/girlfriends" (true). The following questions were answered correctly by the fewest number of respondents: "Few battered women ever stand up forcefully to their mates" (false), "There is an established psychological profile of women who become involved with abusive men" (false), "Batterers do not usually threaten or injure the victim's friends or family members" (false), and "Women rarely require medical treatment for injuries received from their husbands/boyfriends" (false).

The next step in examining indirect paths was to determine whether receiving DV education had any discernible effect on knowledge or attitudes concerning DV (Hypothesis 2b). There were no significant differences between those who did and did not receive such education (nor were there any differences in their personal characteristics—gender, age, or years of experience). Indeed, despite full participation in DV education, Rhode Island judges had the lowest average knowledge scores. Although we had planned to explore whether differences or lack of differences might be attributed to characteristics of the training (the number of hours, recency of participation, sponsor, topics covered), too

TABLE 6
Judge's Knowledge and Attitudes, By Judge's Domestic Violence Education in Past 3 Years

	Judge Received Domestic Violence Education in 3 Years				
	No (n = *8)*		*Yes* (n = *52)*		
	M	SE	M	SE	*Wilcoxon Test*
Knowledge score	12.25	0.90	13.44	0.30	0.24
Attitudes					
Evidence: Weight given to evidence of danger	10.39	0.35	9.82	0.42	0.76
Danger: Prediction that abuse will continue	65.31	2.95	68.72	3.14	0.94
Views about domestic violence in child custody cases	2.17	0.19	2.23	0.08	0.97
	%	n	%	n	p *(Fisher's Exact Test)*
Fathers' rights: Could deny a father visits to protect the mother's safety	75	6	81	42	.63

few respondents gave complete answers to those questions, so we were not able to analyze them or even to supplement the self-report data with information from the sponsor.

Effects of education on court orders. The next step was to explore whether education might have a more direct impact on the orders issued by these judges (Hypothesis 2c; see Table 7). Although education appeared to have no effect on orders of legal custody, orders of judges who received DV education were twice as likely to give the mother sole physical custody and half as likely to give her primary or shared physical custody, as orders of judges who did not receive such education. At the same time, judges who received DV education were less likely to structure the times of the father's visits or to impose any conditions on the father's visitation, and they imposed fewer conditions. Orders by judges who had received DV education more often protected the mother's address and less often referred her to counseling.

Post hoc chi-square analyses revealed that the difference by education in physical custody orders was particularly strong when legal custody was joint, because, in those instances, judges

TABLE 5
Father's Visitation Orders by Custody Orders[a] and Custody Statutes

		Presumption Without Competing Provisions (n = *99*)		*No Presumption* (n = *138*)		*Presumption Plus Competing Provisions* (n = *20*)		
Visitation	*Legal Custody*	%	n	%	n	%	n	p (χ^2)
Structured	Joint	61	27	41	41	59	10	.06
	Mother	62	34	61	23	100	2	.53
	$p(\chi^2)$	.95		.04		.25		
Conditions	Joint	43	19	36	36	29	5	.57
	Mother	73	40	53	20	100	2	.10
	$p(\chi 2)$	.004		.08		.05		
Visitation	*Physical Custody*	%	n	%	n	%	n	p (χ^2)
Structured	Mother primary or shared	64	18	63	25	63	12	.99
	Mother sole	59	41	39	38	100	1	.02
	$p(\chi^2)$	.66		.01		.45		
Conditions	Mother primary or shared	46	13	73	29	32	6	.01
	Mother sole	64	44	28	27	100	1	< .0001
	$p(\chi^2)$	.12		< .0001		.16		

a. In cases where all three issues were decided and father was given visitation.

without the education never gave sole physical custody to the mother (Table 5).

With regard to visitation, DV education affected how visitation restrictions were used in conjunction with legal and physical custody. When the judge had received DV education, conditions of visitation were more commonly imposed when the mother received sole legal custody (62%) than when legal custody was shared (36%); conversely, conditions of visitation were less commonly imposed when the mother received sole physical custody (40%) than when physical custody was shared (59%). When the judge had not received DV education, the pattern was similar but not significant with regard to legal custody, and the reverse with regard to physical custody—that is, conditions of visitation were more common when the mother received sole physical custody (82%) than when physical custody was shared (46%).

Effects of knowledge and attitudes about domestic violence and personal characteristics on court orders. In spite of the lack of effect of DV education on knowledge or attitudes, we proceeded to examine whether knowledge or attitudes might affect custody and visitation orders (Hypothesis 2d). Orders granting sole legal custody to the mother and orders granting sole physical custody to the mother were associated with the judge's having greater knowledge about DV and being less able to envision circumstances that would cause them to deny a father visitation to protect the mother's safety. In addition, judges who awarded sole physical custody to the mother were, on average, older, had fewer years of experience, and issued more orders eligible for this study.

With respect to orders pertaining to the father's visitation (when he did not receive physical custody), judges who structured the visitation schedule and who imposed conditions on the father's visitation rights rated the likelihood of continuing vio-

TABLE 7
Patterns of Legal and Physical Custody Orders[a], by Judge's Domestic Violence Education in Past 3 Years

		Judge Received Domestic Violence Education in 3 Years				
		No		*Yes*		
Legal Custody	*Physical Custody*	*%*	*n*	*%*	*n*	$p(\chi^2)$
Father						NA
	Father sole	100	2	100	13	
	Mother primary shared	0	0	0	0	
	Mother sole	0	0	0	0	
Joint						< .0001
	Father sole	9	2	8	13	
	Mother primary or shared	91	21	34	52	
	Mother sole	0	0	58	89	
Mother						.02
	Father sole	0	0	0	0	
	Mother primary or shared	24	4	11	11	
	Mother sole	76	13	89	91	

NOTE: Father: No (n = 2), Yes (n = 13); Joint: No (n = 23), Yes (n = 159); Mother: No (n = 22), Yes (n = 103).
a. In cases where both legal and physical custody were indicated.

lence in the hypothetical scenario to be higher, and fewer could envision circumstances that would warrant denying a father visitation to protect a mother's safety. They were, on average, younger and had fewer years of experience.

Additionally, not shown in the tables, female judges had higher knowledge scores and more enlightened attitudes about DV; however, gender had no direct effect on court orders. Knowledge levels were also higher in states with the statutory presumption. Education enhanced judges' knowledge and attitudes. Judges who believed that a father's right of visitation is inviolable had lower levels of knowledge about DV. Notwithstanding these findings, however, judges' knowledge of DV did not affect their custody or visitation orders.

DISCUSSION

STRENGTHS AND LIMITATIONS

A major strength of this research is the use of multiple levels of data from state statutes, court orders, and judges' surveys.

Because of careful selection of the states, they represent a variety of statutory schemes, and there was broad participation by judges. There are a number of limitations. Several of the measures in the survey of judges were designed for this study and, although piloted in advance, remain to be validated. In the absence of a direct measure of previous DV, the existence of a previous restraining order is an imperfect proxy—at once overlooking cases that did not result in an order and treating the order as conclusive on the issue. Also, the researchers did not determine whether the judge was, in fact, aware of the previous order. Furthermore, because it was not feasible to consider the nature of the evidence in each case, one must assume that a broad spectrum of violence was represented and normally distributed in the orders. However, the systematic method for selecting orders should enhance the accuracy of that assumption. Other limitations of the study design and analytic approach are discussed elsewhere.

EFFECTIVENESS OF THE STATUTORY PRESUMPTION

The statutory presumption against custody to a perpetrator does appear to be effective in reducing orders that give legal custody to a father who had battered the mother. Nevertheless, even with the presumption, 40% of the fathers were given joint custody, in spite of the fact that all had been found to perpetrate family violence against the mother. Joint or shared custody—whether legal or physical—requires a high level of communication and cooperation between parents. The effectiveness of the presumption was severely undermined, however, by competing statutes—specifically, a presumption in favor of joint custody (with a weak exception for DV) and a friendly parent provision. In cases with DV, the friendly parent provision effectively penalizes an abused parent who asks that the abuser's visitation be denied or severely curtailed. Inferences concerning these competing statutory provisions are limited, however, because this research was not initially designed to study them and, therefore, only one state in the sample had those provisions. Other unique aspects of the state statutory and judicial structure could explain our observations. Nonetheless, the statutory provisions, taken together, were the only significant predictors of legal custody orders.

Physical custody, by contrast, did not follow the statutory presumption. Instead, it was more closely related to legal custody, at least when legal custody was awarded solely to either parent. Other factors besides competing statutory provisions, such as judges' education on DV, their personal characteristics, and their attitudes, contributed to physical custody decisions. It is alarming that in the state with competing provisions, sole physical custody was given more often to fathers than to mothers. Moreover, the predominant award of primary physical custody to the mother in that state is tantamount to shared physical custody.

As with joint custody, unrestricted visitation requires the parents to communicate and cooperate around visits and, thus, builds in opportunities for further conflict and potential abuse. The father's visitation was more restricted in cases where legal custody was given to the mother, and this was particularly true in states with the presumption. Greater use of structure and conditions in conjunction with sole legal custody makes sense if sole legal custody is awarded based on the severity of the history of abuse.

In states without the presumption, disturbing patterns were observed in visitation orders in conjunction with physical custody: Visitation structure and conditions were ordered as alternatives to sole physical custody to the mother. Apparently, when ordering sole physical custody to the mother, judges deemed visitation structure and restrictions to be unnecessary—a questionable proposition, at best—and included them in only 39% and 28% of the cases, respectively. Alternatively, under pressure from both sides of the litigation, judges sought to fashion a decree that offered something to each of the parties and, therefore, would meet with greater overall acceptance. Whatever the rationale, this is a disturbing practice because if there are reasons that sole physical custody is necessary, then the same reasons mitigate against having unrestricted visitation; by the same token, placing conditions on visitation may not be adequate to bolster an otherwise unworkable order of shared physical custody.

By contrast, in states with the presumption, conditions were imposed on visitation irrespective of physical custody. This appears to be an added benefit of the presumption—that it discourages the trading off of physical custody against visitation

restrictions. Still, at best, only 64% of orders in these states imposed structure or conditions on visitation orders.

More frequent protection of the mother's address in states with the presumption suggests that perhaps the statute (or perhaps the broader statutory scheme of which it is a part) makes the courts take the threat of violence more seriously.

The policy implications indicate that enacting a statutory presumption against custody to a perpetrator of DV is clearly an effective measure with regard to legal custody, visitation, and even ancillary matters such as protecting the address of the abused parent. However, competing statutory provisions prevail and awards of primary physical custody undermine the effectiveness of the presumption. This may be particularly problematic when the competing statutes were enacted, applied, and interpreted for many years before enactment of the Model Code presumption. Therefore, it is important to consider the presumption as part of the broader statutory scheme. To avoid undermining the presumption, any competing provisions should have a meaningful exception for cases where there has been DV (i.e., not requiring a felony conviction). In addition, judicial education might undertake to promote greater use of restrictions on visitation to improve protection of the victim.

EFFECTIVENESS OF JUDICIAL EDUCATION

The main hypothesis concerning mandatory judicial education was not supported. The most obvious explanation is that in all six states, the vast majority of judges received DV education, irrespective of legislative mandate. Clearly, forces other than statutory mandate—probably court rules, guidelines, and practice, although these were not studied in this research—lead to judicial education. The quality of such education, however, is open to question, in light of the findings discussed below.

Although DV education had no discernible effect on judges' attitudes, or even on knowledge as tested by the instrument we used, this could be because of the inadequacy of our measures. The development of a wide range of psychometrically sound attitudinal measures, in particular concerning child custody and visitation, is urgently needed. Nevertheless, both knowledge and education had effects on judges' orders, and education strongly

favored sole physical custody to the mother, particularly when joint legal custody was ordered.

Surprisingly, effects of education on visitation structure and conditions were in the opposite direction, and education seemed to generate an inverse association between physical custody and visitation orders. As in states with no presumption, judges who had received DV education ordered sole physical custody or restrictive visitation conditions, using the two as alternatives, rather than as reinforcing each other. Perhaps the educational content emphasized only custody, leaving visitation to greater judicial discretion and compromise. Another possibility may be that the education may have simply provided a rather incomplete understanding of the ways in which both shared physical custody and unrestricted visitation contribute to the perpetuation of DV long after the intimate relationship has ended.

The policy implications of these findings indicate that mandating judicial education on domestic violence is unnecessary. Instead, efforts should concentrate on improving the quality and usefulness of judicial education. The Model Code itemizes aspects of DV that should be covered, but we were unable to identify the content of education received by the judges in this study. Further research on this question would help to identify which topics are overlooked and which topics or methods are ineffective. To be effective in these cases, such education will need to move beyond simply informing judges about DV to spelling out the wider ramifications of DV for both child custody and visitation decisions. In particular, it should encourage judges to use legal custody, physical custody, and visitation structure and conditions as a range of tools to be used each in consort with the other to avert further incidents of violence, rather than as awards to be distributed or balanced between the litigants in an attempt to satisfy parties on both sides of the litigation.

It would also be worth exploring origins of some judges' belief that there is no situation that could justify denying a father visitation to protect the safety of the mother. Paradoxically, judges holding that belief were more likely to order sole physical custody to the mother and structured visitation, perhaps to compensate for the perceived necessity of protecting the father's visitation rights at all cost. Education about DV should not only provide information but also find creative ways to ascertain and address

attitudes that judges may bring to bear not only on their decision making but also on the learning process itself.

NOTES

1. Related provisions that are beyond the scope of this research include the following: Relocation because of violence is not to weigh against the victim (§ 402); a "change of circumstances" warranting review of a custody order is defined to include any subsequent act of domestic or family violence (§ 404); mediators are required to screen for domestic violence (§ 407); and mediation may not be ordered or conducted when a protective order is in effect, or when domestic violence has been alleged unless certain conditions are met for the protections of the victim (§§ 407, 408).

2. Some, but not all, of these states also have enacted a provision that visitation by a batterer be conditioned on adequate safety for the child and battered custodial parent (Conrad N. Hilton Foundation, 1994, § 405), with varying degrees of alteration of the language. States also vary in the extent to which specific visitation restrictions are explicitly authorized.

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