

National Council of Juvenile and Family Court Judges

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# A Judicial Guide to Child Safety in Custody Cases





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National Council of Juvenile and Family Court Judges  
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2008

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# A Judicial Guide to Child Safety in Custody Cases

## Introduction

Custody and visitation decisions are among the most difficult that judges make. Whether by statute, case law, or custom, all state and tribal courts employ some form of “the best interest of the child” standard in making these decisions. A child’s physical, emotional, and psychological safety are always in his or her best interest. This tool is designed to maximize a child’s safety as you determine issues of custody and visitation and can help you

- Assess whether a child or parent is at risk for physical, emotional, or mental abuse.
- Review the evidence so that the safety of the child is the primary factor in determining his or her best interest.
- Evaluate safety risks at various stages of a case, from initial filing through post-disposition.
- Make findings that explain and prioritize safety concerns.
- Draft custody and visitation orders that maximize family safety.

This tool will also assist you in conducting a thoughtful exploration of the child’s safety risks when abusive behavior has been part of the family fabric. Sometimes, the parties may not articulate clearly either the abuse or the child’s safety risks during litigation. Indicators may be present that require you to explore the possibility that one parent is putting the other parent or the child at risk of abuse. Because the abused parent might not directly raise issues of physical abuse or other forms of control, you will want to be aware of indicators of abusive behaviors that may alter the dynamics of the litigation process. This tool will explore the various behaviors that you might encounter, both from the controlling and abusive parent, and from the controlled and abused parent.

## Organization of the Bench Tool

This supplemental guide and the attached bench cards follow your decision-making from the initial filing through drafting and enforcing the order. While much of the material is presented in procedural order,<sup>1</sup> there are also bench cards and chapters devoted to topics and issues that can arise throughout litigation.

The authors suggest that you first read the cards as an introduction to the topics addressed. This supplement, to which the cards are keyed, offers additional information and suggests further resources at the end of the guide, and in footnotes.

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1. The stages of litigation might be named differently in various state and tribal jurisdictions. The process of filing, hearing, and decision-making are familiar enough that the procedural references made in this volume are likely to be easily adapted to the actual practice in your court.



# I. Children, Abuse, and Custody

Numerous studies document the negative effects on children who are exposed to the abuse of one parent by the other. The studies provide evidence of the problems associated with their psychological, emotional, and cognitive functions, and longer-term development.<sup>2</sup> Children who witness violence and coercive control by one parent toward the other experience at least the same level of serious effects as those who were direct targets of the abuse.<sup>3</sup> The research also shows that each child's experiences, perceptions, and responses are unique. Any intervention should be tailored to that child's particular risk set and situation.<sup>4</sup>

Studies also support that children are at greater risk of being abused when one parent is abused by the other parent.<sup>5</sup> Abuse of the children, or threatened abuse, is a powerful tool of control.<sup>6</sup>

Abuse directly perpetrated on the child happens frequently after parental separation when the abusive parent may no longer have ready access to the other parent. This means that children are at risk post-separation even if they were never directly abused by the abusive parent previously.<sup>7</sup> Sometimes, abuse of a child can lead to "reconciliation" if the abused parent believes that resuming the relationship is the only way to keep the child safe.<sup>8</sup>

## A. [§1.1] Indications that Abuse Exists in a Child's Life

As with adults who have been subjected to physical abuse or other forms of coercive control, there is no one pattern of behavior that will be observed in children who have experienced abuse, whether they were abused themselves or whether they have lived in a family where one parent has abused the other. Given the range of psychological and physical injury to a child from an abusive parent and the many elements that contribute to or delay a child's recovery, assessing risk to the child from the abusive parent is a complex process.<sup>9</sup> Sometimes, child behaviors can be confusing or counterintuitive. Children who have experienced abuse might

- Be better behaved with either the at-risk or the abusive parent, or, on the contrary, act disrespectfully toward him or her.
- Identify with the parent who is perceived as more powerful.<sup>10</sup>

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2. For a review of these studies, see J. L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839-870 (1999).

3. See, e.g., UNICEF, CHILD PROTECTION SECTION, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (2006).

4. See generally J. L. EDLESON, VAWNET, NATIONAL RESOURCE CENTER, PROBLEMS ASSOCIATED WITH CHILDREN'S WITNESSING OF DOMESTIC VIOLENCE (revised).

5. Studies show that if a mother is abused, her children are at a 30-60% greater risk of being abused. See generally A.E. Appel & G.W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12-4 J. FAM. PSYCH. 578-599 (1998); S.M. Ross, *Risk of Physical Abuse to Children of Spouse-Abusing Parents*, 20(7) CHILD ABUSE & NEGLECT 589-598 (1966).

6. Please note that this tool addresses child safety in the context of private, civil legal custody cases involving abuse or coercive control by one parent over the other.

7. See generally L. BANCROFT & G. SILVERMAN, *ASSESSING RISK TO CHILDREN FROM BATTERERS* (2002), [http://www.lundybancroft.com/pages/articles\\_sub/JAFFE.htm](http://www.lundybancroft.com/pages/articles_sub/JAFFE.htm).

8. See generally *FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES* (Jeffrey Edleson & Zvi Eisikovits, eds, Sage Publications 1996).

9. *Id.* at 5.

10. Some people may assume that a person who abuses an intimate partner would not abuse their children out of love for them. However, love is not a preventative and does not foreclose abuse. Likewise, the fact that children love an allegedly abusive parent is no indication that abuse did not occur. Children often bond with the abuser. This is sometimes referred to as "traumatic bonding." L. BANCROFT & J. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 39-40 (2002).



- Act lovingly toward or comfortable with an abusive parent.
- Assume the role of parent.
- Be anxious when away from the abused parent.

Those children may also

- Suffer from depression or other mental health problems.
- Self medicate with drugs or alcohol (adult victims often do the same).

## **B. [§1.2] The Best Interest of the Child Standard**

Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in sole custody, joint legal custody, or joint physical custody with the abusive parent.<sup>11</sup> The most important protective resource to enable a child to cope with exposure to abuse is a strong relationship with a competent, nurturing, positive adult—most often, that adult will be the non-abusing parent.<sup>12</sup> Providing for the physical, mental, and emotional safety of the child will include providing safe visitation by the abusive parent, if truly safe visitation can be arranged. You should award visitation to an abusive parent only if you find that adequate provisions for the child’s and the abused parent’s safety can be made, assuming that contact with the abusive parent is advised at all.<sup>13</sup>

At-risk parents may advocate for limited or supervised contact between the abusive parent and the child; their reasons may not be clearly or easily articulated. Any allegations of abuse, whether made by the at-risk parent or the child, should be taken seriously. Often when viewed through the lens of abuse and coercive control, though, the case comes into focus. It is important that abusive parents’ access to their children occur only in safe environments or when safety of both the child and the at-risk parent can be ensured. Even if you find that the behaviors of a parent do not seem to meet the definition of “abuse” as defined in this tool, the best interest of the child standard demands that the child be placed in the custody of the more appropriate, and safer, parent.

# **II. Abusive Behavior and Evidence of Risk**

## **A. [§2.1] How This Tool Defines “Abusive Behavior”**

It is important to remember that abusive behavior, often described as domestic violence, is not limited to physical violence against a parent. Physical violence is generally one of

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11. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (HEREINAFTER NCJFCJ), FAMILY VIOLENCE: A MODEL STATE CODE (HEREINAFTER MODEL CODE) §401 and its commentary (1994).

12. J. D. Osofsky, *The Impact of Violence on Children*, 9 DOMESTIC VIOLENCE AND CHILDREN 38 (1999).

13. NCJFCJ, Model Code §405(1) (1999).

























































- Is there another person each would suggest to deliver and pick up the child if it is unsafe for one parent to do so?
- What specifics do they recommend to ensure safety at drop-off and pick-up?
- If visitation needs to be supervised, and no professional supervised visitation center exists in the community, is there a safe non-relative who could supervise the visitation?
- What vacation and holiday schedule do they propose?
- What weekly visitation do they propose?
- Is each parent comfortable with the other taking the child out-of-state or out of the country?
- What restrictions, if any, would they put on travel?
- What do they anticipate to be the most difficult issues for the child regarding any change in the current custodial or visitation arrangement?
- What terms would they like to see in an order to help the child transition safely and comfortably into a different custody and visitation arrangement?

## **B. [§12.2] Considerations Prior to Issuing the Order**

If you determine that the case involves a parent with a history of violent or coercive behavior, then you will want to consider

- Ordering professionally supervised visitation between the child and the abusive parent.
- If professional supervision is not available, determining whether the child is at risk if there is visitation.
- If you determine that a non-relative can provide safe supervision, setting out the parameters for how visitation is to be conducted and what behaviors justify the supervisor terminating the visit.
- Ordering the parent whose behavior requires the supervision to pay the supervisor or the costs of visitation exchange.
- Ordering a thoroughly detailed visitation schedule.
- Designing an order that eliminates any contact between the parties.
- Designating another person to communicate emergency messages when visitation cannot occur.
- Setting out rules for the communicator so that he or she knows not to communicate any messages beyond a verified emergency involving the child or the need to cancel a scheduled visitation.
- Informing parties that, should the parent fail to appear for visitation within a set number of minutes of the appointed time (20-30 minutes), the visitation is cancelled and will not be made up.
- Setting out a mechanism to enable the parties to reschedule visitations cancelled on account of an emergency (such as death of a family member, or serious illness of a child or parent).

- Setting a date in three or four months to review compliance and any difficulties that the child might be experiencing.<sup>61</sup>
- If possible, designing a plan that will work without the use of a parent coordinator. If you must appoint a coordinator, make sure that it is someone who is well-trained and experienced in the dynamics of abuse and how those dynamics play out in family law cases. Assign costs of the coordinator to the party whose behavior necessitated the appointment.

### **C. [§12.3] Safer Options for Visitation and Exchange**

Supervised visitation or exchange is preferred where you have found that one incident of abuse or a pattern of abuse was present in the family.<sup>62</sup> Supervised visitation or exchange is also preferred where a parent has abused third parties, including former intimate partners or other children. Many supervised visitation centers have the training and experience to provide services specifically for domestic violence cases. If you do not have a supervised visitation center in your area, local advocates or domestic violence law enforcement might help you develop some creative solutions. Rarely will family members be appropriate supervisors.

Asking staff or counsel to contact supervised visitation centers to obtain copies of their hours of operation and their visitation rules and regulations will give you helpful ideas for drafting an order that sets out the guidelines of supervision. In some situations, it simply will be too unsafe for either the child or one of the parents for you to order visitation. You will want to make sure that you set out your findings carefully to support any termination, suspension, or restrictions on visitation.

The best interest of the child demands that the safest and healthiest environment possible be created for the child's development. Your orders can accomplish not only safe visitation and custody, but provide maximum nurturing for the child.

## **XIII. Enforcing the Order**

Accountability and consequences for the abusive parent can be effective tools for stopping the abusive behavior and improving the safety of the other family members. Enforcement proceedings afford valuable opportunities to control abusive behavior and shift the balance of power away from the abuser.

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61. Regularly scheduled review hearings should take place only if being required to attend them does not place the at-risk parent at further physical, emotional, or financial harm.

62. See generally Jaffe et al., *supra* note 25, at 89.

## A. [§13.1] Non-Compliance as Controlling Behavior

Abusive parents generally have carefully manufactured a situation that facilitates and, in their minds, justifies their behavior. When the justice system fails to hold abusive parents accountable, especially when their behavior has been revealed to the court, it reinforces their belief that there are no real consequences for their actions. Because the abusive parent now sees the court as a collusive partner, he or she may have no reason to think that the court will hold him or her accountable to obey any of its orders. This result puts both the child and the at-risk parent in an extremely dangerous position.<sup>63</sup>

## B. [§13.2] What You Can Do

- Do not let the first violation of the order go by without consequences.
- Require that the abusive parent prove any defenses to the contempt or other action with independent evidence.
- Order the abusive parent to pay all court expenses pertaining to the violation, including the attorneys fees and lost wages of the at-risk parent.
- Even if not required to do so in your jurisdiction, make findings in your order that will be helpful to you and the parties should additional contempt actions follow.
- Set a review date to ensure compliance and address any safety concerns.<sup>64</sup>
- Have the abusive parent wait in the courthouse for 15 minutes so that the other parent may leave safely. Have a bailiff or security guard escort the at-risk parent out of the building.

## C. [§13.3] When the Abusive Parent Files for Contempt

There will be times when the at-risk parent violates an order. As with decision-making at other critical points in the case, context is everything. In order to intervene effectively, it is important to understand the effect that coercive control has had on the at-risk parent and the context within which any violation of your order occurred.<sup>65</sup> For example, an at-risk parent may violate an order to protect the child's physical or emotional safety, particularly if the child was abused during a visit. Equally important is that you evaluate any new allegations of abuse to avoid placing the at-risk parent in the no-win position of choosing between non-compliance and failing to take action to halt further abuse.

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63. Barbara J. Hart, *Rule Making and Enforcement, the Violent and Controlling Tactics of Men Who Batter, and Rule Compliance and Resistance, The Response of Battered Women*, in *I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE* 258, 262 (Beth Sipe & Evelyn Hall eds., 1996).

64. Regularly scheduled review hearings should only take place if the at-risk parent will not be placed at further physical, emotional, or financial harm if required to attend. Consider reviews where the at-risk parent may report to the court without appearing.

65. FREDERICK & TILLEY, *supra* note 20, at 1.



## **D. [§13.4] What You Can Do**

- Understand the connection between prior abuse and the perceived threat of abuse that triggered the violation of your order.
- Consider making findings that explain the facts behind the contempt, as well as the basis for your order.
- Draft an order that addresses any lingering safety concerns.
- Schedule a review date so that you can monitor compliance.

If a parent files for contempt for what appear to be trivial infractions, that parent may be using the legal process as a tool to continue the coercive control. To enhance party safety, protect the at-risk parent from financial obligations resulting from the other parent's behavior, and prevent the use of your court as a tool for coercion. Also, inquire into facts behind any alleged contempt with both parties, and the intent of the complainant, where possible. While the answers may not alleviate any contempt finding, it may prompt you to consider revising a prior order.

## **Conclusion**

While child custody and visitation issues can be difficult ones, there are strategies that can guide you in making appropriate and effective decisions. Familiarity with the dynamics of abuse will clarify and simplify custody and visitation cases where domestic violence, sexual assault, dating violence, or stalking may be an issue. Being familiar with the dynamics of abuse and the tactics of coercive control, through observation of the family and review of the supporting literature, can assist you in making appropriate child-centered orders that maximize safety.





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