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Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence

Charlotte Germanet†
Margaret Johnson††
Nancy Lemon†††

INTRODUCTION

California is the only state that requires parents to mediate custody or visitation disputes involving their minor children. Since the enactment of the mandatory mediation statute in California, the vast majority of child custody disputes are settled out of court in a mediation conference. While such mediation has lightened the load on family court calendars, the result has been less than favorable for many women—those

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1 CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985) provides in relevant part:
(a) In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

2 For example, the San Francisco Superior Court had five custody or visitation hearings or trials in 1980, and three as of November 1981, a notable reduction in caseload since the court had five to fifteen hearings per day before it began to use mandatory mediation. King, Handling
who have been battered in their marriages. Researchers estimate that domestic violence occurs in nearly one-third of all marriages in the United States. Given the epidemic proportions of domestic violence in this country, a reexamination of the assumptions underlying mandatory mediation of custody awards is critical.

Mediation of child custody is a nonadversarial process of dispute resolution conducted as an alternative to litigation in court. The concept of mediation assumes an equal balance of power between the two parties. It results in a negotiated resolution of a "family" dispute. However for the many couples who come to mediation with a history of spousal abuse the balance of power is not an equal one. An examination of the psychological profiles of battered women and batterers shows that a history of spousal abuse results in a wife who is convinced of her own powerlessness and helplessness and a husband who is manipulative and dominating. Given these circumstances, agreements made through mandatory mediation are not the product of negotiations between parties of equal bargaining power. What should be a mutual agreement is in reality a series of concessions by the wife under duress.

A second aspect of the problem faced by battered women in the mediation context is the fact that California law emphasizes joint custody or sole custody with liberal visitation to the noncustodial parent. In

Custody and Visitation Disputes Under the New Mandatory Mediation Law, CAL. LAW., Jan. 1982, at 40, 41.

3 Domestic violence comes in many forms, from verbal abuse to sexual abuse, from pushes and shoves to homicide. The problems addressed in this article may be problems for women who have experienced only "minor" levels of abuse or violence, but the women we are focusing on for the most part are those who have experienced physical abuse to the point of injuries (bruises, black eyes, broken bones, concussions) and mental abuse to the point of having internalized a feeling of low self-esteem and fear of the consequences of disagreeing with the abuser.

4 M. STRAUS, R. GELLES & S. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 32 (1980). This statistic refers to violent acts committed by husbands as well as by wives. However, the researchers note that husbands have higher rates of the most dangerous and injurious forms of violence, that violent acts committed by a husband are repeated more often than is the case for wives, and that the data do not tell what proportion of violent acts by wives were in self-defense or a response to blows initiated by husbands. Id. at 43.

It is widely recognized that the vast majority of serious spousal abuse is committed by men against their female partners. For the purposes of this article, the terms "domestic violence" and "spousal abuse" are used interchangeably to refer to physical abuse by a husband against his wife.


6 See infra notes 58-81 and accompanying text.

custody determinations, whether mediated or court ordered, little if any weight is given to a husband's past violence against his wife. Thus, for battered women, mediation is likely to result in an unfair settlement and a custody arrangement which is likely to require continuing contact between the battered woman and her ex-husband assailant. This ongoing contact sets the stage for future violence, placing the woman and her children in jeopardy.

This article will examine the California legislation on mandatory mediation of custody and California's joint custody statutes in the context of families with a history of wife abuse. Section I will discuss the background of California law on mandatory mediation, joint custody and visitation. Section II will set forth the psychological profiles of battered wives and battering husbands. Section III will then analyze the problems presented by mandatory mediation and joint custody or liberal visitation awards when the husband is a batterer. Finally, the article will conclude with suggestions for reform in this area.

I. BACKGROUND OF CALIFORNIA LAW

A. A Brief History of Mandatory Mediation of Custody and Visitation in California and the Current Structure

California's increasing emphasis on solving family law problems through counseling began in 1939 with the enactment of the Family Conciliation Court Law. This legislation provided for the establishment of conciliation courts to hear domestic relations cases in counties where the superior court determined that the numbers of such cases warranted the establishment.

CAL. CIv. CODE § 4607(b) (West 1983) specifies that counties are not required to establish family conciliation courts, although each superior court must make a mediator available.

8 Schulman, Poor Women and Family Law, 14 CLEARINGHOUSE REV. 1069, 1074 (1981). CAL. Civ. CODE § 4608 which sets forth guidelines for determining custody awards mentions abuse against the child but does not mention spousal abuse as a factor to be considered. Id. § 4608(b) (West Supp. 1985).

9 1939 Cal. Stat. ch. 737, § 1 (codified in CAL. CIV. PROC. CODE §§ 1730-1772 (West 1982 & Supp. 1985)). The emphasis on conciliation can be seen in § 1730, which states:

The purposes of this chapter are to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.

CAL. CIV. CODE § 4607(b) (West 1983) specifies that counties are not required to establish family conciliation courts, although each superior court must make a mediator available.
new procedures. This movement toward counseling and conciliation culminated in 1980 with the enactment of legislation requiring each county to designate at least one judge to hear all domestic relations cases before a family conciliation court. The family court has been defined as:

a court with integrated jurisdiction over family matters, assisted by a staff of lay specialists, which exists for the purpose of providing help for families in trouble, employing the resources of the community to that end. The court, under this concept, is not cast simply in the role of arbiter in a controversy; rather, its main function is to provide therapeutic aid to the family unit. Some counties provided voluntary mediation of custody and visitation disputes through conciliation court services from 1977, but not until 1980 were counselors of conciliation authorized by state law to mediate such issues.

In 1981, California became the first state to require mediation of child custody and visitation disputes. There are two main reasons for the increased emphasis on counseling in court services: (1) a shift from the traditional litigation viewpoint to the behavioral science viewpoint in resolving family law problems, and (2) the overwhelmingly crowded court calendars of family law judges. As a result of mandatory mediation, the vast majority of custody arrangements between parents emanate from mediation conferences. It is now a rare case that actually goes to a judge for a decision on custody.

In a typical disputed child custody case, after or in conjunction with filing and service of the initial pleadings, one of the parties will set a hearing to determine the temporary custody and support of the children. If the case involves domestic violence, the temporary orders requested may include "kick-out," "stay-away," or restraining orders. The hearing on temporary orders will take place within a few weeks of separation and there may be ex parte orders in effect from the date of filing to the time of hearing. In every case in which child custody is contested the parties will be referred to a mediation unit, often administered within the court system.

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10 CAL. CIV. PROC. CODE § 1733 (West 1982).
13 See King, supra note 2, at 41.
14 See 1980 Cal. Stat. ch. 48, § 2 (codified in CAL. CIV. PROC. CODE § 1744(h) (West 1982)).
15 1980 Cal. Stat. ch. 48, § 5 (codified in CAL. CIV. CODE § 4607 (West 1983)).
16 Former Judge Donald B. King of the San Francisco Superior Court described the great efficiency of the mediation system: "In one year there were fewer hearings than there had been in a single day under the old system." King, supra note 2, at 41.
17 Id.
18 See CAL. CIV. CODE §§ 4359, 4607(e) and 7020 (West 1983 & Supp. 1985).
19 Id. § 4607; CAL. CIV. PROC. CODE §§ 1760-1768 (West 1982).
The actual process of mandatory mediation is left to the discretion of local courts and therefore varies from county to county. Generally, the court-appointed mediator will meet with the parties and attempt to help them to develop a custody agreement. As stated in the statute, "[t]he purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents."

The mediator has the authority to exclude counsel from all media-

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21 CAL. CIV. PROC. CODE §§ 1745 and 1745.5 (West 1982 & Supp. 1985) prescribes the qualifications for conciliation counselors. CAL. CIV. PROC. CODE § 1745 provides:

(a) Any person employed as a supervising counselor of conciliation or as an associate counselor of conciliation shall have all of the following minimum qualifications:

(1) A masters degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.

(2) At least two years' experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served.

(3) Knowledge of the court system of California and the procedures used in family law cases.

(4) Knowledge of other resources in the community to which clients can be referred for assistance.

(5) Knowledge of adult psychopathology and the psychology of families.

(6) Knowledge of child development, child abuse, clinical issues relating to children, the effects of divorce on children, the effects of domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.

(b) The family conciliation court may substitute additional experience for a portion of the education, or additional education for a portion of the experience, required under subdivision (a).

(c) The provisions of this section shall be met by all counselors of conciliation not later than January 1, 1984. This section does not apply to any supervising counselor of conciliation who is in office on the effective date of this section.

The newly enacted CAL. CIV. PROC. CODE § 1745.5 adds the following requirements:

(a) Supervising and associate counselors and mediators described in subdivision (b) of Section 4607 of the Civil Code shall participate in such programs of continuing instruction in domestic violence, including child abuse, as may be arranged and provided to them. This training may utilize domestic violence training programs conducted by nonprofit community organizations with an expertise in domestic violence issues.

(b) Areas of instruction shall include, but are not limited to, the following:

(1) The effects of domestic violence on children.

(2) The nature and extent of domestic violence.

(3) The social and family dynamics of domestic violence.

(4) Techniques for identifying and assisting families affected by domestic violence.

(5) Interviewing, documentation, and appropriate recommendations for families affected by domestic violence.

(6) The legal rights of, and remedies available to, victims.

(7) Availability of community and legal domestic violence resources.

(c) The Judicial Council shall solicit the assistance of community organizations concerned with domestic violence, and shall seek to develop a training program that will maximize coordination between conciliation courts and local agencies concerned with domestic violence.

Although the above section was enacted as of January 1, 1985, the provisions regarding domestic violence training have yet to be implemented.

tion proceedings,\textsuperscript{23} although in some counties the process begins with a conference between the mediator and the lawyers.\textsuperscript{24} If the mediation session fails to produce an agreement, the mediator may recommend that a custody investigation be conducted.\textsuperscript{25} After the investigation and evaluation are complete the case may go to trial on the custody issue.

In 1984 the California Legislature recognized the need for statewide coordination of mediation and conciliation services.\textsuperscript{26} Among other provisions, the Judicial Council is now required to establish a uniform statistical reporting system concerning custody dispositions and to administer grants for research and demonstration projects in family law. The hope is that this will help to provide improved legal response to the needs of battered women and their children who are going through custody or visitation litigation.

B. History of Joint Custody in California

Until the nineteenth century, Anglo-American law automatically gave custody to fathers since children were considered their rightful property.\textsuperscript{27} In the nineteenth century, the "tender years" doctrine developed, based on the assumption that it was always in the best interests of the young child to be in the custody of the mother.\textsuperscript{28} The twentieth century has seen most states remove any statutory preference based on gender by instituting the sex-neutral "best interests of the child" standard.\textsuperscript{29}

In 1979, California became the first state to enact legislation making it the public policy of the state to assure minor children continuing contact with both parents following divorce, and to consider joint custody as being in the best interests of the children when both parents agree to it.\textsuperscript{30}

\textsuperscript{23} Id. § 4607(d).
\textsuperscript{24} King, supra note 2, at 40.
\textsuperscript{27} Scott & Derdeyn, supra note 7, at 464 n.41.
\textsuperscript{28} Folberg & Graham, supra note 7, at 530-32; Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Fam. L. 423, 432-34 (1975). See also Klaff, The Tender Years Doctrine: A Defense, 70 Calif. L. Rev. 335 (1982).
\textsuperscript{29} Scott & Derdeyn, supra note 7, at 466.
\textsuperscript{30} See 1979 Cal. Stat. ch. 204, §§ 1-3 (codified in Cal. Civ. Code §§ 4600(a) and 4600.5(a) (West 1983 & Supp. 1985)). The policy statement in Cal. Civ. Code § 4600(a) provides:

(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

Cal. Civ. Code § 4600.5 provides:

(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child subject to Section 4608 where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage.
The legislation was strongly backed by fathers' rights groups seeking to

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases, subject to the provisions of Section 4608. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to Section 4602.

(c) Whenever a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interests of the child shall not be sufficient to meet the requirements of this subdivision.

(d) For the purposes of this part:
   (1) “Joint custody” means joint physical custody and joint legal custody.
   (2) “Sole physical custody” means that a child shall reside with and under the supervision of one parent, subject to the power of the court to order visitation.
   (3) “Joint physical custody” means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.
   (4) “Sole legal custody” means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.
   (5) “Joint legal custody” means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

(e) In making an order of joint legal custody, the court shall specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, either parent acting alone may exercise legal control of the child. An order of joint legal custody shall not be construed to permit an action that is inconsistent with the physical custody order unless the action is expressly authorized by the court.

(f) In making an order of joint physical custody, the court shall specify the right of each parent to the physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping.

(g) In making an order for custody with respect to both parents, the court may award joint legal custody without awarding joint physical custody.

(h) In making an order of joint physical custody or joint legal custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purposes of determining eligibility for public assistance.

(i) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court’s own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

(j) Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

(k) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

(l) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records, shall not be denied to a parent because that parent is not the child’s custodial parent.

For a discussion of the legislative history of these bills see Lemon, supra note 7, at 491-517. Prior to the enactment of this legislation courts were sometimes reluctant to award joint custody or to enforce joint custody orders. See, e.g., Holsinger v. Holsinger, 44 Cal. 2d 132, 279 P.2d 961 (1955); Burge v. City & County of San Francisco, 41 Cal. 2d 608, 262 P.2d 6 (1953);
expand their custodial rights following divorce.\textsuperscript{31} The trend has caught on, and over thirty states now have some form of joint custody legislation.\textsuperscript{32}

The California statutes now define joint custody and distinguish between joint legal and joint physical custody.\textsuperscript{33} Joint physical custody is an arrangement in which children spend roughly equal time with each parent.\textsuperscript{34} This can take the form of dividing weeks, months, or even years in half; the children can go from one parent to the other, or there can be a "nest" where the children stay while the parents take turns being with them.\textsuperscript{35}

The most common physical custody arrangement now is to have the children live with their mother but see their father regularly on weekends. This is sometimes called joint custody and sometimes called sole physical custody with visitation. In awarding joint physical custody, the judge is required to specify the right of each parent to the physical control of the child so that child snatching and kidnapping laws can be used to give the parent deprived of such control a cause of action against the other parent.\textsuperscript{36}

\textit{In re Marriage of Schwartz, 104 Cal. App. 3d 92, 163 Cal. Rptr. 408 (1980); Adoption of Van Anda, 62 Cal. App. 3d 189, 132 Cal. Rptr. 878 (1976).}

\textsuperscript{31} See Lemon, supra note 7, at 527-28. In discussing the legislative history of CAL. CIV. CODE §§ 4600 and 4600.5, Lemon explained:

The people pushing hardest for the legislative change in California were not feminists and were not advocating joint custody as a move toward sexual equality. In fact, much of the literature they sent to legislators, the press, and the public in support of the legislation characterized mothers as opting for sole custody in order to get excessive support income from fathers.

\textit{Id. (citations omitted); see also Scott & Derdeyn, supra note 7, at 462.}

\textsuperscript{32} In addition to California, states that have enacted legislation specifically allowing joint custody include: Alaska, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas and Wisconsin.

For a detailed chart comparing the legislative approaches and appellate decisions in the various states see Folberg, supra note 7, at 14-55.


\textsuperscript{34} See Id. § 4600.5(d)(3). CAL. CIV. CODE § 4727 (West Supp. 1985) provides that for the purposes of child support, "shared physical custody" means that each parent has custody of the child more than 30% of a 365-day period.

\textsuperscript{35} Joint physical custody, in practice, is often hard to distinguish from sole physical custody with liberal visitation. See Levy & Chambers, supra note 7, at 10.

\textsuperscript{36} See CAL. CIV. CODE § 4600.5(f) (West Supp. 1985). Joint custody, physical or legal, also presents problems under the Uniform Child Custody Jurisdiction Act. CAL. CIV. CODE §§ 5150-5174 (West 1983). If the batterer steals the children and takes them to another state, a frequent occurrence in domestic violence cases, the battered woman may have to convince the judge to modify the order to sole custody before she can get enforcement under this act. In People v. Harrison, 82 Ill. App. 3d 530, 37 Ill. Dec. 820, 402 N.E.2d 822 (1980), the court held that neither parent could remove the child from the state without infringing on the rights of the other parent who shared joint custody. If other states follow Harrison such problems will be minimized. Joint legal custody also presents a contrasting problem in interstate custody disputes. Since battered women often flee states where their batterers live, they may run the risk of jail or other sanctions for violating a joint legal custody order. CAL. PENAL CODE § 278.5 (West Supp. 1983), for example, sets forth punishment of 16 months to three years and a fine of not more than ten thousand dollars or both for any person who deprives another
Joint legal custody, on the other hand, requires the parents to continue to make decisions together about a minor child's health, education and welfare. These decisions generally include schooling, medical care, vacationing, religion, and other important issues. Joint physical custody and joint legal custody can be awarded in conjunction or combined with sole physical or sole legal custody.

California Civil Code sections 4600 and 4600.5 state that joint custody is presumed to be in the best interests of the child only where the parents agree to such an award. In every other case, the court may award custody to either parent, or to both parents jointly. The court should then only very rarely make a joint custody award to parents who do not agree to it, since parents who do not both want joint custody are generally unable to cooperate to the degree required for joint custody.

C. Standards for Custody and Visitation

The basic requirement of California law in custody disputes is for the court to order what is in the "best interests of the child." This standard is tempered by other subsidiary standards, provided by Civil Code sections 4600 and 4600.5. The statutes require, in consideration of the best interests of the child, preference for joint custody when the parents agree to it; consideration of the child's preference; and in the event that sole custody is awarded, a preference for the parent who will allow more contact with the non-custodial parent.

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38 Id. § 4600.5.
39 Id. § 4600.5(a).
41 CAL. CIV. CODE § 4608 (West 1983 & Supp. 1985). The statute provides:
   In making a determination of the best interest of the child in any proceeding under this title, the court shall, among any other factors it finds relevant, consider all of the following:
   (a) The health, safety, and welfare of the child.
   (b) Any history of abuse against the child. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against the child" means child abuse as defined in subdivision (g) of Section 11165 of the Penal Code.
   (c) The nature and amount of contact with both parents.
42 Id. § 4600.5(a).
43 Id. § 4600(a).
44 Id. § 4600(b)(1). This has been termed the "friendly parent" provision. See Schulman & Pitt, supra note 7, at 554-56. Friendly parent provisions pose a special problem for battered wives. A woman who fears continued contact with her ex-husband may nevertheless agree to joint custody so as not to appear uncooperative and risk a grant of sole custody to the husband. See also Scott & Derdeyn, supra note 7, at 476-77 (arguing that where a friendly parent provision
The amendment in 1979 of Civil Code section 4600 and the enactment of Civil Code section 4600.5 did not substantially change California custody law. Rather, it emphasized the legislature's interest in joint custody, and clarified that judges are authorized to make such awards. The court's focus on serving the best interests of the child has not changed. However, in some counties courts have come to see joint custody as being nearly equivalent to the child's best interests, and alternative ways of seeing those interests are not routinely considered. Thus joint custody has become, in some instances, a panacea for resolving the oftentimes difficult dilemma of how to serve the best interests of the child.45 Many lawyers, judges and mediators also seem to believe that California has a joint custody preference, although this is nowhere to be found in the statutes.46

As case law has developed over the years and expanded on these concepts, certain patterns have emerged. California courts have traditionally tried to minimize the disruptive effects of divorce on the child's life and daily activities.47 Before the popularity of joint custody, this usually meant that the child would remain in the family home with the custodial parent, typically the mother.48 Case law has also established that other factors in custody decisions may include the religious beliefs of the parents,49 the sexual orientation of the parents,50 the general physical condition of the parents,51 and any substance abuse by the parents.52

Pursuant to a new addition to Civil Code section 4608 effective January 1, 1985, California courts are required to consider prior instances of

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42 See, e.g., Scott & Derdeyn, supra note 7, at 469, n.63 and accompanying text (arguing that joint custody allows the judge to avoid the difficult task of choosing between two fit parents).

43 The policy statement in CAL. CIV. CODE § 4600(a) does not establish that joint custody is the preferred award. While some commentators have interpreted the statute as preferring joint custody over sole custody, e.g. Folberg, supra note 7, at 2-3; Scott & Derdeyn, supra note 7, at 472, this is not supported by the legislative history. For a thorough discussion of the history of the joint custody code sections see Lemon, supra note 7. Lemon's research indicates that the legislature clearly intended to make joint custody an equal choice with sole custody. Additionally, since the enactment of these code sections in 1980, California legislators have introduced several unsuccessful bills which would have made joint custody the preferred option. This provides further evidence that joint custody is not currently preferred over sole custody.


child abuse in determining child custody awards.\(^{53}\) Prior instances of spousal abuse are not part of this new statute, although such inclusion will again be proposed.\(^{54}\) Case law shows that such past acts are not controlling in the court’s determination of custody.\(^{55}\)

As to visitation, California Civil Code section 4601 states in pertinent part that “reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child.”\(^{56}\) “Reasonable visitation rights” are not defined in the statute. As in the custody area, case law has fleshed out the operative definitions of these terms. Courts are reluctant to deny all visitation by a parent, and if such denial is requested, the burden of proof is on the requesting parent to prove that visitation with the other parent would be “detrimental to the best interests of the child.”\(^{57}\)

II. PSYCHOLOGICAL PROFILES

In order to explain why mediation of child custody is inappropriate for families with a history of domestic violence, it is important to understand the psychological effects the physical abuse has on both the abused and the abuser. The following profiles offer a brief description of these psychological effects.

A. Profile of the Battered Woman

There are various theories that attempt to explain the phenomenon of wife battering.\(^{58}\) Many who have worked closely with battered women, including the authors, believe that wife battering is a societal problem and is generated by societal mores and public attitudes.\(^{59}\) The increasing number of battered women’s shelters and the amount of legislative effort that has developed during the last ten years have effected tremendous changes and increased the remedies available at law and in the community to deal with domestic violence problems.\(^{60}\) However, there are psychological characteristics shared by many victims, as well as

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\(^{53}\) CAL. CIV. CODE § 4608(b) (West Supp. 1985).

\(^{54}\) Assemblymember Klehs introduced AB 122 in the 1985 California Assembly to further amend CAL. CIV. CODE § 4608 to require the court to consider spousal abuse when determining child custody. This part of the bill died in committee, but a similar version will again be introduced.

\(^{55}\) See Sanchez v. Sanchez, 55 Cal. 2d 118, 358 P.2d 533, 10 Cal. Rptr. 261, (1961) (past acts are relevant but not controlling in determining custody).


\(^{58}\) For a brief discussion of the main theories that attempt to explain wife battering see Stallone, supra note 5, at 495-505.

\(^{59}\) Id. at 502-05.

\(^{60}\) For a discussion of litigation and legislation on behalf of battered women see generally Schulman, supra note 8.
characteristics common to most batterers, that have not been sufficiently considered in the context of mandatory mediation and joint custody legislation.

The phrase "learned helplessness" has been used to describe women who have learned to expect battering as a way of life, and who believe that they have no influence over the success or failure of events that concern them.61 According to this theory, repeated batterings during the marriage diminish the woman's motivation to respond, change her ability to perceive success, cause her to believe that her response will not have a favorable outcome, and furthermore lead her to believe that nothing she does will alter any outcome. These factors make her extremely prone to depression and anxiety.62 Once a woman is operating out of a phenomenological belief in her own helplessness, this perception becomes reality and she is passive and submissive.63 In this mode she "allows" the violence to continue.

In one study, researchers questioned fifty-seven battered women, most of whom were residents of battered women's shelters, and used a series of personality tests to generate quantitative data on domestic violence.64 The study was conducted on women who had already left their battering husbands, and who therefore would be similar to women entering custody mediation after recent separation from their spouses. The results of these tests showed women with low self-esteem, lack of self-confidence, and a tendency to withdraw.65 They had an aloof quality and a sense of discomfort when interacting with others.66 They experienced financial, household, employment and child care pressures, combined with a constant fear of their husbands' violent outbursts, all of which contributed to a high level of tension.67 The women were depressed, shy, introverted and had difficulty with self-expression.68

It is important to emphasize that the use of the psychological profile described above is not meant to imply that there is a certain personality type common to women who are involved in violent relationships. Rather, it is a description of the psychological state common to many battered women following periods of ongoing spousal abuse. As a whole, battered women encompass all personality types as well as all ethnic groups and socio-economic backgrounds.69

62 Id. at 49-50.
63 Id. at 47.
65 Id. at 483.
66 Id. See also Wetzel & Ross, Psychological and Social Ramifications of Battering: Observations Leading to a Counseling Methodology for Victims of Domestic Violence, PERSONNEL & GUIDANCE J., Mar. 1983, 423, 425.
67 Star, Clark, Goetz & O'Malia, supra note 64, at 483.
68 Id.
69 M. STRAUSS, R. GELLES & S. STIENMETZ, supra note 4, at 31.
B. Profile of the Batterer

Five factors have emerged consistently from studies of wife batterers: (1) a learned predisposition towards violence; (2) alcohol and drug dependency; (3) inexpressiveness; (4) emotional dependency; and (5) lack of assertiveness.\(^\text{70}\)

It is now well known that the majority of violent men were either abused as children, or grew up in families where abuse was prevalent.\(^\text{71}\) The family provides not only the initial exposure to violence, but also the context and meaning of its use to resolve family disputes.\(^\text{72}\) Although a causal relationship may be present, the connection between substance abuse and violence appears to be linked primarily to the batterer’s inability to cope with stress.\(^\text{73}\)

Many men maintain their dominance in the family by being “strong and silent.”\(^\text{74}\) This inexpressiveness in the emotional arena sets the scene for violence which many men perceive to be their only recourse.\(^\text{75}\) Similarly, abusive males are usually very emotionally dependent on their wives.\(^\text{76}\) This is often exhibited in jealousy and possessiveness of these partners and sometimes a resort to violence as a means of keeping the partner in the relationship.\(^\text{77}\) When faced with a partner who is leaving him, this kind of man becomes extremely depressed and even suicidal.\(^\text{78}\)

Finally, abusive men have been found to be less verbally assertive with their wives than non-abusive men. Abusive men appear to resort to violence rather than verbal communication, because they lack the verbal skills to assert themselves.\(^\text{79}\) This last factor appears to be inconsistent with other observations that batterers appear to be “clever, manipulative and charming, and occasionally, intimidating.”\(^\text{80}\) One commentator suggests, however, that these men may have well-developed verbal skills for their professional lives as lawyers, businessmen, contractors, etc., but do not have the verbal skills to express their personal needs.\(^\text{81}\)

\(^{70}\) Ponzetti, Cate, & Koval, Violence Between Couples: Profiling the Male Abuser, PERSONNEL AND GUIDANCE J. Dec. 1982, 222, 223. See also Wetzel & Ross, supra note 66, at 424-25.


\(^{73}\) L. Walker, supra note 61, at 25.

\(^{74}\) Ponzetti, Cate & Koval, supra note 70, at 223.

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) Ferry & Griffin, Treatment Manual for Cases of Domestic Violence 39 (unpublished manuscript) (for information regarding this manual contact Doree Griffin or Richard Ferry at 510 S. Mathilde, Suite 10, Sunnyvale, CA 94087). See also Ganley & Harris, supra note 71, at 4.

\(^{79}\) Ponzetti, Cate & Koval, supra note 70, at 223.

\(^{80}\) Ferry & Griffin, supra note 78, at 31.

\(^{81}\) Ganley & Harris, supra note 71, at 2.
III. MANDATORY MEDIATION OF CUSTODY AND JOINT CUSTODY AWARDS: THE PROBLEM PRESENTED

A. The Danger of Mandatory Mediation

A battered woman facing mandatory mediation of child custody has left her bad marriage and is attempting to resolve her domestic problems by separation or dissolution. She may have left her marriage out of a sense of hopelessness or because of extreme physical danger. Recently separated when she first enters into mediation, she has probably not been away from the batterer long enough to recover even minimal self-confidence. It is unreasonable to expect a person in this situation to function well in a mediation session with the man she fears.

In a mediation session the mediator is likely to find that the husband, in contrast to the wife, is dominant, charming, manipulative, agreeable, socially facile, controlling and holds an unequal amount of power in the marriage relationship. Placing the two together in a working mediation session is likely to resuscitate the old relationship, putting the wife back into her submissive and non-assertive mode. She is much more likely than her husband to be seen by the mediator as resistant to mediation, she will have equal difficulty in expressing her emotional needs but much less ability to present herself socially, she will exhibit fear of her husband and she may enter into an agreement that she does not want in order to get out of the mediation situation.

The wife in the mediation context may be unable to express herself at all, so that often only the husband's view is articulated. The mediator can only reflect what he or she has heard. A skilled mediator who is trained to work with violent couples and who works with them over a series of sessions would recognize these personality dynamics and traits and would attempt to see that both sides are heard. However, this ideal situation is unlikely to occur given the current inadequacies of the mediation process. Although the exact format of mediation varies from one county to the next, in most counties there is a common problem of shortage of county funds. Consequently, mediation units may be understaffed and over-utilized resulting in sessions which are likely to be short and hurried. Furthermore, many mediators have yet to receive any training on the dynamics of domestic violence. Thus the history of domestic violence and the personality dynamics of the couple may not be identified in the mandatory mediation session.

Forcing the parties to mediate custody leads to the possibility that the woman will be emotionally overwhelmed and will return to her violent marriage simply because of her inability to cope with her husband in mediation. Alternatively, the end result is likely to be a joint custody

\[82 \textit{Id.}\]
order or liberal visitation order that places the woman and her children in possible danger.

B. The Danger of Joint Custody

1. Custody Statutes Do Not Include Domestic Violence As a Factor in Custody Proceedings

The California Legislature has declared in California Civil Code section 4600 that "it is the public policy of this state to assure minor children of frequent and continuing contact with both parents."\(^{83}\) The legislature has also instituted a presumption that joint custody is in the best interests of the child if the parents so agree.\(^{84}\) Even where parents do not agree the current statute allows for an order of joint custody.\(^{85}\) In addition, section 4600(b) provides that in making a sole custody award, the court must consider "which parent is more likely to allow frequent and continuing contact with the other parent." Finally, spousal abuse is not considered a statutory factor in deciding the best interests of the child in a custody proceeding.\(^{86}\) These statutes do not take into account the effect of domestic violence on the success or safety of a joint custody or liberal visitation arrangement.

The statement of public policy in Civil Code section 4600(a), that it is in the child's best interests in every case to have frequent and continuing contact with both parents, may not be accurate where there has been domestic violence. In many of these situations the children have witnessed the severe beating and verbal abuse of their mother, and may have been abused themselves. They may therefore exhibit signs of extreme fear towards their father.\(^{87}\) Many batterers also abuse alcohol and/or drugs.\(^{88}\) After obtaining the right to contact his children, the battering husband may well use this opportunity to continue to exert power over, harass, and endanger his former wife.\(^{89}\) This is not so much a result of the child custody arrangement \textit{per se} as it is a function of the opportunity for continued contact between the parties.\(^{90}\)

\(^{83}\) CAL. CIV. CODE § 4600(a) (West Supp. 1985).
\(^{84}\) Id. § 4600.5(a).
\(^{85}\) Id. § 4600.5(b). \textit{See also In re Marriage of Wood}, 141 Cal. App. 3d 671, 683-84, 190 Cal. Rptr. 469, 477-78 (1983).
\(^{87}\) D. MARTIN, BATTERED WIVES 23 (1981).
\(^{88}\) Hiberman & Munson, Sixty Battered Wives, 2 VICTIMOLOGY 460, 461 (1977-78).
\(^{89}\) See J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE 125 (1980), where the authors point out that "raw feelings of both marital partners tend to be exacerbated by visits even when there is no actual contact between former spouses or when such contact is fleeting. The visit is an event continually available for the replay of anger, jealousy, love, mutual rejection, and longing between the divorcing adults."
\(^{90}\) One of the authors handled a case where a husband and wife could not agree about anything. The husband had such a quick temper that he would get enraged even in court. In private mediation they could not be in the same room together and each had to have a separate
While there have been bills introduced in the California Assembly that would make spousal abuse one of the statutory factors to be considered in determining the best interests of the child, at present spousal abuse is not listed as a factor in making this determination. Further consideration ought to be given to the problems involved in contact between the former spouses, and between children and abusive parents, in determining custody agreements.

California's presumption that joint custody is in the best interest of the child when both parents "agree" to such an award fails to take into account the dynamics of a relationship where domestic violence is present. One commentator has pointed out that joint custody presumptions such as California's are inconsistent with a "best interests of the child" standard because the best interest standard requires a case-by-case determination rather than a presumption about what is best for the child.

In a recent California case, In re Marriage of Wood, the court of appeals ruled that even where parents do not agree to a joint custody order, joint custody may be appropriate under the current statute. The court relied on Civil Code section 4600.5(b), which provides that a court may, at its discretion, award joint custody upon the application of either parent, subject to the best interests of the child. The Wood case involved, in the court's own words, "constant acrimony over visitation between the parties resulting in frequent resort to the courts." A battered woman may oppose a joint custody order because of the potential danger to her and her children, yet still be subject to joint custody under the Wood rationale, if her husband requests joint custody.

The "friendly parent" provision of the California statute adds to the dilemma of the battered woman in a custody dispute. Section 4600(b)(1) instructs courts to consider which parent will allow more contact with the noncustodial parent in making a sole custody determination. Battered women who oppose joint custody out of fear for their own safety or the safety of their children, are likely to be viewed by the court as uncooperative. The court may accept the batterer's assurance of continuing contact with the wife as evidence of his greater cooperation, and thus award custody to him. In sum, this provision gives the batterer, who later discussed the arrangement with the other therapist. These people entered into an agreement in which they were exchanging the children four times a day each school day.

91 See supra note 54.
93 Id. § 4600.5(a).
94 Schulman & Pitt, supra note 7, at 552-53.
96 Id. at 683, 190 Cal. Rptr. at 477.
97 See supra note 44 for a discussion of the "friendly parent" provision.
99 Schulman & Pitt, supra note 7, at 555-56. In the Wood case, 141 Cal. App. 3d 671, 190 Cal. Rptr. 469, the court transferred physical custody from the mother to the father because the
CUSTODY MEDIATION

There may be some tacit recognition within these statutes of the inherent problem posed by the emphasis on joint custody where domestic violence is present. One commentator points out that California Civil Code section 4600.5(d)(3), is at "ideological odds" with section 4600.5(f). The former defines joint physical custody as follows: "each parent shall have significant periods of physical custody" and children are assured of "frequent and continuing contact with both parents." Section 4600.5(f), on the other hand, requires the court to be specific enough in making an award of joint physical custody that if one parent abducts the children, the other can use the laws against child-snatching. The commentator notes that the first part is couched in the relaxed, cooperative, joint-parenting language promoted by "helping professionals" [and father's-rights groups], while the second part is clearly designed for law enforcement personnel [and domestic violence activists]. The commentator concludes that true joint custody is largely a fiction as long as such particularity is required.

In sum, the custody statutes as presently written in California do not take into account the interrelation between joint custody or liberal visitation and domestic violence. The statutes emphasize that a child should have continuing contact with both parents, but provide for no exceptions in the case where domestic violence is present. Even where parents do not agree to an award of joint custody, that result is still possible. The "friendly parent" provision under these statutes tends to give a batterer leverage in a sole custody determination by favoring the parent who says he or she will allow more visitation. Finally, the underlying tension between joint custody and domestic violence does receive some recognition in the statutes through the requirement of specificity in a joint physical custody order. However, domestic violence must become an explicit statutory factor, to be considered whenever relevant to a custody or visitation determination.

2. Courts Do Not Consider Domestic Violence in Determining Custody

While courts have broad discretion to consider any factor they find relevant in deciding the best interests of the child, judges have gener-
ally not considered spousal abuse in custody determinations. Courts have failed to recognize that violence affecting the parent also affects the children of that parent. In addition, courts have long been instructed to ignore the needs of parents in favor of the needs of the child. As a result, courts largely do not yet acknowledge that domestic violence involves children and parents in a complex situation that is not so easily subdivided into adult and child problems.

Although the effects on children of witnessing abuse of one of their parents by the other have not been established, children are certainly the psychological victims of the physical abuse suffered by a parent in this situation. The primary effect of interspousal violence is often that the children of the abusing parent develop abject fear of that parent. A secondary effect, because violence is a learned behavior, is that the children grow up not only to accept violence as a way of life, but also to use it as adults to vent frustration and get what they need. Thus, in considering a child's best interests, courts should consider wife battering as well as child abuse.

Judges are almost always reluctant to limit the father's access to the children unless he has been abusive to them. The definition of child abuse in this context, however, needs to be expanded to reflect the severe emotional trauma suffered by children who see or hear their mother or siblings being beaten. The fear and sense of powerlessness experienced by a child who witnesses this horrifying event, and is unable to stop it, is in itself extremely abusive. Child abuse as defined in the “best interests of the child” provision in California does not include psychological abuse of children or viewing abuse of the parent.

Judges and mediators also may make it clear to a battered woman that the batterer's violence towards her is irrelevant in determining cus-
CUSTODY MEDIATION

CUSTODY MEDIATION

The assumption may be that batterers are no more likely than other fathers to abuse their children.\(^{111}\) Again, as the phenomenon of domestic violence becomes better understood, the fallacy of this assumption becomes clear.

Battered women frequently express the fear that once they become unavailable to the batterer he will vent the same uncontrolled violence on the children.\(^{112}\) Many women finally decide to leave a long-term abusive relationship only when they see their partner begin to direct the same abuse toward the children.\(^{113}\) In a survey of one hundred battered women, fifty-four said that their husbands had committed acts of violence against the children as well.\(^{114}\)

Studies showing that batterers were often abused as children\(^{115}\) do not prove that batterers will abuse their children. However, these studies do support the idea that batterers have learned that violence is an acceptable way to treat family members. Though more studies are needed to determine whether children of batterers are more likely to be abused than other children, we know enough to see that a history of violence within the family is relevant in determining the best interests of the child when custody and visitation orders are made. The custody statutes in California and the consequent judicial interpretation of those statutes must be revised to include domestic violence as an important factor in custody determinations.

3. The Nature of Joint Custody Makes It Unworkable in Families With a History of Domestic Violence

Joint custody and "reasonable" visitation are seen in a new light when domestic violence is taken into account. In the best of situations, joint custody demands objectivity, communication and responsible behavior of parents at a time when conflict is likely to prevail between them.\(^{116}\) The profile of batterers discussed their extreme insecurity, lack of verbal assertiveness and consequent resort to physical violence to gain control of their victims. Their victims are noted to be depressed and passive.\(^{117}\) Clearly, these are not people who are equipped to handle the demands of a joint custody arrangement.

Awarding joint custody, or sole physical custody with liberal visita-

\(^{111}\) See Schulman, supra note 8, at 1074.
\(^{112}\) This opinion is based on one author's experience working with hundreds of battered women in battered women's organizations over the last few years.
\(^{114}\) Id. at 196.
\(^{116}\) See Mills & Belzer, supra note 7, at 869 for a discussion of the "tremendous demands on parental capacity" brought on by a joint custody arrangement.
\(^{117}\) See profiles of battered woman and batterer supra notes 58-81 and accompanying text.
tion, can put battered women and their children in danger for years to come. In a San Francisco case, the batterer drove the children around the city during visitation, forcing them to identify the new, secret neighborhood where they now lived so that he could track down his ex-wife. In such a situation, an order allowing visitation only in the presence of a neutral third party could have prevented this abuse of visitation rights. This recourse is available under current law when there is a history of violence and when restraining orders are in effect, but is sometimes hard to obtain.

One expert in the field notes that joint legal custody expands the rights of the non-custodial parent, usually the father, without consequent expanding his responsibility. In effect it gives the father “veto power” over the mother, who is responsible for the day-to-day care of the child. Another writer likens joint legal custody to “a . . . forced remarriage of hostile parties.” The structure of a legal or physical joint custody arrangement holds inherent dangers where domestic violence is present.

IV. SUGGESTIONS FOR REFORM

Domestic violence commentators generally agree that mediation of wife abuse cases is problematic, if not unworkable. Similarly, mandatory mediation of custody and visitation issues is usually not a solution where domestic violence is involved. The mandatory joint session with a mediator is not a setting in which the battered woman can candidly and freely discuss custody and visitation or agree to an arrangement that is safe and fair to all the parties concerned. The court’s intent to achieve an equitable resolution of these issues outside the courtroom is a noble one. That intent, however, is defeated in the case of battered women because the means used are weighted against them. While the family courts cannot solve the problem of domestic violence, they can adopt standards and procedures that acknowledge the problem and protect its victims from further abuse.

A. Hearings Before Individual Meetings With Mediators

California courts should develop a process to screen out couples for whom joint mediation will not be workable. The burden could fall on the

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118 Interview with Ann Graham, family law attorney, San Francisco, California, regarding one of her clients (Nov. 15, 1983).
119 CAL. CIV. CODE § 4601.5 (West 1983).
121 Id. at 31 (quoting Kozak, Chair, N.O.W-N.Y.S. Marriage and Divorce Task Force, Lobby Day Presentation Concerning N.Y. Joint Custody Legislation, (Mar. 24, 1981)).
122 Lerman, supra note 5, at 71.
123 Id. at 57-61.
attorney, or on the battered woman when she has no attorney, to show that joint mediation will be hazardous to the battered spouse. One way to ensure that mediation is used only by those couples for whom it may be appropriate is to provide for a pre-mediation hearing upon a showing of cause. Such a hearing should be available to a party who does not want mediation, to explain why individual meetings with the mediator would be more appropriate. Alternatively, to save court time, the battered woman could be seen separately by the mediator without the necessity of a hearing.

In some counties, mediators meet with the attorneys before meeting with the parties.\textsuperscript{124} This practice helps the party with an attorney by enabling the attorney to point out the problems of a case to the mediator so that he or she can anticipate and watch for symptoms of batterers and battered women. In most counties the mediator does not read the court file and therefore has no way of knowing that there is a documented history of violence present or whether there are restraining orders in effect. The practice of a preliminary meeting between the mediator and the attorneys should be followed in all California counties. Also, all mediations and evaluations should be done via separate meetings with the parents if one of the parties requests it, and if there is a demonstrated justification for the request.\textsuperscript{125}

B. Inclusion of Spousal Abuse as a Factor in Custody Proceedings

California Civil Code sections 4600, 4600.5 and 4601 should be amended to include consideration of past incidents of spousal abuse. The “best interests of the child” standard in section 4608 should be further defined to include past abuse of the mother as a specific criterion to be weighed in custody and visitation decisions.

The presumption in section 4600.5 that joint custody is in the best interests of the child if the parents agree puts undue pressure on battered women to make an agreement that may be dangerous to their own physical safety and that of their children. Section 4600 increases this pressure by instituting a preference for the parent who will allow more contact with the non-custodial parent in sole custody proceedings. The legislature should amend these statutes to provide specific exceptions in cases of domestic violence.

Until the legislature recognizes spousal abuse as an important factor in determining custody, family courts should exercise the broad discre-

\textsuperscript{124} King, \textit{supra} note 2, at 40.

\textsuperscript{125} Other commentators have suggested that it may be appropriate in domestic violence mediation to allow the mediator to speak to the parties separately as well as together, because the victim may be afraid to talk about the violence in front of the abuser. Lerman, \textit{supra} note 5, at 91; Bethel and Singer, \textit{Mediation: A New Remedy for Cases of Domestic Violence}, 7 VT. L. REV. 15, 19-20 (1982).
tion given to them by California Civil Code section 4608, and include spousal abuse as a relevant factor in determining the best interests of the child. A few courts have recognized the relevance of domestic violence in determining custody. In Illinois, the appellate court found a husband's beating of his wife relevant to the custody determination, stating that the conduct of the father served “as a beacon to the trier of fact of his potential for violence and physical harm.” Courts in Montana and Idaho have denied mothers custody because of the violent character of their new husbands. Another Montana court granted custody to the mother where the father had repeatedly assaulted her. California should follow the lead of these courts in considering domestic violence in custody cases.

Current California case law provides some support for the consideration of domestic violence in custody cases. For example, in In re Dorothy J., the court admitted evidence of specific acts of misconduct with an older child to prove a predisposition toward future sexual abuse of the subject child in a dependency proceeding. The court quoted the Assembly Judiciary Committee’s report of 1969 Divorce Reform Legislation in describing the purpose of Civil Code section 4509 (specific acts of misconduct admissible if relevant to child custody) as stating that “[in] child custody actions the character of the potential custodian is important and limited specific acts of misconduct might be the only available evidence of character . . . ” Though judges have not generally read Civil Code section 4509 to allow evidence of spouse abuse to be admitted, it is arguable that they should.

Case law also lends some support to extending the definition of child abuse to include viewing abuse of a parent or sibling. In Cline v. Superior Court, the absconding father was held guilty of child abuse for having grabbed the two-year-old baby away from the mother, carrying him like a football, throwing him in the back of the car, and attempting to drive off while the mother tried to prevent him from doing so. The court stated that child abuse can occur when the child is placed in situations in which the likelihood of serious injury is great, as well as situations in which great bodily injury actually results. The baby’s nightmares and nocturnal hysterical screaming were considered evidence of unjustified mental suffering. Arguably, children are placed in situations that are equally or more dangerous when judges grant a battering father custody

126 See supra note 41 for the text of § 4608.
127 In re Custody of Williams, 104 Ill. App. 3d 16, 18, 432 N.E. 2d 375, 376 (1982).
131 Id. at 1159, 209 Cal. Rptr. at 8.
133 Id. at 949, 185 Cal. Rptr. at 790.
or visitation rights, and exhibit similar signs of terror during and after witnessing their mothers being beaten.

Spousal abuse would probably be a factor in the court's custody decision if the wife could show that the violence against her also harmed the children. It is well-settled in California that a custody order may not "reward an 'unoffending' parent for any wrongs suffered as a result of the 'sins' of the other." A showing of psychological harm to the children, however, would take the issue of spousal abuse and its impact on custody beyond a "reward" analysis. Courts sometimes admit expert psychological testimony on matters of this sort.

Spousal abuse could also be used as evidence of the batterer's poor moral character. A parent's character is at issue in a child custody proceeding, and character may be shown by past personal behavior. Thus, specific acts of violence against a spouse would be relevant. A parent who expresses anger and frustration through violence is a negative influence on the child, teaching by example that violence is an appropriate way to deal with these emotions. One California court recognized the importance of an "environment which will not be detrimental to the character and morals of the child"; a spouse abuser would be unlikely to be able to provide such an environment.

Specific guidelines for mediators and judges should be established in each family court regarding joint custody evaluations. Together with factors such as geographical proximity and the ability to communicate, domestic violence must be an important factor in these guidelines because it has significant effects on the design and effectiveness of custody and visitation plans. Family Court Services of Contra Costa County has developed its own guidelines for joint custody cases. Each county should develop such criteria and include a recognition of domestic violence as a factor arguing against joint custody. Separate standards

135 See B. WITKIN, CALIFORNIA EVIDENCE §§ 290, 327 (2d ed. 1966).
136 CAL. CIV. CODE § 4509 (West 1983).
138 Crossley, General Criteria for Joint Custody, the document used by Family Court Services, Martinez, California, provides as follows:

An award of joint custody is a viable alternative for courts to consider when the circumstances are such that it probably will work. Those circumstances which are favorable to joint custody awards include the following where:

1. The parties have agreed to joint custody or where there has been a prior order for joint custody and experience has shown that the benefits to the child exceed any detriments.
2. The parties have demonstrated that they are capable of reaching shared decisions in the child's best interest and are able to communicate and give priority to the child's welfare.
3. The logistics are such that there is no substantial disruption of the child's
for joint legal and joint physical custody should be developed by each family court.

C. More Mediators and Family Court Judges With Better Training in Domestic Violence

The heavy workload of family court mediators is such that when the parties finally meet with the mediator, individually or jointly, the appointment is often rushed and all the important issues may not be fully covered.\(^{139}\) The mediators handle highly significant situations that have long-term effects on personal lives and there should be enough time available to allow for careful evaluation and discussion of the proposed plan. The limited number of mediators and their heavy client assignments make such evaluation and discussion difficult, if not impossible. The availability of more family court mediators would alleviate this problem and allow the courts to develop a workable custody and visitation plan, rather than an inadequate one which may result in numerous subsequent hearings or out-of-court abusive incidents. Of course, this would require an allocation of additional funds, which is unlikely to occur in most counties. At a minimum, the mediator pool should keep up with the ever-increasing numbers of family law filings in California courts.

Most family court mediators have not yet been given specialized training in domestic violence.\(^ {140}\) Given that a high percentage of married women suffer some form of domestic violence,\(^ {141}\) and that the behavior it engenders in the abuser and victim is distinctive, such training is essential for someone who deals with negotiations between parties who may very

routine, schooling, association with friends, religious training, etc. Ordinarily this means close geographical proximity of both parents or a “bird nest” arrangement.

4. There is no indication that the psychological and emotional needs and development of the child will suffer due to a particular joint custodial arrangement.

5. The work hours and routine of both parents are such that child care will be suitable for both homes.

6. Joint custody is in accord with the child’s wishes and he does not have a strong opposition to such an arrangement.

There are also circumstances where joint custody should be rejected, which include circumstances where:

1. Each party is unalterably opposed to joint custody, or,

2. Animosity and hostility between the parents is so great that joint responsibility and child care is impractical.

3. Joint custody is not a viable alternative due to logistics.

4. Joint custody or past arrangements show that the child has been subjected to a “double bind” due to conflicting decisions or practices of the parents.

5. The work hours or routines of the parent or parents make joint custody impractical.

6. The child rebels against or is strongly opposed to joint custody.

\(^ {139}\) See Freedberg, supra note 25, at 25.

\(^ {140}\) CAL. CIV. PROC. CODE § 1745 (West 1982 & Supp. 1985) now requires that the mediator have “knowledge of ... the effects of domestic violence on children” and § 1745.5 outlines additional training in the area of domestic violence, but these provisions have yet to be implemented. For the complete text of these statutes see supra note 21.

\(^ {141}\) See supra note 4 and accompanying text.
well have been in a violent relationship. Training in domestic violence should be required for mediators and could be most effectively provided by the staff of local shelters for battered women, so long as there is adequate funding for shelter staff teaching time.

One of the results of mandatory mediation of custody and visitation is to reduce the length and number of hearings on the busy court calendar. The introduction of pre-mediation hearings to safeguard the fairness of the mediation process would cause some increase in the number of cases on the family court calendar. Family courts already need more judges if they are to meet their existing case loads, and an increase in hearings will necessitate more judges.

Family court judges, like mediators, have been expected to deal with the previously hidden problem of domestic violence without having had any special training in the area. Judges serving in family courts should be given training in the area of domestic violence so that they can recognize and understand the situations and personalities involved. Again, the local battered women's shelter staff may be in the best position to discuss domestic violence in the community.

D. More Studies on the Effects of Joint Custody

The most comprehensive study of the effects of joint custody on children did not include any instances of court-ordered joint custody; all of the arrangements were worked out amicably by the parents. The study concluded that the effects of joint custody need to be studied further before it can be embraced as a broadly applicable policy. Further study is needed of cases where joint custody is ordered by the court, and where joint custody is instituted in a family with a history of domestic violence.

CONCLUSION

Domestic violence is now a widely recognized problem that affects a substantial number of families. California laws favor joint custody when parties agree to this arrangement, and at the same time require mediation of all custody cases. Under these laws, battered women may end up “agreeing” to joint custody even when joint custody will present continued danger to themselves and their children due to continued contact

142 CAL. CIV. PROC. CODE § 1745.5 (West 1985) provides in part that mediators “shall participate in such programs of continuing instruction in domestic violence, including child abuse, as may be arranged and provided to them.” This is strong language, but does not appear to be mandatory. We laud the intention of the new statute. See also Lerman, supra note 5, at 110-11.

143 King, supra note 2, at 41.

with the batterer. The lack of legislative and judicial recognition of spousal abuse as an important factor in custody determinations makes it even more difficult for a battered woman who decides to fight a joint custody arrangement on this basis. By resisting joint custody, she risks being found "uncooperative" by the court. Under present law, the court could then award custody to the batterer on the grounds that the wife is not likely to allow continuing contact with him. Thus, the joint custody and mandatory mediation laws in California present both a dilemma and a danger to battered wives and their children.

California family courts have been in the forefront of reform in the area of family law. Reform is now necessary in joint custody and mandatory mediation law both in the legislature and in the courts. Domestic violence should be made a factor in custody and visitation determinations. The mediation process should allow for individual hearings where domestic violence is a problem. Mediators and judges should be trained in the dynamics of domestic violence and more mediators and judges are needed to cope with the increasing caseloads of the family courts. Such reforms will ensure that existing progress made in recognition of the general problem of domestic violence is not thwarted in the area of custody law.