

BALLARD BRIEF

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Lack of Child Protection in US Custody Proceedings Involving Allegations of Abuse

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Summary

If allegations of abuse are filed in a child custody proceeding, it is meant to show evidence that the child could be in danger of future physical, sexual, or psychological abuse or neglect. The individuals who receive guardianship of children play a large role in the child's healthcare, education, and living situation.¹ With some numbers estimating that 58,000 children per year are put into the custody of an abuser, this issue is important to consider.² Currently, the United States has different laws and regulations that are not applied consistently across different court cases. While psychological testing is one of the main objective tools used to gain information regarding potential custody situations, there are currently no psychological tests that are admissible in the American custody system that is specifically formulated to analyze children's experiences. However, government funding could increase the resources needed to truly identify abuse, report it, and help children

suffering from abuse.³ Anything that recognizes the right children have to protect against abuse in the United States custody system could benefit thousands of children.⁴ The United States needs to take more measures to ensure that if children end up in the home of an abuser, the victims of the abuse are recognized, fought for, and helped in the ways they deserve.

Key Terms

Abuse—“An action that intentionally causes harm or injures another person.”⁵

Allegation—A claim or assertion that someone has done something illegal or wrong, typically made without proof.⁶

Child Abuse—“Any recent act or failure to act on the part of a parent or caregiver that results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act that presents an imminent risk of serious harm.”⁷

Court Appointed Special Advocates (CASAs)—A volunteer appointed by a

judge to advocate for a child’s best interest in court.⁸

Custody—“The state of physically holding or controlling a person or piece of property, or of having the right to do so.”⁹

Custody Evaluator—A professional (usually a psychologist) who is appointed to evaluate potential custody situations and then give a custody recommendation based on that evaluation.¹⁰

Guardian Ad Litem—Appointed to act in a lawsuit on behalf of a child or other person who is not considered capable of representing themselves.¹¹

Judicial Precedent—A previous case or legal decision that may be or (a binding precedent) must be followed in subsequent similar cases.¹²

Jurisdiction—The extent of the power to make legal decisions and judgments.¹³

Mediation—Intervention in a dispute to resolve it; arbitration.¹⁴

Parental Alienation Syndrome—The theory that abuse allegations made by one parent against another are solely there to alienate the child from them.¹⁵

Context

Q: What is a child custody proceeding?

A: A child custody proceeding is classified as a case “in which legal custody, physical custody, or parent-time concerning a child is an issue.”¹⁶ This decision regarding the division of the child/children’s time

usually requires a custody proceeding to help decide how the parents (or guardians) will spend time with their child(ren).¹⁷

Custody agreements can be decided upon in a variety of different settings. Some separating parents or guardians can reasonably and peacefully make custody decisions without the help of a mediating third party, while others

may need the help of a mediator or have to take their custody disputes to court to let the matter be decided by a judge.¹⁸

This brief focuses on child custody cases that involve allegations of abuse against one or both parents or guardians. Because allegations of abuse are involved, these custody agreements usually involve a court judge or custody evaluator to help make the custody decision, as the parents usually cannot come to a decision themselves.¹⁹

Q: What are allegations of abuse, and why are they filed in child custody cases?

A: In a legal sense, an allegation of abuse is a statement or claim that someone makes when they believe another person has intentionally inflicted harm on a person at some point in time.^{20, 21} Allegations of abuse are present in about 13% of child custody cases.²² However, these allegations are often difficult to prove true. One study completed in 2019 showed that out of 1,946 mothers that

filed allegations of abuse, only 41% of the allegations filed were credited by the court, showing that the majority were disregarded or discredited.²³ Furthermore, in a recent survey conducted in the United States, 25% said that domestic abuse was the main component in their decision to divorce.²⁴ If allegations of abuse are filed in a child custody proceeding, it is meant to show evidence that the child could be in danger of future physical, sexual, or psychological abuse or neglect. The consideration of these allegations of abuse (and a thorough investigation) is important when making a child custody decision so the child is protected from a potentially harmful person or environment.

Q: How prevalent are child custody proceedings in the United States?

A: It's unclear exactly how many custody proceedings occur each year. According to recent studies, 50% of children in the United States will witness the breakup of their parent's marriage, and of that 50%, 50% will

witness the breakup of a second marriage. It is estimated that there are over 1 million children affected by divorce each year in the United States.²⁵ These statistics show us the number of parental separations that could lead to custody proceedings in a given year; however, it's improbable that all of these separations go to custody proceedings.

Q: Why are children vulnerable in custody proceedings, and what are they vulnerable to?

A: The years 0–18 are the most developmentally vulnerable years of a person's life, and studies show that if children are maltreated at this age, it can cause lifelong problems.²⁶ The custody agreements made during a custody proceeding last until the child(ren) reach the age of 18, unless they legally emancipate themselves from their parents or receive permission from the court to change the custody agreement.²⁷ Furthermore, the parent (or parents) who receives

custody is the key decider of the child's healthcare, education, and living situation.²⁸

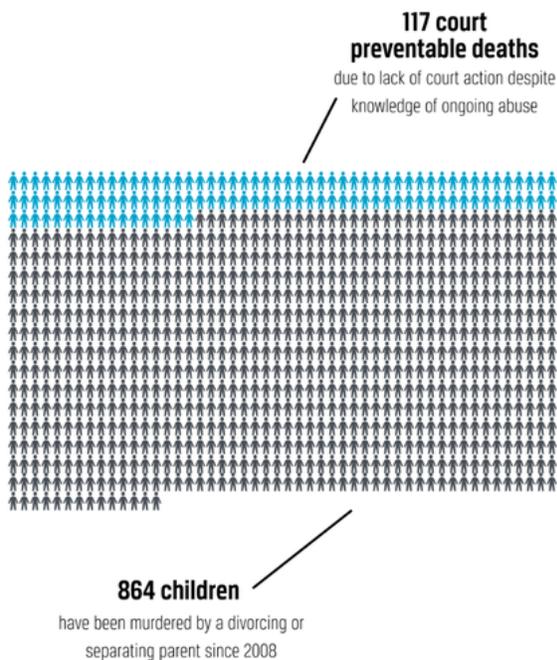
Q: Who are the key players in child custody proceedings with allegations of abuse?

A: The key players in a custody proceeding include the children whose time is being disputed, the potential custody holders, and the judge. When allegations of abuse are involved, there are other professionals who could get involved in the custody decision process, including guardian ad litem, custody evaluators, and court-appointed special advocates (CASAs). All of these professionals are involved if the judge sees fit and if their appointment falls under the judge's jurisdiction based on state and local laws.²⁹

Q: How do we know children are not being protected?

A: While there is a need for more research regarding this topic,³⁰ the research that has been done shows that the United States custody system

places children in abusive households frequently and on a large scale.³¹ A recorded 864 children have been murdered by a divorcing or separating parent since 2008,³² and estimates predict that at least 58,000 children are put in the custody of an abuser each year.³³



Contributing Factors

Legislation and Interpretation

National legislation surrounding the US child custody system has been written broadly and up to interpretation so it can be used to serve virtually all child custody cases.³⁴ Because allegations of abuse are present in only 13% of all cases,³⁵ the laws that have been made to handle virtually all cases (and rely upon the decision-making of each judge and custody evaluator) the courts may not be equipped to handle this serious matter as thoroughly as necessary. This leaves many children at risk of being placed in an abusive situation due to a reliance upon personal discretion.³⁶ While this is a national issue,³⁷ the specific guidelines of a custody proceeding vary by state due to a national interpretation of the Constitution's 10th Amendment.³⁸ The 10th Amendment, which protects the rights of individual states, is

interpreted in a way that puts child custody under individual states' jurisdiction instead of national jurisdiction.

Wide interpretation and jurisdiction can lead to variations regarding how custody cases are handled in each state.³⁹ However, specific points of child custody legislation have been established nationally through the United States National Code, which all states have to follow.⁴⁰ The most applicable clause in the national code that is necessary for understanding this brief is as follows:

18 US Code § 3524 - "Child Custody Arrangements"

Relevant clause: "Best Interest" Clause

"The court and the master shall, in determining the dispute, give substantial deference to the need for maintaining parent-child relationships, and any order issued by the court shall be in the best interests of the child."⁴¹

Interpretation: *This law implies that in every child custody case, every decision made by the court "and the master" should be made because it is what is best for the child. In all state laws, "best interest" is implied as the center of custody disputes.^{42, 43, 44}*

The majority of states usually decide what custody decision is best for the child according to the following factors: the child's age, needs of the child, parent's fitness to care for the child, financial situation of parents, child's adjustment to the environment, co-parenting abilities, parents' behavior in court, and if one parent is currently the primary caretaker.⁴⁵

Lack of Specificity and Enforcement

While legislation is passed that promises protection for children within the United States, without proper specificity or adequate enforcement, any kind of legislation may not have the effect that was originally intended or may not have any effect at all. It has

been reported that many states are out of compliance with federal mandates (specifically concerning the abuse and neglect of children) and are not held accountable by the federal government.⁴⁶ Since each state interprets the laws above differently, it can make it difficult for the United States government to enforce them. For instance, in Connecticut, the judge can take socioeconomic status into effect when deciding custody, but in other states, they cannot.⁴⁷ Even when these types of overarching laws are passed, states still choose if they want to incorporate them into state laws. For instance, Massachusetts is the only state that has still not incorporated the Uniform Child Custody Jurisdiction Act (which implies that once a custody decision is made in a home state, another cannot be made elsewhere),⁴⁸ and they are not required to implement it because they are protected by the 10th Amendment.⁴⁹ These laws are made vague for wide interpretation and wide acceptability for broad application, but this is at the expense of thoroughness.⁵⁰

The term “child’s best interest,” which is one of the most consistent aspects of child custody law in the United States,⁵¹ contains no objective language.⁵² Experts have said that the vagueness of the “best interest” law is a perfect vessel for biases to enter the recommendations of custody evaluators and the custody decisions of judges.⁵³ Each state has its own interpretation of what is in the child’s best interest, and each judge has their own interpretation of their state’s interpretation. Therefore, child custody decisions are reliant on opinion, which does not provide children with enough protection when there is a possibility of them being placed in an abusive situation.

Lack of Adequate Child Representation

Inhibition of Direct Child Involvement

The United States court system discourages children from being directly involved in their own custody cases, which could take away an opportunity for children to protect

themselves or express concern about their current or past living situations.⁵⁴ Direct involvement means asking children questions, getting their input on the situation, and explaining to them the major decisions that are being made. 91% of children in one survey said that they believed they should be involved in the decision-making process.⁵⁵



However, it is widely accepted in the field of law today that children are “not supposed” to make custody decisions for themselves.⁵⁶ This is due to two well-established beliefs: that children are not able to weigh all the factors involved in a custody decision⁵⁷ and that direct questions (such as which parent they would rather live with) could negatively affect them.⁵⁸ Although some children reported that

they felt uncomfortable with these kinds of questions (some even worried about physically violent consequences from their abusive parent or guardian), 70% of children still reported that they desired to express their opinion.⁵⁹ Despite this, in a survey of 89 custody evaluators, only 50% of them reported that they involved children in custody evaluations.⁶⁰

There are certain cases in which children are allowed to be directly involved because they are of sufficient age (which may be determined by state laws),⁶¹ but their opinions still are not held as valid and are sometimes disregarded completely. For example, in one study, when custody evaluators were asked where the wishes of the child ranked in importance out of 30 different variables (1 being most important and 30 being least important), the wishes of children younger than 10 years old did not rank higher than 20.⁶² There is evidence of a child crying for help during a custody evaluation, and their pleas were completely disregarded in the case *Neumann v. Smith* (which took

place in Arkansas in 2008). In another case, a pair of twins expressed a preference to live with their mother because they did not feel safe in their father's home. However, the court still gave sole custody to their father for 5 years before the custody decision was reconsidered due to their mother's appeal.⁶³ Because children are not regularly given the opportunity to express concerns regarding their custody situations, they are powerless to protect themselves from being placed in harmful situations and rely completely on others for protection.

Insufficient Indirect Child Involvement

In an effort to avoid directly involving children but still defending their interests, people are hired or appointed (like custody evaluators and Guardian Ad Litem) to try and collect information and data to act on behalf of the child and make recommendations to the judge.^{64, 65} While these indirect methods are employed with good intentions,⁶⁶ they are usually insufficient in providing evidence of

whether a custody holder is abusive or not. The methods for obtaining evidence of the fitness of a potential custody holder (and their relationship with affected children) are considered by experts to be outdated, vague, and lack the completeness needed to draw conclusions.⁶⁷ Furthermore, the court-appointed or hired professionals may also not have the adequate training, impartiality, or methodology required to determine what is in the child's best interest with the information that is given.⁶⁸ The lack of specialized tests, along with the possible biases in the interpretation of the tests, could put children at risk.⁶⁹

Bias

There are many types of bias that are continually reported to interfere with justice in the legal system, particularly with the custody decision process. Experts say that professionals often cannot adequately represent the best interests of a child because of personal bias.⁷⁰ Examples of bias that can impact the way that these professionals reflect a child's best interest are gender bias,

bias about the income of potential custody holders, and their own views on what is discipline and what is abuse. Possible gender bias could include the persisting belief that children need their mothers (in alignment with the previously accepted tender years doctrine),⁷¹ as women are often implicitly associated with home and family.⁷³ Because of this bias, judges may be inclined to disbelieve allegations of abuse filed against a mother. There is also an assumption that a child is better having both parents involved in the child's life (as shown by many states defaulting to a 50-50 split custody decision),⁷⁴ but this assumption has insufficient scientific backing to overrule allegations of abuse.⁷⁵ Judges also may believe that those with higher incomes can better take care of the children, such as in the case *Duff v. Kearns*,⁷⁶ in which the judge awarded custody solely based on the financial records of each party. Judges may believe that even if there are allegations of abuse present, a child placed in a household that is financially stable would be more in the child's best

interest.⁷⁷ The judge's view of discipline may also vary with their views on corporal (physical) punishment. The judge may believe that the allegation filed is not a case of abuse but is rather an attempt by one party to label discipline as abuse with the intent to manipulate the custody decision. The evidence and data presented could yield different conclusions due to personal bias and lead to a decision that is based on opinion.

Furthermore, if the judge holds some kind of bias and the custody evaluator knows about it, the custody evaluator may change their conduct and their custody recommendation to fall in line with the judge's preconceived beliefs in order to stay in the judge's favor (because custody evaluators are handpicked by judges for custody cases and need the judge's favor to get more case appointments).⁷⁸ Furthermore, the perceived authority and expertise of courtroom professionals (and the emotional nature of these cases) discourage

questioning, leaving many conclusions to be unchecked.⁷⁹

Insufficient Testing

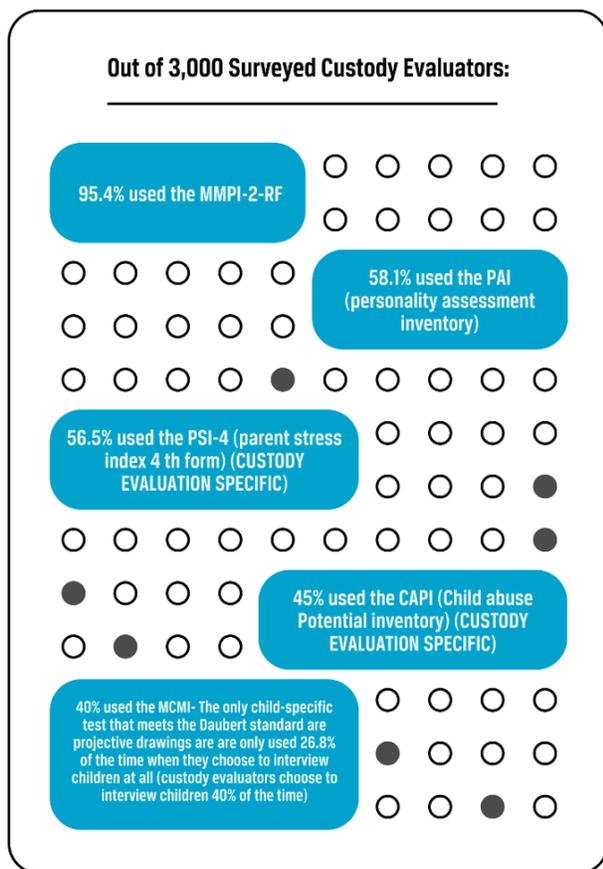
Psychological testing is one of the main objective tools used to gain information regarding potential custody situations.⁸⁰ These psychological tests are conducted according to the discretion of custody evaluators and judges. 75–95% of custody evaluators employ such tests in their evaluations.^{81, 82} In a study of 89 custody evaluators, 96% of them said that they conducted such tests to rule out psychopathology, but only 23% viewed the data as the primary source of data and information, and only 24% reported that they did it to determine the best interest of the child.⁸³ There are currently no psychological tests that are admissible in the American custody system that is specifically formulated to analyze children’s experiences.⁸⁴ The tests mainly evaluate the potential custody holders themselves rather than the relationship the child may have with the potential

custody holder, which leaves much room for interpretation and error.⁸⁵

Personality Tests

Personality Tests are used to rule out potential personality disorders and predict the behavior of the potential custody holder based on their personality profile.⁸⁶ The main personality tests used by custody evaluators are the Minnesota Multiphasic Personality Inventory 2 Restructured Form (MMPI-2-RF), the Millon Clinical Multiaxial Inventory (MCMI-III), and the Personality Assessment Inventory.⁸⁷ These tests meet the standard of admissibility to be presented as evidence in court (the Daubert Standard, which is the standard these tests have to meet to be considered scientific evidence)⁸⁸ and are therefore used most often by custody evaluators.⁸⁹ The MMPI-2-RF is regarded as the “gold standard” of psychological tests and is used by over 90% of custody evaluators that have been surveyed over the past 20 years.⁹⁰ It also includes portions that rule out potential respondent bias in

taking the test.⁹¹ The MCMI-III and Personality Assessment Inventory are similar to the MMPI-2-RF but are not used as often because the MMPI-2-RF has higher levels of admissibility and reported accuracy than the MCMI-III and Personality Assessment Inventory.⁹²



While these tests have been proven to be scientifically admissible, they are not made specifically for the purpose of

measuring a potential custody holder’s fitness and therefore require the use of much personal discretion among custody evaluators to use the data to come to a conclusion about a custody holder’s relationship with the child in question.⁹³ In one study conducted among 70 different custody cases and 18 different evaluators that used the MMPI-2 (similar in admissibility to the MMPI-2-RF, but a longer test), the study found that there was no relationship between the test results of the MMPI-2 scores and the custody recommendations made by the evaluators. Furthermore, 82% of the tests were considered invalid, yet the evaluators still made recommendations based on those tests, resulting in 67% of the cases containing questionable interpretations of test results as the basis of their custody recommendations.⁹⁴ It’s recommended that the interpretation of these test results not be trusted as true without other evidence to support the clinician's interpretation,⁹⁵ yet this does not happen often.⁹⁶

While the test can measure psychopathological traits of custody holders, there are many important aspects of a custody holder's fitness that cannot be concluded from these types of tests, such as the parent-child relationship, their patterns of behavior, the relationship between parents, and ultimately, an objective idea of what is in the child's best interest.^{97, 98}

Projective Tests

In projective tests, the test administrator shows some form of subject matter (such as a picture, sentence, or inkblot) to the test subject, and then the test subject interprets what it means to them.⁹⁹ Then, the test administrator interprets the subject's response as a reflection of their personality, behavior, or thought process in certain situations.¹⁰⁰ Widely used projective tests include the Rorschach test (inkblots) and the (not as widely used) Thematic Apperception Test (TAT).¹⁰¹ Because the results of these tests often vary significantly due to the individual interpretation from evaluator to evaluator, these tests are

only admissible in court when used with objective inventories (such as the Exner system for the Rorschach test). Objective inventories classify the interpretations of test results to make them uniform among other test result interpretations and therefore make what was formerly labeled a subjective opinion a scientifically admissible test result.¹⁰² These tests are typically viewed as not scientifically adequate to provide enough information, to give custody evaluators objective data that indicates what is in the best interests of children in the many aspects of a custody decision and situation.^{103, 104}

Custody Evaluation-Specific Tests

Custody evaluation-specific tests are made to find important objective data regarding custody-specific issues that the other tests cannot identify.¹⁰⁵ These tests include the PSI-4 (Parent Stress Index 4th Form), CAPI (Child Abuse Potential Inventory), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) (which relies on observational, social,

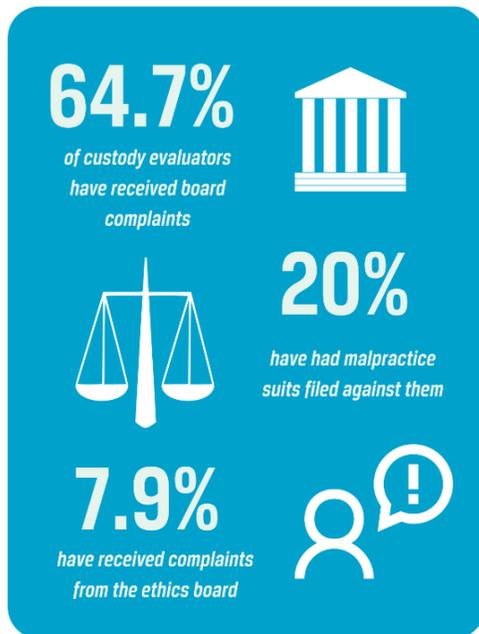
and cognitive-emotional aspects of evaluation), a series of tests developed called the Bricklin Scales, and many that are not as well known or used by custody evaluators.¹⁰⁵

Some of these custody-specific tests have been formulated for children, but none are categorized as meeting the Daubert standard of admissibility and therefore are failed attempts to formulate an admissible psychological custody test specifically meant for children.^{106, 107, 108} These child-centered tests include the Bricklin scales, which have been deemed too intrusive (as some ask children questions that may affect their well-being).¹⁰⁹

The custody-evaluation-specific tests targeted at potential custody holders that meet the Daubert standard are the PSI-4 and CAPI.^{110, 111} But these are still not enough to provide conclusive evidence of the fitness of a parent to hold custody or prove interpersonal violence claims and are not utilized by enough custody evaluators as psychological tests.^{112, 113} While the PSI-4 and CAPI meet the Daubert

standard,¹¹⁴ they still exhibit weaknesses.¹¹⁵ This is due to unknown error rates, reliance on the evaluator's ability to interpret the results, and the methodology used by evaluators.¹¹⁶ Without clear tests that show the relationship between the potential custody holder and the child, there is a significant gap in information between what the custody evaluator knows and what the child knows, emphasized by the lack of custody-related tests for children.¹¹⁷ This leaves a significant amount of room for an evaluator to make a misinformed decision regarding what they believe is in the best interest of the child.¹¹⁸ This makes this aspect of the custody evaluation, which is supposed to be based on objectivity, considerably subjective, and individual perceptions of data (with a large possibility of confirmation bias as 37% of custody evaluators use data to confirm their hypotheses).¹¹⁹

**From a Study Conducted with
Approximately 3,000 Custody Evaluators:**



Disregarded Accounts of Abuse

Allegations of abuse that are brought up in custody proceedings may not be given as much attention as needed to place a child in a safe custody situation. Because of the number of custody cases needed to be investigated (about 130,000 custody cases each year),¹²⁰ some custody decisions are made without conclusive evidence that the

allegations are true or falsified.¹²¹ If the allegations are true, then they can indicate that a parent may not be fit to have custody of the child, and if they are false, the fabrication of the allegations can be considered abuse itself.¹²² Both scenarios have the potential to cause serious harm to the child and can serve as an indicator regarding the potential conflicts that could occur between co-parents.¹²³ While these allegations are extremely important in determining child custody, many either are unreported in the first place or are minimized and inadequately investigated.

Unreported Abuse

There is a great estimated discrepancy between the number of incidences of abuse that occur and the ones that are actually reported.¹²⁴ Regardless of the circumstances compelling a party to silence, unreported abuse in any scenario implies the need to have adequate methods of identifying potential abuse in a custody situation. However, if neither party brings up a concern or allegation of abuse against

the other party, the court has no reason to investigate.¹²⁵

Minimized Abuse

Judges have to be careful in determining the validity of abuse allegations because if they're true, the accused party could be dangerous, but if they're false, the accuser is lying and may be dangerous themselves.¹²⁶ Abuse allegations are found to be false approximately 27–57% of the time.¹²⁷

When one party makes an allegation of abuse, the other party can dispute that allegation by claiming it to be fabricated and by accusing the person of Parental Alienation (PAS) (or Parental Alienation Syndrome), which is the theory that the abuse allegations made by one parent are invented solely to alienate the child from the accused parent.¹²⁸ The theory of PAS was developed as an addition to the men's custody rights movement in the late 1900s and is often used to discredit mothers who accuse their male partners of abuse.¹²⁹

Parental Alienation Syndrome

The theory that the abuse allegations made by one parent are invented solely to alienate the child from the accused parent.



There is no professional or scientific organization that officially recognizes Parental Alienation Syndrome to be a real disorder with scientific backing.^{130, 131} The National Council of Juvenile and Family Court Judges (NCJFCJ) has published Guidelines for custody courts stating that “The theory positing the existence of ‘PAS’ has been discredited by the scientific community... any testimony that a party to a custody case suffers from the syndrome or ‘parental alienation’ should therefore be ruled inadmissible and/or stricken from the evaluation report.”¹³² Despite this, PAS is still often taken to be a valid claim in

recent legal proceedings.¹³³ If PAS accusations are present, it can minimize allegations of abuse and therefore place a child in an abusive custody situation. In a 2019 study conducted over a 10-year period analyzing 222 cases, researchers found that when a claim of parental alienation was involved, mothers' allegations of abuse were 4 times less likely to be credited by the courts, and in some cases, the alienation claims trumped the abuse claims, resulting in the court placing children in custody situations with an alleged abuser solely based on their claim of being alienated.¹³⁴ It's important to note that another study was done to test the validity of the 2019 study, and they claimed that the conclusions made in the 2019 study were "invalid." And yet they still found that when allegations of PAS were found "valid" by the courts, the parent making abuse allegations lost significant custody or custody altogether.¹³⁵ However, this study makes an assumption that PAS is a scientifically valid reason to take away custody rights when it is not

officially recognized by any major organization as a real phenomenon and has been criticized continually for its lack of scientific validity.¹³⁶

Bias Regarding Type of Filed Abuse Allegation

Different biases can be present when it comes to the different types of abuse filed. Judges have varying opinions on the amount of evidence needed to prove different types of abuse and on the threat of danger that each type of alleged abuse poses to a child. For example, physiological trauma like bruises and broken bones is much more evidently admissible in a court of law than claims of emotional abuse. Emotional and psychological abuse is often not the focus of investigations because it is harder to identify than other types of abuse.¹³⁷ ¹³⁸ In one study analyzing 303 cases reported to the Division of Child and Family Services (DCFS), 50% of the cases (about 152 children) exhibited symptoms of emotional and psychological abuse, but only 9% of the cases (27 children) were credited by

DCFS at the time of referral.¹³⁹ This bias regarding the type of abuse children are experiencing leaves them vulnerable to being placed in a situation in which they will continue to be abused.

Sexual abuse is the most commonly disregarded allegation of abuse in custody allegations because it can be a trauma-inducing experience to check for evidence of sexual abuse.¹⁴⁰ In one study looking at court cases where mothers alleged various types of abuse, researchers discovered that judges still awarded custody to the father in 28% of cases where the mother claimed that he had sexually abused the child.¹⁴¹

Physical abuse can also be mistaken for discipline (as mentioned previously). The line between physical abuse and physical discipline is not well-established in custody law and can therefore cause judges to minimize allegations of abuse by labeling them as “discipline” according to their own opinions. For instance, in the United States, there is a question of how much physical discipline is acceptable before

it is considered abuse. Corporal punishment is still legal in the classrooms of 19 states, and the definition of abuse is different from state to state, leaving much up to interpretation in the courtroom.^{142, 143} This is not the case in other countries, such as Sweden, which believe that children have a right not to be physically punished, just as adults have a right not to be physically assaulted.^{144, 145} Any type of abuse filed shows that there is the potential for a child to be placed in a harmful custody situation, and although judges may believe that certain abuse is worse than others, there is no “tolerable” level of abuse.¹⁴⁶

Consequences

Physical and Sexual Child Abuse

The main consequence of children not being protected in a custody proceeding with allegations of abuse is the child being placed in an abusive home. With a conservative estimate of 58,000 children put in the custody of

an abuser each year, this leaves a lot of children in a position in which they could be seriously abused.¹⁴⁷ Furthermore, in a study conducted of 468 custody proceeding cases in which there were credited allegations of abuse, 13% of them gave custody to the alleged abuser.¹⁴⁸ There are several different types of abuse that could affect these children, including physical, emotional, mental, and sexual abuse. Often children experienced more than one type of abuse, as 74% out of 303 children surveyed in one study experienced more than one type.¹⁴⁹ Not only are each of these types detrimental to a child's development in the most developmentally vulnerable years of their lives, but once they are placed in an abusive environment, the abuse may have to be endured for a long period of time.¹⁵⁰ In 2020, there were a reported 617,000 children abused nationally, with younger children being abused the most (the rate of possible abuse decreases by more than half after children turn 1).¹⁵¹

Physical Abuse

Though the number of children physically abused after a final custody decision is unmeasured, the total number of children physically abused in 2020 was 101,805. This may be an underestimate as abuse is widely underreported.¹⁵² Physical abuse to developing children can lead to broken bones, bruises, head trauma, and even death. Studies have also determined that physical abuse can be the root cause of many long-term psychological, emotional, and behavioral problems due to maldevelopment. For instance, in one study, those who were physically abused were 1.5 times more likely to develop a depressive or anxiety disorder and were 3 times more likely to exhibit suicidal behavior.¹⁵³

Sexual Abuse

In 2020 it was reported that 57,998 children were sexually abused nationally, with more being experienced but unreported.¹⁵⁴ Sexual abuse not only has short-term consequences, including psychological

trauma, physical damage, and sexually transmitted disease, but it increases the probability of improper sexual development, depression, suicidality, and revictimization.^{155, 156} It also can impair the child's ability to develop healthy sexual relationships in the future or develop a healthy attachment to others.¹⁵⁷

Psychological Abuse

Children in the United States custody system are also at great risk of being placed in situations where they are psychologically and emotionally abused by their custody holders. Psychological maltreatment of children is the most prevalent yet challenging type of abuse to identify because it involves more of a relationship dynamic rather than one specific event of abuse.^{158, 159} For instance, this could be continually putting the blame on the child for a parent's mistakes, name-calling, or not adequately responding to children's emotional needs. While there are no physically identifiable signs of abuse occurring, there are measurable effects on a child's development.

Emotional abuse can result in distress, mental illnesses, and suicidality.¹⁶⁰

Also, it has been said that emotional abuse is one of the most damaging types of abuse as it could continue to put children in a situation where they cannot receive help because no evidence can be produced to show the abuse is happening.¹⁶¹

Furthermore, emotional or psychological abuse is considered a critical aspect of all other types of abuse. Physical abuse, sexual abuse, and neglect each have an emotional aspect to them.¹⁶² Emotional abuse is often accompanied by other types of abuse. One study showed that out of 152 children with credited cases of psychological abuse, 63% (96 children) also experienced a form of physical abuse, and 76% (111 children) experienced a form of neglect.¹⁶³



The witnessing of domestic abuse can also be considered psychological abuse, as it forces children to be placed in a situation where their development, relationships, and well-being are at risk. Even if a child is not being directly abused, just being a witness to domestic violence or abuse can be a form of psychological harm that can have lifelong negative consequences.¹⁶⁴ It has even been shown that children who witness abuse can experience some of the same effects as children being physically abused themselves.¹⁶⁵ In one meta-analysis done on 118 studies, there was a tiny mean difference calculated regarding the long-term well-being (including academic problems, psychological problems, and social problems) of children who had witnessed domestic

violence and children that had been physically abused, showing that indirect abuse can be as harmful to as direct abuse in the long-term.¹⁶⁶

Children with divorced or separated parents are 2-3 times more likely to have witnessed domestic violence.

Witnessing domestic violence as a child is also associated with a higher risk of developing post-traumatic stress disorder (PTSD), antisocial personality disorder (or conduct disorder for younger children), and other behavioral and emotional disorders.¹⁶⁷ It is also shown that children with divorced or separated parents are 2–3 times more likely to have witnessed domestic violence in their lifetime.¹⁶⁸ An inefficient custody system that fails to take even just the witnessing of

domestic abuse seriously could place children in a position in which they have to endure long periods of psychological and emotional abuse that could have negative consequences for the rest of their lives.

Inhibition of Children’s Rights Legislation

Not allowing children to participate directly in custody cases, especially those involving abuse, minimizes the rights of children and makes it so that new legislation regarding children’s rights cannot be implemented as it would require the custody system to change.¹⁶⁹ The practices in the United States currently are not in accordance with the internationally accepted rights of children, particularly the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC is a globally accepted document that outlines the rights of children all over the world.¹⁷⁰ Currently, the United States is the only nation in the United Nations organization that has yet to ratify this document.¹⁷¹ The adoption of the UNCRC would require the United States

to make changes in the way it treats its children, including in custody proceedings.¹⁷²

Many countries changed and rewrote legislation shortly after their ratification of the UNCRC in 1989. In England and Wales, there has been enforcement and encouragement of direct child involvement in custody decisions as a result of the adoption of the UNCRC.¹⁷³ Similarly, in Norway, while implementation and enforcement are difficult, they have embraced and encouraged the participation of children in their own custody cases.¹⁷⁴ The current US custody system is structured in such a way that does not align with the principles outlined in the UNCRC, which includes the lack of uniformity in the United States custody system, children’s lack of involvement in their custody proceedings, and the prioritization of parental rights over children’s rights in custody decisions.¹⁷⁵ Therefore, because the United States custody system has been minimizing the rights of children, the unwillingness to fix the system is further preventing the United States

from affording children the rights that are recognized in other parts of the world.

United States representatives have proposed a resolution (Resolution 99), which supports the US government's unwillingness to ratify the UNCRC.¹⁷⁶ Those who proposed the resolution were concerned that the UNCRC would encroach upon the sovereignty of the United States by giving the United Nations too much control over national policy. They also thought that its ratification would undermine the rights of guardians to parent their children.¹⁷⁷

There has been significant debate regarding how the UNCRC would change custody proceedings and visitation and thereby make custody proceedings more uniform in the United States.¹⁷⁸ One side may argue that while many of these concerns are interpretations of the Constitution,¹⁷⁹ many of the rights expressed in the UNCRC are already afforded to persons in the United States. However, "freedom of speech," "peaceful assembly," and life are currently only

minimally allotted to children because the interpretation of the United States Constitution and the rights expressed in it do not apply the same way to children as they do to adults.¹⁸⁰ This is because children are largely seen as an extension of their parents, and parents are allotted the right to parent their children how they please.¹⁸¹ The treatment of children in the current custody system reflects the view of a parent's right to their children and is another reason for custody holders to be hesitant about the adoption of the UNCRC. The UNCRC explicitly has these rights for children stated within its clauses and, therefore, would require a change on behalf of the United States. Therefore, legislation regarding the rights of children cannot be passed or ratified due to the nature of the custody system, and the US government's unwillingness to change the custody system is perpetuating a cycle that minimizes and endangers children's rights.

Practices

DV Leap

DV Leap is an organization that helps pleading victims of domestic violence who have received unjust custody decisions. DV Leap argues that there is a lack of representation in custody proceedings for victims of domestic abuse and criticizes the custody system for prioritizing co-parenting rather than the protection of children and survivors of domestic abuse. This organization allows those who have been domestically abused to make their allegations of abuse as credible as possible through the help of a lawyer so that those allegations of abuse may be credited by the court. The lawyers who work through DV Leap accept the contested abuse cases pro bono and work the cases for free in an effort to help those in need. It allows those who are victims of domestic violence who lack resources to receive professional consultation with the support of nationally recognized forensic psychologists analyzing the details of

their case. The organization is also heavily involved in organizations such as the Leadership Council for Child Abuse and Interpersonal Violence, which publish studies relating to the placement of children in abusive situations, and the Center for Judicial excellence, which tracks child fatalities in which divorce custody was a major factor in the death of the child. Together, these organizations also lobby for legislation and create a community for those who have lost custody to an abuser or for those who have been placed in the custody of an abuser.

DV Leap has provided over 3,000 free consultations to the domestically abused, donated over \$10 million for pro bono case costs, and donated 17,498 unpaid hours of work to help the domestically abused receive justice in court.¹⁸² Furthermore, the cases in which justice is reached in child custody act as a precedent for future custody cases, thereby influencing thousands of other child custody cases indirectly.

While DV Leap seems to be advocating for the domestically abused, it seems to have an overwhelming focus on women and placing domestically abused parents at the center of the cases instead of domestically abused children. This is a gap that could be filled with advocacy for pro bono quality guardian ad litem to act for children that need representation just as much as domestically abused parents.¹⁸³

Checking on Children After a Custody Decision is Made

One potential practice for ensuring the safety of children whose custody proceedings involve allegations of abuse is to check on the custody situation over periods of time. This practice was suggested by The Leadership Council on Child Abuse & Interpersonal Violence after their research discovered that children placed in the home of an abuser by the United States court system were forced to stay in the abusive situation for an average of 3.2 years.¹⁸⁴ The suggested practice of checking on children could

include checking on the child's development, monitoring any instances of abuse filed by CPS since the custody decision was made, and possibly modifying the custody order to better suit the child's best interest. There currently is no government program that enforces checks on children who've possibly been placed in abusive homes.

Because this practice has not been implemented routinely, there is currently no data recorded on its effectiveness. Because of this lack of data, an effective proposal for this idea has not been constructed by organizations such as the Leadership Council on Child Abuse & Interpersonal Violence. At the moment, custody orders are only modified under certain circumstances, such as well-documented child abuse or the inability of the custody holder to care for the child. Plus, the courts must be notified of those circumstances by the custodial parents themselves,¹⁸⁵ which puts a burden on the custody holder to maintain a child's safety when the custody holder may be the one abusing

the child. Implementing the practice of checking on the custody situation increases the chances that a custody situation would have to be changed, and custody changes are expensive because of the professionals required to make a change. For instance, the average cost of a custody evaluator was over \$12,000.¹⁸⁶ This cost is a major reason why this practice has not been instituted.

Legislative Measures

Legislative measures that would uniformly change the course of custody cases in the United States, especially regarding cases with allegations of abuse, have been proposed but have ultimately failed because many believe that custody court rules are decided under the jurisdiction of individual states rather than the United States as a whole. For instance, H.Con.Res.72 was an effort instigated by the House of Representatives in 2017 as a response to research that showed that the United States custody system was placing children in unsafe situations.^{187, 188}



Some of the solutions that were proposed in the resolution were the prioritization of child safety in child custody cases, the need for experienced professionals, the recognition of bias in those who make the custody decisions, and the need for abuse allegations to be taken more seriously so that they may be given evidentiary admissibility.¹⁸⁹ While this resolution provided new national recognition and prioritization of children’s safety, the operative clauses in which the “solutions” were proposed did not include many specific provisions. Ultimately, H.Con.Res.72 was not implemented into the United States code as it was not renewed after the 2-year period it was enacted for.¹⁹⁰ This resolution was an effort to allow states to decide their own specific course of action regarding the

prioritization of children’s safety but ultimately did not do much to execute its operative clauses.

Furthermore, the expansion of laws to cover children in custody proceedings and improved reporting, enforcement, and funding of current laws could greatly benefit children in abusive situations. An example of a law that could be expanded to include children in abusive custody situations is CAPTA (the Child Abuse and Prevention Treatment Act),¹⁹¹ which is a law that largely applies to children in foster care but could be expanded to help children in custody cases where allegations of abuse are present. Another legislative measure that could greatly benefit children in the United States is the explicit expression of their rights in national law and in the Constitution. While the UNCRC is highly controversial regarding its ratification in the United States, the United States does not have to ratify the UNCRC to grant children these basic rights.^{192, 193}

Furthermore, more government funding could increase the resources needed to truly identify abuse and report it; the current amount of national funding allotted to help children suffering from abuse has been considered “woefully inadequate” by professionals.¹⁹⁴

Anything that recognizes the right children have to protect against abuse in the United States custody system could benefit thousands of children.¹⁹⁵ The United States needs to take more measures to ensure that if children end up in the home of an abuser, the victims of the abuse are recognized, fought for, and helped in the ways they deserve.

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