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Coercive Control in High-Conflict Custody Litigation

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Introduction

Family law professionals and scholars have been concerned about the effects of high-conflict custody litigation on children for decades.¹ These difficult cases pose serious challenges for the professionals tasked with helping to resolve them through the family courts. Those professionals include parents' lawyers, guardians *ad litem* (GALs), custody evaluators, mediators, and judges. This article examines the danger of conflating intimate partner abuse, particularly “coercive control,”² with mutual high-conflict behavior in child custody disputes. Drawing from relevant social

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1. See, e.g., *High-Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589 (2001) (reporting on the September 2000 multidisciplinary conference on reducing the impact of high-conflict custody litigation on children); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496–97 (2001) (discussing concerns about the effect of high-conflict custody cases on children).

2. See *infra* Part II.A for discussion of coercive control.

science and legal literature as well as our own professional experience,³ we argue that when legal professionals fail to accurately decipher coercive control from mutual conflict, custody orders unwittingly expose children and parents to unsafe and potentially harmful circumstances.

Children's interests are best served through an analytical and informed approach to high-conflict child custody disputes. Current approaches to child custody disputes too often fail to integrate a robust understanding of coercive control dynamics and the effects of trauma on both adult and child victims.⁴ Family law professionals must be aware of how to identify patterns of coercive control in child custody cases, which requires a careful, individualized, and evidence-focused approach to each case. Professionals must take active steps to overcome misconceptions and biases that harm abused parents and children and result in less safe custody outcomes.⁵

This article proceeds in four parts. Part I briefly reviews relevant legal standards operating in child custody litigation. Part II draws upon domestic violence and family conflict literature to elucidate how coercive control harms both adult victims and their children and demonstrate how coercive control is too often misunderstood as mutually high-conflict behavior. Part III connects relevant themes emerging from current literature to coercive control in high-conflict child custody litigation. Finally, Part IV offers the authors' recommendations for legal professionals, such as judges, custody evaluators, GALs, and parents' attorneys, to implement as they engage with high-conflict custody litigation.

3. Gillian Chadwick has represented hundreds of survivors of domestic violence, sexual assault, stalking, and human trafficking in domestic relations, protection order, and immigration cases in the District of Columbia and Kansas. In addition to her academic work, Professor Chadwick regularly trains practicing attorneys on issues of gender-based violence, litigation skills, and family law at national trainings hosted by the American Bar Association Commission on Domestic and Sexual Violence. Dr. Stef Sloan is a researcher and lecturer at the University of Kansas School of Social Welfare, studying family court outcomes for child and adult victims of domestic violence and coercive control and developing valid and reliable instruments for measuring violence within the context of custody litigation. Dr. Sloan is a trained forensic custody evaluator and has worked to develop and evaluate preventative legal services. The discussion and recommendations in this article are informed by our professional experiences working with coercive control survivors in custody proceedings.

4. See *infra* Part II.A.

5. See *infra* Part IV.

I. Legal Framework for Custody Disputes

A. Best Interest of the Child

The universal legal standard for child custody determinations is the “best interest of the child.”⁶ Most states have attempted to concretize this abstract concept by creating specific “best interest” custody factors,⁷ such as “[e]ach parent’s role and involvement with the minor child before and after separation,” “the emotional and physical needs of the child,” and “the school activity schedule of the child,” as well as “evidence of domestic abuse” and “the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent.”⁸ The best interest factors are generally considered non-exhaustive, meaning that courts may consider other points besides those included in the enumerated factors.⁹ Although courts may be broadly bound to consider “best interest” factors when making custody decisions,¹⁰ there are few to no prescriptive standards as to how the factors will be applied and custody judges enjoy extensive discretion in implementing the best interest standard.¹¹ Some states incorporate custody presumptions, including rebuttable presumptions favoring joint custody and/or against awarding custody to a perpetrator

6. See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384 (2008).

7. See *Chart 2: Child Custody Statutes in 2022*, 56 FAM. L.Q. 337–44 (2023).

8. KAN. STAT. ANN. § 23-3203(a)(1), (5), (8), (9) (excerpts from Kansas’s best interest of the child factors); see also, e.g., 23 PA. STAT. AND CONS. STAT. ANN. § 5328 (West) (Pennsylvania’s best interest of the child factors); IDAHO CODE ANN. § 32-717 (West) (Idaho’s best interest of the child factors).

9. See, e.g., *In re A.N.O.*, 332 S.W.3d 673, 678 (Tex. App. 2010) (best interest factors are not limited to enumerated factors).

10. See, e.g., *Stacey J. v. Henry A.*, 842 S.E.2d 703, 710 (W. Va. 2020) (analysis was inadequate when trial court gave “no indication” of considering enumerated best interest factors); *Dumas v. Woods*, 914 A.2d 676, 679 (D.C. 2007) (holding trial court’s failure to make findings as to each relevant factor required remand).

11. See, e.g., Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 350 (1993) (“The vagueness and uncertainty of the ‘best interest’ standard vests tremendous discretion in trial court judges.”); Elrod & Dale, *supra* note 6, at 397 (discussing the unpredictability of custody outcomes and the potential for judges to rely on “‘gut’ feeling”); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 69 (2014) (critiquing the “vastly indeterminate” nature of the best interest standard).

of domestic violence.¹² However, overall, custody law remains highly flexible.¹³ Flexibility offers the benefit of accommodating and adapting to many different family situations to meet the needs of each individual child.¹⁴ However, with flexibility comes inherent subjectivity, which may allow value judgments, stereotypes, and biases to dominate child custody outcomes.¹⁵ Lawyers and judges are not immune from cognitive error, stereotyping, or bias.¹⁶ As such, it is particularly important that professionals apply a truly analytic approach and eschew “gut” feelings and focus on concrete evidence and the best available social science when making custody determinations.¹⁷

B. Friendly Parent Doctrine

One best interest factor that has been the focus of significant attention is the so-called friendly parent factor, which is rooted in the “friendly parent doctrine.”¹⁸ The friendly parent doctrine is the expectation that each parent

12. See Chart 2: *Child Custody Statutes in 2022*, *supra* note 7; Lisa A. Tucker, *Domestic Violence as a Factor in Child Custody Determinations: Considering Coercive Control*, 90 *FORDHAM L. REV.* 2673, 2679–80 (2022) (discussing domestic violence presumptions); J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 *FAM. CT. REV.* 214 (2014).

13. See, e.g., *Williams v. Williams*, 757 S.E.2d 859, 861 (Ga. 2014) (“When considering a dispute regarding the custody of a child, [a] trial court has very broad discretion, looking always to the best interest of the child.”) (citation omitted); Anna Burke et al., eds., *Child Custody, Visitation & Termination of Parental Rights*, 21 *GEO. J. GENDER & L.* 201, 207 (2020) (noting the “broad judicial discretion inherent in the best interests of the child” standard).

14. See Milfred Dale, “*Still the One*”: *Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions*, 34 *J. AM. ACAD. MATRIM. LAWS.* 307, 311–12 (2022).

15. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 *J. L. & FAM. STUD.* 337, 337 (2008) (noting that the best interest of the child standard is “necessarily subjective”).

16. See Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 *CLINICAL L. REV.* 783, 785 (2003) (discussing the effects of bias on lawyering); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 *CLEV. ST. L. REV.* 137, 138–60 (2013) (discussing socioeconomic bias, stereotyping, and cognitive error in judges); Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 *CLINICAL L. REV.* 195, 209–11 (2021) (reviewing two studies indicating race and gender bias among lawyers in evaluating others’ work); *id.* at 2011–13 (synthesizing empirical evidence of bias among judges).

17. See Gordon, *supra* note 16, at 240 (“Flexibility, gut-feelings, and impressions are where bias lives.”); Elrod & Dale, *supra* note 6, at 397 (noting drawbacks of judges’ reliance on “gut” feeling).

18. See Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 *LOY. J. PUB. INT. L.* 41 (2004); Dale, *supra* note 14, at 344, 355; DiFonzo, *supra* note 12, at 225.

should facilitate the child’s relationship with the other parent.¹⁹ Willingness to facilitate a relationship with the other parent is considered “friendly” parenting.²⁰ Parental friendliness is generally believed to be a critically important element of co-parenting in the best interest of the child.²¹ When one parent is deemed “unfriendly” towards the other parent, a judge may restrict or even eliminate that parent’s custody or access to the child.²²

The paradox of the friendly parent doctrine is that highly contested child custody cases are inherently adversarial—each parent is battling for their desired custody arrangement.²³ The friendly parent doctrine has also been criticized as encouraging conflict and being harmful to victims of abuse.²⁴ These critiques will be revisited in the analysis offered in Part II.B below.

II. Understanding Conflict in Custody Litigation

A. Coercive Control

Intimate partner abuse, commonly called domestic violence,²⁵ is a phenomenon that affects millions of families and has devastating, long-term consequences for children.²⁶ Researchers and theorists have proposed a number of models to describe domestic violence.²⁷ While domestic violence was initially recognized as physical abuse, experts now understand that domestic violence can encompass a variety of behaviors, which does

19. Dore, *supra* note 18, at 41–42.

20. *Id.*

21. *Id.*

22. *Id.* at 44–45.

23. *Id.*

24. *Id.* at 47–48; Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 FAM. CT. REV. 187, 191 (2014) (expressing concern that domestic violence victims may be “forced into shared parenting” arrangements to avoid being deemed “unfriendly parents”).

25. Scholars use a variety of terms to refer to intimate partner abuse, including domestic violence, domestic abuse, intimate partner violence (IPV), coercive control, and others. Notably, criminal law definitions of domestic violence tend to focus on what has been called the “violent incident model,” represented by a single act of physical violence. However, the violent incident model poorly captures the realities of intimate partner abuse. See Courtney K. Cross, *Coercive Control and the Limits of Criminal Law*, 56 U.C. DAVIS L. REV. 195, 214–17 (2022).

26. See Debra Pogrud Stark et al., *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1, 10, 22–26 (2019) (summarizing the effects of domestic violence on children).

27. See, e.g., LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 29–40 (2012) (describing a variety of models that have been used to characterize domestic violence).

not always include physical violence.²⁸ These abusive behaviors often continue after separation or divorce.²⁹

Coercive control, a term popularized by Evan Stark, is a pattern of behaviors—which may include “violence, intimidation, isolation, and control”—used to achieve domination over a current or former intimate partner.³⁰ Coercive control can include emotional, psychological, sexual, physical, and economic abuse, as well as threats, intimidation, stalking, and the use of children to obtain dominance.³¹ Strategies of coercive control are distinguishable from routine use of control in relationships in that they aim to dominate and restrict the “autonomy, liberty, and personhood” of the victim.³² Physical violence is often present in a coercive control dynamic.³³ However, nonphysical coercive control has been found to yield similar negative emotional or psychological consequences for victims as physical domestic violence.³⁴

Domestic violence, particularly coercive control, is poorly understood within the legal system. Several states specifically recognize “coercive control” as a form of domestic violence, and other states define domestic violence to include financial crimes or other offenses that do not involve physical violence or threats of violence.³⁵ However, domestic violence laws generally place a disproportionate emphasis on physical violence and fail to recognize coercive control tactics such as intimidation, isolation, and control, which can be deeply harmful even when not physically violent.³⁶ Many legal professionals still think of domestic violence as predominantly

28. *Id.* at 40–53; Jennifer L. Hardesty et al., *Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types*, 77 J. MARRIAGE & FAM. 833, 833–34 (2015).

29. See Jennifer L. Hardesty et al., *The Influence of Divorcing Mothers’ Demeanor on Custody Evaluators’ Assessment of Their Domestic Violence Allegations*, 12 J. CHILD CUSTODY 47, 48 (2015).

30. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 241 (2007); see also Cross, *supra* note 25, at 207 (discussing emergence of the term “coercive control”).

31. STARK, *supra* note 30, at 241–74.

32. *Id.* at 367.

33. *Id.* at 376 (noting that in coercive control, “violence is used to reinforce complementary forms of oppression”).

34. See Kimberly A. Crossman, Jennifer L. Hardesty & Marcela Raffaelli, “*He Could Scare Me Without Laying a Hand on Me*”: Mothers’ Experiences of Nonviolent Coercive Control During Marriage and After Separation, 22 VIOLENCE AGAINST WOMEN 454, 456–57, 467–69 (2016) (discussing the outcomes of “nonviolent” coercive control as compared to populations who were physically battered).

35. See *Chart 8: Domestic Violence Civil Protective Order Statutes in 2022*, 56 FAM. L.Q. 396–404 (2023); Tucker, *supra* note 12, at 2678–79.

36. See Tamara Kuennen, *Not All Violence in Relationships Is “Domestic Violence,”* 86 BROOK. L. REV 43, 44–45 (2021).

physical and fail to recognize a myriad of coercive control strategies such as financial and economic abuse, stalking, sexual coercion, psychological manipulation, and threats of violence.³⁷

There can be serious and prevalent consequences for abused parents and children when the family court system does not systematically evaluate for and attend to the full range of coercive control tactics.³⁸ Failure to appropriately consider and evaluate for the presence of coercive control increases the likelihood that such tactics will persist after divorce, leading to continued victimization for children and parents, particularly mothers.³⁹ Inappropriate or uninformed assessments of domestic violence can lead to a variety of negative consequences, including victim parents losing custody,⁴⁰ children being exposed to coercive controlling parenting,⁴¹ and protracted exposure to post-separation abuse.⁴² Continued exposure to coercive controlling parenting and post-separation abuse can have devastating consequences for children. Separating a child from a secure and nurturing parent is similarly harmful. Certainly, these outcomes are adverse to the best interest of the child.

37. See Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 83 (2019) (describing that common measurement of interpersonal violence misses the interplay of coercion and control tactics and dismisses the experience of psychological abuse, isolation, gaslighting, and financial abuse as “not that bad”); Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 62 (2003) (addressing the myth that court professionals can easily determine whether abuse is present and warrants intervention in custody proceedings); Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 J. FAM. ISSUES 322 (2005).

38. See Hardesty et al., *Toward a Standard Approach*, *supra* note 28.

39. See *id.*

40. See Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115, 123–24 (2017) (describing doubt courts cast upon victims that results in disbelief in victim account interpreted as intentionally misleading behaviors that are punished by the court).

41. See Emma Katz, Anna Nikupeteri & Merja Laitinen, *When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence*, 29 CHILD ABUSE REV. 310, 311 (2020) (concluding that exposure to coercive control by a parent harms children); Jane E. M. Callaghan et al., *Beyond “Witnessing”: Children’s Experiences of Coercive Control in Domestic Violence and Abuse*, 33 J. INTERPERSONAL VIOLENCE 1551, 1555 (2018) (describing use of children in perpetuating controlling behaviors such as monitoring and stalking other parent).

42. See April M. Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization Among Victimized Mothers*, 28 J. FAM. VIOLENCE 547, 547, 554–56 (2013) (discussing tactics used to control mothers post-separation and how shared custody is used to continue coercive controlling behaviors).

B. “High Conflict” Cases

Many parental separations resolve out of court. Those that stay in court and move towards litigation inherently involve some level of conflict. The most contentious of those are labeled high-conflict cases.⁴³ That label alone can carry an implication that both parties are at fault for being involved in a conflict-ridden relationship. Unfortunately for victims of intimate partner abuse, the assumption of mutuality that accompanies the high-conflict label can be incredibly difficult to overcome, even when the conflict arises from a pattern of coercive control orchestrated by one party.

Data regarding high-conflict custody cases are limited.⁴⁴ However, a history of domestic violence has been found to be present in a significant majority of high-conflict divorce cases.⁴⁵ Some researchers have taken issue with the validity of the term “high-conflict divorce” due to a failure to distinguish high-conflict behavior from domestic violence.⁴⁶ According to a judicial guide published by the National Council of Juvenile and Family Court Judges, the high-conflict label is often incorrectly assigned to cases involving intimate partner abuse.⁴⁷ In contested child custody litigation, coercive control perpetrated by one parent is often misperceived as mutual parental conflict.⁴⁸ Custody evaluators may fail to identify and

43. See *High-Conflict Custody Cases*, *supra* note 1, at 590 (describing high-conflict cases as those “marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation”).

44. See Jaffe, Crooks & Poisson, *supra* note 37, at 59 (noting that research on domestic violence and divorce have developed independently of one another, resulting in difficulty identifying the overlap).

45. LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RICHIE, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 165 (2d ed. 2012) (citing a 1988 study by Johnston & Campbell).

46. See *id.*

47. See HON. JERRY J. BOWLES ET AL., NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, *A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES* 10 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/judicial-guide_0_0.pdf (“Family law cases involving evidence of abuse may be (and in fact, often are mistakenly) labeled ‘high-conflict.’ Abuse cases may have high-conflict characteristics, but they require a different set of considerations in order to promote safety for the at-risk parent and child.”).

48. See Jason D. Hansetal., *The Effects of Domestic Violence Allegations on Custody Evaluators’ Recommendations*, 28 J. FAM. PSYCH. 957, 958 (2014) (describing counterallegations and the inappropriate assumption that violence is mutual); see also Samantha Jeffries, *In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the “Expert” Assessments That Guide Judicial Determinations*, 5 LAWS 1, 8 (2016) (synthesizing social science research on this point).

document coercive control, and may label victims of abuse as “unfriendly” or “alienating.”⁴⁹

Another element of the coercive control abuse dynamic in contested custody cases is litigation abuse.⁵⁰ Coercive control frequently persists beyond separation and divorce, and often manifests as excessively adversarial litigation that can cause psychological and financial harm even if the abuser is unsuccessful in court.⁵¹ Perpetrators can have rigid ideals about what the workings of post-divorce life should look like, subsuming the need for a constructive co-parenting relationship tailored to serve the best interest of the children. Coercive controlling perpetrators may attempt to maintain control over victims by demanding access to children.⁵² In fact, some research suggests that fathers who are domestic abusers may be more likely than non-domestically abusive fathers to seek sole custody of their children.⁵³

C. Parental Alienation

“Parental alienation” theory purports to explain contact resistance, contact refusal, or parental rejection exhibited by a child in the post-separation or divorce context.⁵⁴ The term “parental alienation” originated from the widely discredited “Parental Alienation Syndrome” (PAS) theory coined by Richard Gardner, which was based on Gardner’s personal impressions from his own clinical practice.⁵⁵ Gardner sought to establish

49. See Jaffe, Crooks, & Poisson, *supra* note 37, at 58, 62 (noting victims often present with trauma-induced emotionally disregulated behavior in comparison to perpetrators, which skews custody evaluation in favor of perpetrators); Hans et al., *supra* note 48, at 964; Megan L. Haselschwerdt, Jennifer L. Hardesty & Jason D. Hans, *Custody Evaluators’ Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives*, 26 J. INTERPERS. VIOLENCE 1694, 1703–13 (2011).

50. See Kathryn J. Spearman, Jennifer L. Hardesty & Jacquelyn Campbell, *Post-Separation Abuse: A Concept Analysis*, 79 J. ADVANCED NURSING 1225, 1229 (2022) (identifying tactic of “manipulation of systems,” including when a domestic violence perpetrator uses the family court system to seek custody as a means of maintaining control).

51. See Heather Douglas, *Legal Systems Abuse and Coercive Control*, 18 CRIMINOLOGY & CRIM. JUST. 84, 85–86 (2018); Ellen R. Gutowski & Lisa A. Goodman, *Coercive Control in the Courtroom: The Legal Abuse Scale (LAS)*, 38 J. FAM. VIOLENCE 527, 528–529 (2022).

52. See BANCROFT, SILVERMAN & RICHIE, *supra* note 45, at 141.

53. *Id.* at 140.

54. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (2001) (reconceptualizing the alienated child apart from PAS); Benjamin D. Garber, *Conceptualizing Visitation Resistance and Refusal in the Context of Parental Conflict, Separation, and Divorce*, 45 FAM. CT. REV. 588 (2007).

55. See Robert E. Emery, Randy K. Otto & William T. O’Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCH. SCI. PUB. INT. 1, 10 (2005).

PAS as a pathology exhibited by mothers attempting to use fabricated allegations of child sexual abuse as a means to win custody.⁵⁶ The reliability and validity of Gardner’s PAS theory have been thoroughly debunked.⁵⁷

Despite a lack of scientific validation, PAS and its derivative, parental alienation theory, continue to influence custody litigation.⁵⁸ Some argue that parental alienation can be separated from the debunked PAS.⁵⁹ Importantly, this distinction is easily lost in practice as many in the legal system conflate PAS and parental alienation theory.⁶⁰ Even if parental alienation could, in practice, be reliably distinguished from PAS, the evidence base for assessing parental alienation and parental alienation theory is debated.⁶¹ In particular, research on parental alienation theory does not distinguish cases of unjustified contact refusal from cases of contact refusal due to child abuse, seriously deficient parenting, or domestic violence.⁶² Nor is there any published research examining the effect of coercive control on contact refusal behaviors or parental alienation.

56. Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 235–36 (2009); see RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE* (1987); RICHARD A. GARDNER, *TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE* (1992); RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (2d ed. 1998).

57. See Meier, *supra* note 56, at 239–40 (noting “[t]he dominant consensus in the scientific community is that there is *no scientific evidence of PAS*” and summarizing extensive evidence discrediting the scientific validity of PAS).

58. See *id.* at 233 (noting parental alienation is a dominant theme in child custody litigation); Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527, 540 (2001) (“In practice, PAS has provided litigation advantages to noncustodial parents with sufficient resources to hire attorneys and experts.”); Amanda Robert, *Taking Sides: Courts Are Grappling with How to Handle Claims of Parental Alienation*, A.B.A. J. (Apr. 1, 2023), <https://www.abajournal.com/magazine/article/taking-sides-courts-are-grappling-with-how-to-handle-claims-of-parental-alienation>.

59. See Amy J. L. Baker, *Reliability and Validity of the Four-Factor Model of Parental Alienation*, 42 J. FAM. THERAPY 100, 101–02 (2020) (distinguishing parental alienation from PAS).

60. See Madelyn Simring Milchman, *Misogynistic Cultural Argument in Parental Alienation versus Child Sexual Abuse Cases*, 14 J. CHILD CUSTODY 211, 211–13 (2017) (explaining the underappreciation of differences between PAS and parental alienation).

61. See *id.* at 219–22 (noting deficiencies in parental alienation research); Emery, Otto, & O’Donohue, *supra* note 55, at 10 (“[T]here is no established way of measuring ‘alienation.’”); Madelyn Simring Milchman, *How Far Has Parental Alienation Research Progressed Toward Achieving Scientific Validity?*, 16 J. CHILD CUSTODY 115 (2019) (discussing lack of construct validity to support empirical validation of parental alienation).

62. See Milchman, *Misogynistic Cultural Argument*, *supra* note 60, at 220 (noting failure of parental alienation researchers to establish divergent validity); Jaffe, *supra* note 24, at 188 (noting a “rush to find a victimized parent as an ‘alienator’” without regard for what is causing that parent to act protectively).

The absence of a credible evidence base—particularly the absence of a systematic method for identifying, considering, weighing, and distinguishing unjustified contact-refusal from the effects of abuse—means that the parental alienation label is inherently subjective and particularly poorly suited for practical application in family court. Abused and protective parents are far too vulnerable to being improperly labelled as alienators.⁶³ In fact, research indicates that the concept of parental alienation is inappropriately applied to cases in which abuse and child maltreatment are present.⁶⁴ This inappropriate application harms victims of child abuse and victims of domestic violence and their children, and leads to child custody outcomes that are not in the best interest of the child.

Notably, the American Psychiatric Association declined to include Parental Alienation Syndrome in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) due to insufficient scientific support.⁶⁵ Furthermore, it is worth noting that some have a financial interest in bolstering the theory of parental alienation. Undeterred by a lack of sound scientific evidence, a cottage industry of reunification camps has capitalized on the popularity of the concept of parental alienation, charging thousands

63. See Madelyn S. Milchman, Robert Geffner & Joan S. Meier, *Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A Critique*, 58 FAM. CT. REV. 340, 341 (2020) (synthesizing research on improper application of parental alienation concept in cases of true abuse or seriously deficient parenting).

64. See Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE & FAM. L. 92, 99 (2020) (concluding based on study that where parental alienation was used in defense of allegations of domestic abuse, parental alienation claims took priority in judicial custody determinations even when courts affirmed there was abuse); Kelly & Johnston, *supra* note 54, at 251 (noting the importance of distinguishing justified contact refusal from unjustified, and noting the problematic nature of how frequently distinctions are not made, and parental alienation is inappropriately applied); Bruch, *supra* note 58, at 532 (noting that parental alienation allegations result in reframing protective parenting behaviors as intentional lying about the presence of domestic violence).

65. See Nina Jaffe-Geffner, Note, *Gender Bias in Cross-Allegation Domestic Violence-Parental Alienation Custody Cases: Can States Legislate the Fix?*, 42 COLUM. J. GENDER & L. 58, 72–73 (2021).

of dollars to allegedly deprogram children who have been alienated from a noncustodial parent.⁶⁶

Restrictive gatekeeping is another theory that seeks to describe one parent's interference with the other parent's relationship with their child-in-common.⁶⁷ Again, in the context of domestic violence, particularly coercive control dynamics, a victim parent's efforts to keep themselves and their child safe are too easily interpreted as gatekeeping behavior. Regardless of the term used to describe contact refusal and related behaviors, family law professionals must be keenly aware of the danger of mischaracterizing justified contact refusal as nefarious parental interference. This risk is compounded by the way trauma affects domestic violence victims, which is discussed in more detail in Part III.D below. Domestic violence victims rarely present with tidy, linear narratives that easily identify themselves as victims. Thus, family law professionals must always look for evidence of domestic violence when examining contact refusal and resistance behaviors.

D. Misuse of the Friendly Parent Factor and Shared Parenting Preference

Parental alienation claims made in child custody litigation are generally filtered through the friendly parent factor or policy preferences (either explicit or implicit) or presumptions for shared parenting. When an abused, protective parent discloses abuse by the other parent and seeks protection

66. See Barbara Bradley Hagerty, *Can Children Be Persuaded to Love a Parent They Hate?*, ATLANTIC (Dec. 2020), <https://www.theatlantic.com/magazine/archive/2020/12/when-a-child-is-a-weapon/616931/>; Hannah Dreyfus, *Barricaded Siblings Turn to TikTok While Defying Court Order to Return to Father They Say Abused Them*, PROPUBLICA (Feb. 26, 2023), <https://www.propublica.org/article/parental-alienation-utah-livestream-siblings> (covering a high-profile case in which a custody judge in Utah ordered allegedly alienated siblings to go to a reunification camp with their father, whom they had accused of sexual abuse); Alyssa G. Rao, Note, *Rejecting "Unjustified" Rejection: Why Family Courts Should Exclude Parental Alienation Experts*, 62 B.C. L. REV. 1759, 1759 & nn.1–3 (2021) (citing *Reveal* podcast investigative report about the Ionescu children, who were court ordered to attend the Family Bridges program, costing \$20,000).

67. Marsha Kline Pruett, Lauren A. Arthur & Rachel Ebling, *The Hand That Rocks the Cradle: Maternal Gatekeeping After Divorce*, 27 PACE L. REV. 709, 712–13, 716 (2007). Notably, the concept of "gatekeeping" also has a strongly gendered history in this context, emerging in the literature as "maternal gatekeeping," which was understood as a gender-specific concept. *Id.* at 712 (asserting that while men and women may be capable of gatekeeping, maternal gatekeeping "in its more restrictive function" is "the focus of theory and research"). While gatekeeping now purports to be gender-neutral, evidence of gender bias in the legal system (discussed in Part III.C *infra*) suggests that gender may still play an important role in how the concept of gatekeeping is administered).

for the child, the protective parent can be classified as “unfriendly” in violation of the friendly parent doctrine.⁶⁸ Victim parents “may be seen as undermining the other parent by even raising concerns about domestic violence.”⁶⁹ This can have devastating effects for the victim parent, who may lose legal and physical custody as a result.⁷⁰ Statutory or normative preferences for shared custody can drive a court’s expectation of “friendly” coparenting.⁷¹

As one lawyer put it, “‘friendly parents’ are those who do not make allegations about the other parent. . . . ‘Unfriendly parents’ are those who make allegations. . . .”⁷² We would refine this assertion to say that so-called unfriendly parents include those who make *abuse* allegations; *alienation* allegations do not appear to be seen as unfriendly. Even if allegations of abuse are true, making those allegations can be considered unfriendly.⁷³ Empirical research indicates that custody courts sometimes assign more weight to claims of parental alienation than substantiated instances of child or partner abuse.⁷⁴ Moreover, it appears that gender plays a significant role in the success of alienation claims made in response to abuse allegations, favoring fathers over mothers.⁷⁵

Courts, lawyers, and other family law professionals may or may not use the phrase “parental alienation” when invoking friendly parent doctrine or shared parenting preference. However, the troubled concept of parental alienation is infused into friendly parent doctrine, which creates in one parent a legal responsibility for the child’s relationship with the other parent. While parental harmony is an admirable ideal, the law should not expect parents to be “friendly” towards a co-parent who has been abusing them or their children. Despite a lack of sound scientific basis for parental alienation theory, the concept and label continue to play an outsized role in custody litigation—through the friendly parent factor and the strong policy favoring shared parenting.⁷⁶

68. See Dore, *supra* note 18, at 45, 47–48.

69. Jaffe, *supra* note 24, at 191.

70. See Dore, *supra* note 18, at 45 (“Courts punish parents engaging in ‘unfriendly behavior’ by denying them custody or time with their children.”).

71. See Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 FAM. L.Q. 173, 187 (2016) (noting presumption of joint custody invokes public policy underlying friendly parent doctrine).

72. Dore, *supra* note 18, at 44.

73. *Id.* at 44 n.17 (noting in Dore’s experience “it does not matter whether the statements are true or false; any allegation can be sufficient to support a friendly parent analysis”).

74. Meier, *supra* note 64, at 92, 95–102.

75. *Id.* at 100.

76. See Garvin, *supra* note 71, at 187.

III. Focusing on the Evidence

The following is information family law professionals need to understand and bear in mind when dealing with highly contested custody matters. While not all of the science discussed in this section is new, much of it seems to be unknown, forgotten, or disregarded by those in positions to influence the outcomes of custody battles. By understanding the complexity of custody cases that involve coercive control, family court professionals will be able to practice more efficiently, reduce resource and time strains caused by a failure to identify the true source of conflict in a case, and improve decision-making accuracy and the welfare of children.

A. Co-Victimization of Children and Longitudinal Harm

Many children are exposed to domestic violence.⁷⁷ Given that the presence of coercive control in the home is not situation-reliant or incident-specific, but is an ongoing and persistent dynamic, children who witness coercive control have been found to demonstrate trauma symptoms similar to children who are directly subjected to physical or sexual abuse.⁷⁸ The web of abusive strategies is internalized by the victim and their children, resulting in constant elevated stress and hypervigilance.⁷⁹

One longitudinal study measured children's exposure to coercive controlling domestic violence behaviors such as witnessing name calling or put-downs, threats of violence, or acts of physical violence.⁸⁰ Higher frequencies of witnessing such violence resulted in greater levels of youth depression at multiple time points.⁸¹ Findings of this study highlight the ongoing nature of the ramifications of witnessing domestic violence,

77. SHERRY HAMBY ET AL., OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., NCJ No. 232272, CHILDREN'S EXPOSURE TO INTIMATE PARTNER VIOLENCE AND OTHER FAMILY VIOLENCE 3 (2011) (reporting National Survey of Children's Exposure to Violence results indicating that "[a]pproximately 1 in 15 youth, or 6.6 percent, had been exposed to some form of physical assault between their parents in the past year").

78. See Jeffries, *supra* note 48, at 2–3.

79. See Nat'l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain*, at 3 (Working Paper No. 3, 2014) (noting persistent stress experienced by children results in higher levels of adrenaline and cortisol, which can lead to the inability to regulate emotions elicited from stress responses); Angie C. Kennedy et al., *The Impact of Family and Community Violence on Children's Depression Trajectories: Examining the Interactions of Violence Exposure, Family Social Support, and Gender*, 24 J. FAM. PSYCH. 197, 197 (2010) (summarizing literature on toxic stress and describing the connection between psychological arousal, sustained increases in cortisol, and regulation difficulties).

80. See Kennedy et al., *supra* note 79, at 200 (describing findings from two-year study assessing children witnessing IPV).

81. *Id.* at 202–03.

as child depression scores remained elevated even when there were reductions in the frequency with which they witnessed abuse.⁸² This study also highlighted gender differences among the child sample, with girls showing consistently higher depression symptoms than boys.⁸³

In addition to negative consequences of exposure to coercive control, children can also be harmed through direct engagement in coercive controlling tactics.⁸⁴ For instance, using threats to kidnap or harm the children, or manipulating the children to repeat coercive controlling behaviors, can result in undermining the victim's parental authority, prevent the victim from enacting protective strategies, and interfere with help-seeking.⁸⁵ Moreover, coercive controlling strategies can also include constant derogation of the protective parent or deliberate creation of conflict between the non-abusive parent and child as a means to undermine the parent-child relationship and the victim's parental authority. Children who are triangulated in coercive controlling dynamics can also feel personally responsible for mitigating violence perpetration.⁸⁶ Studies examining child responses to witnessing or being involved in coercive controlling abuse highlight that children may engage in de-escalation behaviors and strategies to buffer coercive controlling tactics employed by the perpetrating parent.⁸⁷ This kind of co-victimization, also known as secondary exposure or secondary victimization, is too often overlooked by family law professionals, who, on the whole, fail to reliably identify and adequately address coercive control tactics.⁸⁸

In addition to the harmful implications of witnessing and being involved in coercive controlling dynamics, perpetration of violence directed at a

82. *See id.* at 202.

83. *See id.*

84. *See* Callaghan et al., *supra* note 41, at 1555 (describing how children can be actively involved in coercive controlling tactics).

85. *See* Katz, Nikupeteri & Laitinen, *supra* note 41, at 318–20 (describing stalking, threats of kidnapping, and manipulation that undermine the protective parent).

86. *See* Callaghan et al., *supra* note 41, at 1553 (discussing triangulation and role inversion resulting from children feeling responsible for buffering or mitigating abuse, which can cause psychological harm to children).

87. *Id.* at 1567 (describing “Children as Agents” dynamic, in which children are deployed by coercive controlling parents as “informant[s]” and carefully navigate safe and unsafe spaces with differential behavior).

88. *See id.* at 1555–56 (arguing terms such as “exposed” to domestic violence diminish the harm children experience from being victims of coercive control directed at another and recommending using language that specifies children as victims).

partner or ex-partner is a statistically significant predictor of child abuse.⁸⁹ Parents who use coercive controlling violence against the other parent are also likely to use similar strategies with children.⁹⁰ Moreover, coercive controlling behavior involving the children may increase upon separation or divorce, as the children may have increased unmediated contact with the perpetrating parent.⁹¹ Coercive controlling violence perpetration is also strongly associated with authoritarian or rigid parenting, which also has detrimental effects for children.⁹² Perpetrators of coercive control can view children as objects to be owned or controlled, and lack empathy or awareness about the child’s needs. As a result, perpetrators may use parenting approaches that prioritize obedience, hold rigid beliefs about children, and utilize harsh and verbally abusive disciplinary styles.⁹³

Children who experience coercive control are also at higher risk of internalizing poor relationship skills that harm their current or future relationships.⁹⁴ For instance, exposure to domestic violence can contribute to sibling conflict and violence.⁹⁵ Additionally, children who witness and experience coercive controlling violence are also at higher risk of becoming perpetrators or victims of domestic violence in adulthood.⁹⁶ Given that children learn about how to engage in relationships by observing their caregivers, coercive controlling abuse, even when not aimed directly at a child, models and condones such behaviors for children.⁹⁷

89. See JOYANNA SILBERG, STEPHANIE DALLAM & ELIZABETH SAMSON, CRISIS IN FAMILY COURT: LESSONS FROM TURNED AROUND CASES. FINAL REPORT SUBMITTED TO THE OFFICE OF VIOLENCE AGAINST WOMEN, DEPARTMENT OF JUSTICE 7 (2013) (noting that in a review of over 30 studies, domestic violence and child maltreatment were found to co-exist in 30–60% of the families studied).

90. See BANCROFT, SILVERMAN & RICHIE, *supra* note 45, at 34–35.

91. See *id.* at 132.

92. See Katz, Nikupeteri & Laitinen, *supra* note 41, at 312 (describing self-centered parenting exhibited by coercive controlling parents, which can manifest as authoritarian and/or neglectful).

93. See BANCROFT, SILVERMAN & RICHIE, *supra* note 45, at 34–35.

94. See Megan L. Haselschwerdt, *Theorizing Children’s Exposure to Intimate Partner Violence Using Johnson’s Typology*, 6 J. FAM. THEORY & REV. 199, 215 (2014) (summarizing findings of studies on effects of IPV exposure on children, with numerous studies demonstrating internalized symptoms in children as a result of witnessing domestic violence); Jeffries, *supra* note 48, at 4 (describing poor role modeling and implications of children witnessing domestic violence).

95. See BANCROFT, SILVERMAN & RICHIE, *supra* note 45, at 98–101.

96. See Valentina Nikulina, Melissa Gelin & Amanda Zwillig, *Is There a Cumulative Association Between Adverse Childhood Experiences and Intimate Partner Violence in Emerging Adulthood?*, 36 J. INTERPERS. VIOLENCE 1205, 1217 (2017) (study participants with a history of witnessing domestic violence were more likely to experience or perpetrate psychological abuse later in life).

97. See Jeffries, *supra* note 48, at 4.

Numerous studies have found that children are considerably aware of coercive control and negatively impacted emotionally, cognitively, and socially.⁹⁸ Importantly, coercive control often continues after the relationship has ended.⁹⁹ In those cases, separation and divorce do not halt the abuse; rather, upon separation, co-parenting arrangements for children may become the vehicle for the abuser to assert coercive control.¹⁰⁰ As such, it is vital that family court professionals assess for coercive control and utilize approaches that seek to limit further exposure to such tactics.

B. Importance of a Protective Parent or Caretaker Parent

A critically important fact for family law professionals to bear in mind is that a child's positive nurturing relationship with a non-abusive parent can mitigate and heal damaging consequences of traumatic stress experienced by the child as a result of domestic violence.¹⁰¹ In fact, a nurturing attachment with a non-abusive parent is profoundly important to the well-being of a child co-victim of domestic violence.¹⁰² Research shows that certain protective factors can help buffer toxic childhood stress, such as that caused by domestic violence.¹⁰³ These protective factors can reduce or eliminate the harmful impacts of toxic childhood stress or

98. See Callaghan et al., *supra* note 41, at 1560–63 (describing multidimensional impacts of coercive control on children); Nikulina, Gelin & Zwilling, *supra* note 96, at 1223 (describing how social learning theory illustrates the ways children observing violence used in the family can result in the entrenched belief that violence is an appropriate way to address conflict across the life course).

99. See Spearman, Hardesty & Campbell, *supra* note 50, at 1226 (describing co-parenting as the means by which post-separation abuse impacts children and protective parents).

100. See *id.* at 1230 (“Because physical proximity may be limited in the post-separation context, batterers devise tactics that take advantage of their former partner’s availability. For example, court mandated periods such as court appearances and custody or visitation exchanges of children offer opportunities where the survivor is mandated to be available in the presence of the abuser.”).

101. See Jeffries, *supra* note 48, at 5.

102. See *id.* (“The literature suggests that more than any other factor, emotional recovery for children who have lived with coercive control is dependent on a positive and secure relationship with the non-abusive parent.”).

103. See Megan Greeson et al., *Beyond Deficits: Intimate Partner Violence, Maternal Parenting, and Child Behavior over Time*, 54 AM. J. CMTY. PSYCH. 46, 47 (2014).

“adverse childhood experiences.”¹⁰⁴ Protective factors include nurturing and attachment between the child and at least one parental figure.¹⁰⁵

While maintaining a strong relationship with both parents is generally assumed to be a paragon of the best interest of the child, that assumption should not apply when one parent abuses the other parent. Such abuse is profoundly harmful to the child, as discussed in Part III.A above. When one parent abuses the other, the child needs protection from further abuse. Without that protection, the child is likely to continue to experience the harms explained above. Further, safe, stable, and nurturing relationships are vital for children’s healthy socioemotional development and may help to buffer against negative effects from exposure to risk factors like abuse.¹⁰⁶ Thus, a child’s relationship with their non-abusive parent should be prioritized and protected so as to preserve access to this potential protective factor.

C. Gender Bias in Custody Litigation

Gender bias against women has been documented in various parts of the legal system.¹⁰⁷ Women may suffer a “credibility discount,” particularly when relaying experiences of domestic violence.¹⁰⁸ Expectations about behavior seem to play a central role in credibility assessments. For example, having a “pleasant” demeanor has been correlated to better custody outcomes and higher assessments of credibility for mothers.¹⁰⁹ In custody litigation, mothers may be met with heightened skepticism when raising allegations of domestic violence or child abuse.¹¹⁰ In fact, a growing body of research indicates that mothers fare worse than fathers in child custody

104. See Elizabeth Crouch et al., *Safe, Stable, and Nurtured: Protective Factors Against Poor Physical and Mental Health Outcomes Following Exposure to Adverse Childhood Experiences (ACEs)*, 12 J. CHILD & ADOLESCENT TRAUMA 165 (2019).

105. See *id.* at 165–66 (the Protective Factors Model is rooted in resilience and includes positive relationships, safe and protective environments, and the promotion of socioemotional competence).

106. See, e.g., Terence P. Thornberry et al., *Breaking the Cycle of Maltreatment: The Role of Safe, Stable, and Nurturing Relationships*, 53 J. ADOLESCENT HEALTH 525, 528 (2013).

107. See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 435–36 (2019) (summarizing research showing women are judged less credible than men in legal settings); see also Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, 5 FAM. & INTIMATE PARTNER VIOLENCE Q. 13 (2012) (compiling evidence of gender bias against battered mothers in court).

108. See Epstein & Goodman, *supra* note 107 (describing women’s “credibility discount,” particularly as to experiences of domestic violence).

109. Hardesty et al., *The Influence of Divorcing Mothers’ Demeanor*, *supra* note 29, at 64.

110. See SILBERG, DALLAM & SAMSON, *supra* note 89, at 13.

cases that involve cross allegations of abuse and alienation.¹¹¹ Importantly, gender bias can compound with other biases, such as racial bias.¹¹²

D. Truthfulness, Credibility & Trauma

Judges, custody evaluators, and GALs understandably place a great deal of emphasis on credibility in high-conflict cases. Often the parties present diametrically opposing pictures of the facts, and allegations of abuse may be met with skepticism, particularly when made by mothers. However, that skepticism is disproportionate to the true risk of false allegations of abuse.¹¹³ Data on child abuse allegations made in the context of parental separation indicate false reporting rates are relatively low, with noncustodial parents more likely to make false reports than custodial parents or children.¹¹⁴ It is critical that the legal system not overestimate rates of false reporting of abuse, particularly on the part of custodial parents and mothers.

Often, custody judges, GALs, and custody evaluators rely upon child welfare agency substantiation to determine the credibility of abuse claims.¹¹⁵ This approach is highly flawed because the child welfare system has a distinct purpose and operates on fundamentally different parameters than custody court. Substantiation by a child welfare agency is a preliminary

111. See Epstein & Goodman, *supra* note 107, at 431–32 (synthesizing research on gender bias in alienation claims); Sidnei Priolo-Filho et al., *Judgments Regarding Parental Alienation When Parental Hostility or Child Sexual Abuse Is Alleged*, 15 J. CHILD CUSTODY 302, 321 (2018) (study showing mothers were more likely to be viewed as alienators than fathers when alleging child sexual abuse); Madelyn Simring Milchman, *Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations*, 14 J. CHILD CUSTODY 234, 254–55 (2017) (study showing that fathers won custody cases in which they alleged parental alienation when accused of child sexual abuse).

112. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (discussing her intersectionality theory and explaining how the intersection of multiple oppressed identities compounds discrimination against Black women).

113. See Nico Trocmé & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333, 1334 (2005) (noting a “widespread misperception that there is a high incidence of intentionally false allegations of child abuse made by mothers” during custody disputes for strategic advantage).

114. See, e.g., *id.* at 1341 (in an analysis of abuse and neglect allegations in the context of custody disputes, authors found 12% were intentionally false allegations, with allegations by noncustodial parents making up 43% of those intentionally false allegations; followed by 19% from relatives, neighbors, or acquaintances; and 14% by custodial parents).

115. See Madelyn Simring Milchman, *Distinguishing Parental Alienation from Child Abuse and Adverse Parenting*, in CHALLENGING PARENTAL ALIENATION: NEW DIRECTIONS FOR PROFESSIONALS AND PARENTS 107, 109 (Jean Mercer & Margaret Drew eds., 2022). See also, e.g., *Ciannamea v. McCoy*, 760 N.Y.S.2d 774, 777 (App. Div. 2003) (trial court relied in part on state child welfare agency’s unfounded finding as evidence that mother fabricated child sex abuse allegation).

procedural and policy-based threshold, and is often used for the purpose of service provision and determining whether to seek judicial intervention.¹¹⁶ In fact, unsubstantiated does not mean “untrue,” but, rather, that the agency was unable to obtain sufficient information to accurately determine the truth of an allegation.¹¹⁷ The process of substantiation involves some subjectivity, and the outcomes of this process do not necessarily predict future risk.¹¹⁸ Child welfare is generally siloed from the field of domestic violence.¹¹⁹ Many child welfare workers lack training and procedural guidance, and face additional barriers to investigating abuse claims that occur in the context of custody litigation.¹²⁰ Substantiation by a child welfare agency is therefore not a reliable indicator of credibility of abuse claims in custody court, particularly in instances of coercive control.

Meanwhile, child welfare agencies often defer to custody courts and close investigations on the belief the court will determine the truth of any abuse.¹²¹ This mutual deferral can create a vacuous cycle in which welfare agencies close cases without investigation, while custody judges, evaluators, and GALs interpret a child welfare investigation that ends without a finding as an indication that abuse did not occur. The latter conclusion reflects an incorrect belief that substantiation is the validation of the truth of an allegation and unsubstantiation reflects a false allegation.¹²²

Custody judges, evaluators, and GALs are also highly susceptible to error when it comes to identifying whether claims of intimate partner

116. See Cora Bartelink et al., *Agreement on Child Maltreatment Decisions: A Nonrandomized Study on the Effects of Structured Decision-Making*, 43 CHILD & YOUTH CARE F. 639, 641 (2014) (discussing approaches to appraising child maltreatment allegations that were designed with the intention of informing the necessity of service intervention related to ensuring the child’s safety); Sarah Front & Kathryn Maguire-Jack, *The Organizational Context of Substantiation in Child Protective Services Cases*, 36 J. INTERPERSONAL VIOLENCE 7414, 7415–16 (2019); Patricia L. Kohl et al., *Time to Leave Substantiation Behind: Findings from a National Probability Study*, 14 CHILD MALTREATMENT 17, 18 (2009).

117. See DIANE DEPANFILIS & MARSHA K. SALUS, DEP’T OF HEALTH & HUM. SERVS., OFF. ON CHILD ABUSE & NEGLECT, *CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS* 39, 40–41, 125 (2003).

118. See Kohl et al., *supra* note 116, at 23 (reporting on study results: “Using a national probability sample, we were able to confirm findings from local samples demonstrating that future child risk is similar for both substantiated and unsubstantiated cases.”).

119. See Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos That Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals*, 28 VA. J. SOC. POL’Y & L. 275, 293–94 (2021).

120. See Michael Saini, Taina Laajasalo & Stacey Platt, *Gatekeeping by Allegations: An Examination of Verified, Unfounded, and Fabricated Allegations of Child Maltreatment Within the Context of Resist and Refusal Dynamics*, 58 FAM. CT. REV. 417, 424, 426 (2020).

121. See Meier & Sankaran, *supra* note 119, at 293–94.

122. Milchman, *Distinguishing Parental Alienation*, *supra* note 115, at 109–10.

violence are true. Typical criteria by which credibility is weighed, such as consistency, coherence, and stable emotionality, are in conflict with how domestic violence victims present abuse allegations.¹²³ Trauma symptoms can be inappropriately viewed as signs of poor credibility.¹²⁴ Given the cognitive and emotional consequences of domestic violence, victims may present allegations in a disjointed, inconsistent, and emotionally fraught manner.¹²⁵ Domestic violence victims may appear angry, unstable, and highly anxious.¹²⁶ As such, allegations can be discredited by court professionals lacking specific training in working with victims of domestic violence.¹²⁷

IV. Recommendations

Given the information discussed above, we propose that all legal professionals involved in high-conflict custody litigation implement corrective measures to ensure they are not advancing incorrect assumptions, specious science, or implicit bias to the detriment of children and families.

1. **Screen and evaluate for domestic violence, including coercive control.** Recalling that coercive control has been found in 75% of so-called high-conflict divorces, it is vital to systematically screen for the presence of coercive control in cases that present as high-conflict.¹²⁸ Given methodological challenges of assessing for coercive control, it may be necessary to use a multi-method approach, such as a combination of questionnaires and semi-structured interviews.¹²⁹ Professionals in the field must be aware that coercive control tactics include a wide range of behaviors,

123. See Teresa C. Silva, *Assessment of Credibility of Testimony in Alleged Intimate Partner Violence: A Case Report*, 21 J. FORENSIC PSYCH. RSCH. & PRAC. 58 (2021).

124. See Epstein & Goodman, *supra* note 107, at 421.

125. *Id.*

126. See Hardesty et al., *The Influence of Divorcing Mothers' Demeanor*, *supra* note 29, at 65.

127. Epstein & Goodman, *supra* note 107.

128. See PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 442–75 (Leslie Drozd, Michael Saini & Nancy Olesen eds., 2d ed. 2016); Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 504 (2008). See also *Introduction to the SAFer Approach*, BATTERED WOMEN'S JUST. PROJECT (Jan. 3, 2020), <https://bwjp.org/introduction-to-the-safer-approach/>.

129. Kevin Hamberger et al., *Coercive Control in Intimate Partner Violence*, 37 AGGRESSION & VIOLENT BEHAV. 1 (2017) (noting reliance on one instrument to assess for coercive control is insufficient and more specific assessment can be best achieved through the use of structured interviews).

and each abuser employs a unique combination and application of coercive control behaviors. Information used to assess for coercive control must be gathered through a variety of sources as methods.¹³⁰

- 2. *Understand how domestic violence affects victims.*** Given how common and devastating for children domestic violence is, family law professionals have a responsibility to stay informed on this important topic. Education about domestic violence, including coercive control, is a key part of basic competency for professionals who work on custody matters. In light of the research discussed above, it is important to remember that domestic violence victims commonly present with trauma symptoms that cause them to be perceived as less credible, even when telling the truth. Importantly, protective and defensive actions by victims are easily mistaken for vexatiousness, alienation, gatekeeping, and high-conflict behavior in a litigation and dispute resolution context. Terms like “alienation,” “gatekeeping,” and “high-conflict” are easily misapplied in custody conflicts by well-meaning professionals who use these terms without fully appreciating their complexity and narrow applicability.
- 3. *Prioritize addressing the harm of co-victimization.*** Professionals must prioritize child safety and minimize the harms that children experience as a result of domestic violence, including coercive control tactics. Children should be considered as co-victims, rather than witnesses or secondary victims of abuse. Child (and adult) exposure to coercive control does not end with divorce or separation. As discussed above, post-separation abuse—including litigation abuse—is common, and children suffer significant harm as a result of that abuse. Continued co-victimization from coercive control gives rise to serious cognitive, emotional, psychological, and social consequences that will affect children’s short- and long-term mental and physical development. These risk factors must be prioritized in custody decision-making. Custody arrangements that expose adult and child victims to coercive control tactics include joint custody, shared decision-making, frequent and/or unsupervised custody exchanges, and unrestricted

130. For more information about multidimensional screening for coercive control, see Hardesty et al., *Toward a Standard Approach*, *supra* note 28.

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contact between abuser and victim. Custody arrangements should be carefully designed with safety and child well-being in mind.

4. **Address bias.** In light of the research discussed above, the court system still has a lot of work to do to address gender bias, as well as other forms of bias, and confront incorrect assumptions about domestic violence and coercive control. Family law professionals must actively work to identify and combat implicit biases to avoid bias-related errors.¹³¹ Specific education and training are available from organizations that identify and address gender bias in detecting and appraising credibility of domestic violence and coercive control, such as the Safe and Together Institute.¹³² Custody evaluators should utilize a systematic approach to hypothesis testing to ensure appropriate identification and appraisal of coercive control evidence.¹³³ In addition, they should utilize rigorous, evidence-based approaches to investigate cross allegations of coercive control, parental alienation, and restrictive gatekeeping.¹³⁴

Conclusion

Custody conflict presents a significant challenge for family law professionals seeking to act in the best interest of each child who is the subject of a custody dispute. The most contentious cases, often labeled

131. Importantly, bias often operates beyond the realm of conscious thought. That means everyone—including lawyers, custody evaluators, and judges—can be influenced by bias without intending or even being aware of that bias. *See supra* note 16 and accompanying text.

132. *See* SAFE & TOGETHER INST., <https://safeandtogetherinstitute.com>.

133. *See* LESLIE M. DROZD ET AL., PARENTING PLAN AND CHILD CUSTODY EVALUATIONS: USING DECISION TREES TO INCREASE EVALUATOR COMPETENCE AND AVOID PREVENTABLE ERRORS 201 (2013).

134. *See* Milchman, *Distinguishing Parental Alienation from Child Abuse and Adverse Parenting*, *supra* note 115, at 107–37; *see also* ASS’N OF FAM. & CONCILIATION CTS., GUIDELINES FOR PARENTING PLAN EVALUATIONS IN FAMILY LAW CASES 26 (2022) (“Evaluators should only provide opinions that are sufficiently based upon facts or data, reliable principles and methods, and principles and methods that have been applied reliably to the facts of the case.”), https://www.afccnet.org/Portals/0/PDF/2022%20Guidelines%20for%20Parenting%20Plan%20Evaluations%20in%20Family%20Law%20Cases1.pdf?ver=U1r1w6hGs2QTJz2Hf_iLoQ%3d%3d; ASS’N OF FAM. & CONCILIATION CTS., GUIDELINES FOR EXAMINING INTIMATE PARTNER VIOLENCE: A SUPPLEMENT TO THE AFCC MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION 6–8 (2016) (highlighting necessary skills and knowledge, evaluation approaches, and mitigation of bias), [https://www.afccnet.org/Portals/0/PDF/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence%20\(1\).pdf?ver=UEMamlbgkRzYKA S4tPBjFQ%3d%3d](https://www.afccnet.org/Portals/0/PDF/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence%20(1).pdf?ver=UEMamlbgkRzYKA S4tPBjFQ%3d%3d).

high-conflict cases, can be the most vexing. These cases often involve the highest stakes for children and families, and lawyers, judges, and custody evaluators are keenly aware of those stakes. Current approaches to custody conflict are failing domestic violence victims and their children in important ways. Though domestic violence is common in so-called high-conflict custody cases, many family law professionals are unable to accurately distinguish abuse, particularly coercive control, from mutual high-conflict behavior, and account for that abuse and its effects on children.

In particular, victims' defensive and protective responses to abuse are too readily categorized as unfriendly, uncooperative, or hostile. Even when professionals recognize abuse, many fail to adequately respond to the realities of that abuse—including the risk to co-victim children, risk to adult victims, and challenging behavior from adult victims. The latter may be presumed to be evidence of parental alienation, when it may, in fact, be a result of trauma, self-protection, protection of a child, or frustration with a system that can be used by an abuser to further coercive control.

This article analyzes some of the pitfalls of existing child custody doctrine and practice that contribute to this problem and offers some critical context for professionals who are in a position to influence custody assessments and adjudications. While there are no easy answers in child custody conflicts, we offer some suggestions for family law professionals. These suggestions are intended to ground professionals in the evidence of each case and help them overcome incorrect assumptions, implicit bias, and questionable or overinterpreted science. By implementing the recommendations above, legal professionals will be better equipped to navigate these challenging cases and ultimately improve outcomes for children and families.