



Research Indicating That the Majority of Cases that Go to Court as “High Conflict” Contested Custody Cases Have a History of Domestic Violence

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RESEARCH INDICATING THAT THE MAJORITY OF CASES THAT GO TO COURT AS “HIGH CONFLICT” CONTESTED CUSTODY CASES HAVE A HISTORY OF DOMESTIC VIOLENCE

Discussions of family court litigation are often peppered with the term “high conflict” to refer to litigation that courts find to be persistent and contentious. However, the phrase is often also used to refer to cases involving domestic violence, even though “violence” is different from “conflict” and requires very different responses. This Research Summary was compiled to assist readers in clarifying the extent to which the label “high conflict” is being used to describe cases involving domestic violence – a use the authors and many of the following researchers would suggest is misguided. *For a general discussion of these terms and the distinctions between such cases, see Dalton et al., High Conflict Divorce, Violence and Abuse: Implications for Custody and Visitation Decisions, JUV. & FAM. CT. J., September 2003, at 11-33.*

I. Prevalence of Domestic Violence in Contested Custody Cases

Janet Johnston’s research

Janet Johnston is best known as a researcher of high conflict divorce and parental alienation. Not a particular friend of domestic violence advocates or perspectives, she was one of the first to note that domestic violence issues should be seen as the norm, not the exception, in custody litigation.

Johnston states that approximately 80% of divorce cases are settled, either up front, or as the case moves through the process. In-depth research has found that only approximately 20% of divorcing or separating families take their case to court. Only approximately 4-5% ultimately go to trial, with most cases settling at some point earlier in the process.¹

Johnston cites another study done in California by Depner and colleagues, which found that, among custody litigants referred to mediation, “[p]hysical aggression had occurred between 75% and 70% of the parents . . . even though the couples had been separated. . . [for an average of 30-42 months.]” Furthermore, [i]n 35% of the first sample and 48% of the second, [the violence] was denoted as *severe* and involved battering and threatening to use or using a weapon.”²

After surveying the research, Johnston concludes:

Taken all together these studies suggest that, in divorces marked by ongoing disputes over the custody and care of children, both inside and outside the court, there is often a history of domestic violence in the family and a likelihood that the violence will continue after the separation.³

Peter Jaffe’s research

Peter Jaffe is one of the world's leading experts on children, domestic violence, and custody.

¹ Janet R. Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 284 (2005); Janet R. Johnston, *High-Conflict Divorce*, 4 THE FUTURE OF CHILDREN 165, 167 (1994), both citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

² Johnston (1994), *supra* note 1 at 168, citing Depner et al., *Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services*, 30 FAM. & CONCILIATION CTS. REV. 185-206 (1992).

³ *Id.* at 169.

Jaffe lists the following independent research studies as supporting the position that most custody litigants have had a history of domestic violence:⁴

- In a review of parents referred for child custody evaluations by the court, domestic violence was raised in 75% of the cases.⁵
- Of 2,500 families entering mediation in CA, approximately three quarters of parents indicated that domestic violence had occurred during the relationship.⁶
- Physical aggression had taken place in between 70-75% of parents referred by the family court for counseling because of failed mediation or continuing disputes over the care of their children.⁷
- Attempts to leave a violent partner and take her child[ren] with her are one of the most significant factors associated with severe domestic violence and death.⁸

National Center for State Courts

Studies conducted by the National Center for State Courts (NCSC), looking solely at court records, have found *documented* evidence of domestic violence in 20-55% of contested custody cases. The same study found that a screening process (utilized by the mediation program) “revealed a much higher incidence of domestic violence than a review of court records alone would have indicated.”⁹

II. Mis-Labeling Domestic Violence as “High Conflict”

An example of the conflating of domestic violence and high conflict can be seen in another of Johnston’s statements: “[M]ultiple allegations of abuse are a feature of those higher conflict families” in contested custody litigation.¹⁰ The implication here is that abuse *allegations* are not indicative of true abuse. In contrast, Jaffe’s latest publication on this subject states:

A majority of separating parents are able to develop a post-separation parenting plan for their children with minimal intervention of the family court system. However, in 20% of the cases greater intervention was required by lawyers, court-related personnel (such as mediators and

⁴ All cited in PETER JAFFE, MICHELLE ZERWEER, AND SAMANTHA POISSON, CENTRE FOR CHILDREN AND FAMILIES IN THE JUSTICE SYSTEM, ACCESS DENIED: THE BARRIERS OF VIOLENCE AND POVERTY FOR ABUSED WOMEN AND THEIR CHILDREN AFTER SEPARATION 1 (2004).

⁵ P.G. Jaffe & G. Austin, *The Impact of Witnessing Violence on Children in Custody and Visitation Disputes*, Paper presented at the Fourth International Family Violence Research Conference, Durham NH (July 1995).

⁶ A. Hirst, *Child Custody Mediation and Domestic Violence*, Paper presented at the 2002 Family Court Services Statewide Educational institute (2002).

⁷ J. JOHNSTON & L.E.G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988).

⁸ NEIL WEBSDALE, *UNDERSTANDING DOMESTIC HOMICIDE* (1999).

⁹ Susan Keilitz et al., *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*, prepared for the National Center for State Courts State Justice Institute, NCSC Publication Number R-202, at 5.

¹⁰ Johnston, *supra* note 1 (citing Maccoby and Mnookin (1992)).

evaluators) and judges. In the majority of these cases, which are commonly referred to as "high-conflict," domestic violence is a significant issue.¹¹

III. Custody Courts Regularly Fail to Note or Lack Information about History of Domestic Violence

Perhaps explaining the tendency to treat abuse allegations as false, and merely indicative of "high conflict," is the pervasive failure of family courts to identify true histories of violence among the litigants before them. Peter Jaffe and Robert Geffner have stated that "'nonidentification of domestic violence in divorce cases is a prevalent and problematic issue."¹²

- Kernic et al, from the Harborview Injury Prevention & Research Center in Seattle, go on to state that "[o]ur study provides strong support for this assertion." This study looked at divorce cases, including both those with a documented, substantiated, and/or alleged history of domestic violence, and those without. The study found that in 47.6% of cases with a documented, substantiated history, no mention of the abuse was found in the divorce case files.¹³
- The same study found that "the court was made aware of less than one fourth of those cases with a substantiated history of intimate partner violence."¹⁴
- In the same study, fathers with a history of committing abuse were denied child visitation in only 17% of cases. Mothers in these cases were no more likely to obtain custody than mothers in non-abuse cases. This study found that mothers were "more likely" than fathers to be awarded sole custody, but does not identify what proportion of cases resulted in equal sharing of physical custody (which is available in Washington even when one parent is designated "primary").¹⁵
- The Virginia Commission on Domestic Violence Prevention commissioned a study of these issues at University of Virginia in 1997-98. The study found that, in custody cases where there was also a domestic abuse case in court, only 25% of the custody files referenced the existence of the domestic abuse case.¹⁶

¹¹ JAFFE ET AL., *supra* note 4, at 1.

¹² Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991, 991-1021, 1013 (August 2005), citing Peter Jaffe et al., *Child Custody Disputes And Domestic Violence: Critical Issues For Mental Health, Social Service, And Legal Professionals*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 371, 371-396 (George W. Holden, Robert A. Geffner & Ernest N. Jouriles, eds., 2000).

¹³ *Id.* at 1005.

¹⁴ *Id.* at 1016.

¹⁵ *Id.* at 1014-1015.

¹⁶ <http://www.courts.state.va.us/fvp/history.html>