

## **SPECIAL REPORT**

# **Perverse Incentives, False Allegations, and Forgotten Children**

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The family is the bedrock of society. The family socializes the young, provides economic security to its members, and allows for emotional fulfillment. But what happens to a society when a law provides incentives to file false claims of abuse that then become the basis for family dissolution?

The following case involving a Major League baseball player illustrates the problem:

*Southpaw pitching ace Chuck Finley was married to actress Tawny Kitaen, whose prescription drug addiction and erratic behavior once placed the lives of their two daughters at risk. One night Kitaen turned on the gas in the fireplace without lighting it and then called the girls to come to bed to go to sleep. On another occasion, she was charged with vandalizing a woman's car in a parking lot.*

*On April 1, 2002, Kitaen attacked Finley while he was driving the car, kicking him with her high-heeled boots, which left abrasions and scrapes on his body. Kitaen was arrested by the Newport Beach, California police. Three days later, Finley filed for divorce and was granted temporary custody of their children.*

*But in a move to gain custody of the two girls, Kitaen retaliated, accusing Finley of domestic "violence" because he had allegedly started the argument. Finley had no prior record of physical violence.*

Following passage of the Violence Against Women Act in 1994, states began to overhaul their domestic violence statutes by enacting some 1,500 civil and criminal laws.<sup>1</sup> These laws:

- Ensure the easy availability of restraining orders, resulting in 2–3 million temporary orders being issued each year
- Strengthen arrest and prosecution efforts
- Allow domestic violence (DV) victims to receive a range of legal, counseling, medical, and job training services, and
- Make it easier for alleged DV victims who are going through divorce to gain custody of their children

It is believed that many, perhaps the great majority of, allegations of domestic violence are false. For example, in half of all restraining orders, violence is not even *alleged*.<sup>2</sup> And in those states with dominant aggressor laws, men are often arrested as a result of sex-biased criteria, such as physical size or "which person appears to be more in control of the situation."<sup>3</sup>

One reason for the rash of false allegations is the fact that civil and family law statutes now provide for a broad range of property, monetary, and child custody benefits, referred to in the law as "remedies" or "relief." These benefits serve as incentives to file false allegations.

This Special Report analyzes the remedies described in the domestic violence and family law statutes in the 50 states and the District of Columbia.

### **Restraining Order Procedures**

In most states, judges issue a temporary order to the alleged victim (referred to in legal parlance as the “petitioner” or “claimant”) on an emergency *ex parte* basis. The order is followed by a hearing 10–14 days later, at which time a permanent order can be awarded. In about 85% of cases, the claimant is female.<sup>4</sup>

Since restraining orders (sometimes referred to as “orders of protection”) are issued under civil law, the “preponderance of evidence” standard applies. Unlike the “beyond a reasonable doubt” standard used in criminal cases, this means that even if the man accused has a credible case, the alleged victim will prevail if she appears to have a slightly stronger case.

The most basic element of a restraining order is the prohibition of contact between the two parties. The **California** statute is typical:

“An order may be issued under this part, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved.”<sup>5</sup>

This means that the accused (legally referred to as the “respondent” or “defendant”) is prohibited from entering the claimant’s place of residence or employment, approaching them within a prescribed area, or telephoning the claimant.

When restraining orders involve couples who reside together or have children, three additional issues arise:

1. Use of the couple’s residence,
2. Temporary custody of the children, and
3. Financial support for the children’s caregiver.

Even though denying the respondent access to his own home and children are serious penalties, such restrictions are imposed relying on broadly worded definitions of “abuse”<sup>6</sup> and based on the unsupported assertions of the claimant.

If a couple is going through a divorce, the temporary restraining order issued in civil court is then filed by the attorney in divorce court, requesting that the judge grant child custody as part of the divorce decree. By invoking “continuity” and “best interests of the child,” the temporary restraining order becomes a *de facto* permanent award of child custody and child support payments to the mother.

Other incentives are available, as well. In many states, judges can order that the alleged victim receive a variety of additional “remedies” and types of “relief.” The incentives fall into the two categories listed below, both of which are discussed in the sections that follow.

1. Property and monetary benefits
2. Final child custody awards

### **Property and Monetary Benefits**

In most states, the judge has the discretion to award a broad range of benefits to an alleged domestic violence victim. These benefits are summarized in this section. The information in this section is extracted from WomensLaw.org, a website that compiles civil domestic violence laws.<sup>7</sup>

#### *Property*

As noted above, states allow the judge to award the exclusive use of the family residence to the alleged victim. In many states, the judge can award other types of property as well.

In **Missouri**, for example, the judge can “order that the petitioner be given temporary possession of specified personal property, such as automobiles, checkbooks, keys, and other personal effects.”<sup>8</sup> In **Idaho** and other states, the judge can even restrain the “respondent from taking more than personal clothing and toiletries and any other items specifically ordered by the court.”<sup>9</sup>

One wonders how the person, now evicted from his home, can be expected to go about his normal activities with only clothing and toiletries to his name.

#### *Monetary*

In most states, the judge can also require the defendant to pay for a variety of expenses, including attorney’s fees, suitable alternative housing, alleged property damage, moving expenses, and medical and psychological services for the alleged victim.

In **Illinois**, for example, the judge may:

Order respondent to pay petitioner for losses suffered as a direct result of the abuse, neglect, or exploitation. Such losses shall include, but not be limited to, medical expenses, lost earnings or other support, repair or replacement of property damaged or taken, reasonable attorney's fees, court costs and moving or other travel expenses, including additional reasonable expenses for temporary shelter and restaurant meals.<sup>10</sup>

*Open-Ended Statutes*

The statutes in many states include open-ended language such as “including, but not limited to” and “other relief deemed necessary.”

In **Nebraska**, for example, the law permits “Ordering *such other relief deemed necessary* to provide for the safety and welfare of the petitioner and any designated family or household member.”<sup>11</sup> [italics added]

In **Massachusetts**, the wording of the law is more generous in “ordering the defendant to pay the person abused monetary compensation for the losses suffered as a direct result of such abuse. Compensatory *losses shall include, but not be limited to*, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees.”<sup>12</sup>

*Summary of Property and Monetary Benefits*

The “Incentives for Allegations of Domestic Violence” table contains tabulated information for each state and the District of Columbia:

- “Number of Remedies” (column 1) lists the number of benefits allowable under the statute.
- “Type of Remedies” (column 2) indicates the kind of remedies that can be awarded.

Because all states allow the judge to award temporary child custody, use of the family residence, and temporary financial support, these remedies are not cited in the table.

The number of allowable remedies (in addition to the three benefits mentioned in the paragraph above) ranges from 0 to 14, with an average of 3.1 remedies per jurisdiction, as follows:

- No additional remedies are specified in the following nine states: Connecticut, Florida, Hawaii, Kentucky, Maryland, Michigan, Rhode Island, South Dakota, and Vermont.
- Twenty-three states allow for 1–2 additional benefits, the most common being legal fees/court costs, personal property, and “other relief.”
- In 14 states, 5 or more extra remedies are enumerated. There, the list of possible benefits begins to resemble a restraining order sweepstakes. Those states are: Alaska, California, Delaware, Illinois, Indiana, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, Pennsylvania, and West Virginia.
- New Jersey has the largest number of additional allowable remedies—14.

The New Jersey statute reads as follows (remedies beyond basic spousal and child support are indicated in italics):<sup>13</sup>

(4) ...Compensatory losses shall include, but not be limited to, *loss of earnings or other support*, including child or spousal support, *out-of-pocket losses for injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling for the victim, moving or other travel expenses, reasonable attorney's fees*, court costs, and *compensation for pain and suffering*. Where appropriate, *punitive damages* may be awarded in addition to compensatory damages.

(8) An order requiring that the defendant make or continue to make *rent or mortgage payments* on the residence occupied by the victim.

(9) An order granting either party temporary possession of specified personal property, such as an *automobile, checkbook*, documentation of health insurance, an identification document, a *key*, and *other personal effects*.

(10) An order awarding *emergency monetary relief*, including emergency support for minor children, to the victim and other dependents, if any.

The New Jersey statute is excessive for two reasons. First, it enumerates a large number of remedies. Second, it allows for compensation for pain and suffering and punitive damages, remedies that are generally awarded only after a jury has reached a decision following a full evidentiary trial.

## **Child Custody**

Wives are more likely to engage in partner abuse than husbands, according to the latest research.<sup>14</sup> Fewer than 5% of domestic violence incidents involve currently-married couples, whereas in about 60% of cases, the alleged incident occurs between partners who are currently separating.<sup>15</sup> This reveals that partner aggression occurs predominantly during times of relationship break-up.

The American Bar Association has completed a compilation of the way divorce courts treat domestic violence allegations or findings in child custody decisions.<sup>16</sup> That listing was published in 2004 and is still considered to be largely accurate. The information is presented in the “Incentives for Allegations of Domestic Violence” table:

- “Court Must Consider Evidence of DV/Best Interest of the Child” (column 3) is the weakest type of law that can be used to prevent an award of joint custody. Twenty-six states have enacted such laws.
- “Rebuttable Presumption Against Joint Custody” (column 4) means that joint or sole custody should *not* be awarded to the abuser unless that person is able to produce compelling evidence that the allegation of domestic violence is false. In other words, the burden of proof rests on the defendant. Twenty-three jurisdictions have such statutes.

- “Prohibition of Joint Custody” (column 5) indicates that the statute actually precludes a joint custody award in the event of an allegation or finding of domestic violence. Four states—Arizona, Pennsylvania, Texas, and Washington—have such provisions.

Two states—Connecticut and West Virginia—have no statutes that address this issue.

The irony is that an allegation of partner abuse may become the basis for a father losing custody of his children—*even if he never abused his children, or such abuse was never alleged.*

### **Remembering the Forgotten Children**

Each year, one million children experience the divorce of their parents. Often allegations of domestic abuse are made during the divorce proceedings to gain a legal advantage. In 85% of all cases, custody is awarded to the mother<sup>17</sup>. Now, 34% of all American children do not live with their biological father.

The effects of removing children from their fathers are well-documented as they are profound. These include a higher risk of academic difficulties, drug and alcohol abuse, mental health problems, conduct problems, teenage pregnancy, and involvement with the criminal justice system.<sup>18</sup> In some studies, paternal involvement has been shown to have more impact than maternal love on delinquency, substance abuse, and overall mental health and well-being.<sup>19</sup>

Living in a single-mother household places a child at greater risk of physical mistreatment. “In 2004, 57.8 % of child abuse and neglect perpetrators were females and 42.2 % were males,” according to the federal Administration for Children and Families.<sup>20</sup> Likewise, one Gallup Survey found that mothers were twice as likely as fathers to report ever physically abusing a child.<sup>21</sup>

Father-absence is also linked to economic well-being. One report noted that in 1999, 8% of children in married-couple families were living in poverty, compared to 42% of children in female-headed families.<sup>22</sup>

Clearly, removing a father from the family has highly detrimental effects on children, and eventually on the social order.

This Special Report has reviewed the statutes in all 50 states and the District of Columbia. This report documents that in only five states—Connecticut, Maryland, Michigan, Rhode Island, and Vermont—do the statutes contain no undue incentives to make claims that are trivial or unwarranted. By legislative design, 46 jurisdictions have created incentives to file false allegations of domestic violence.

So an allegation of domestic violence is often the first step in an inexorable cascade of legal actions and judicial decisions that each year results in hundreds of thousands of children losing daily contact with their fathers.

Ten-year old Josh has these simple words to say about his father: “Dad is my buddy.”

And six-year-old Amanda looks forward to her nightly bedtime stories: “At the end of the day when I go to bed, Daddy tucks me in. We talk together about our day. He reads me a story to help me sleep. We pray together. That is my favorite part.”<sup>23</sup>

It’s the Joshes and Amandas who have been forgotten by the people who have crafted our nation’s domestic violence laws.

**Incentives for Allegations of Domestic Violence**

<b>State</b>	<b>Number of Remedies</b>	<b>Type of Remedies</b>	<b>Court Must Consider Evidence of DV/ Best Interest of the Child</b>	<b>Rebuttable Presumption Against Joint Custody</b>	<b>Prohibition of Joint Custody</b>
Alabama	1	Other relief		Yes	
Alaska	7	Vehicle, personal items, medical expenses, counseling, shelter, and repair or replacement of damaged property, legal fees	Yes		
Arizona	1	Other relief		Yes	Yes, if the court finds that there is significant DV
Arkansas	2	Legal fees; other relief		Yes	
California	7	Personal property, liens, loss of earnings, medical care, temporary housing, legal fees, other relief		Yes	
Colorado	1	Other relief	Yes		
Connecticut	0				
Delaware	9	Personal property, medical, dental, counseling, loss of earnings, repair or replacement property, moving, travel expenses, and legal fees		Yes	
District of Columbia	2	Personal property and legal fees		Yes	
Florida	0			Yes	
Georgia	2	Personal property and legal fees	Yes		
Hawaii	0			Yes	
Idaho	1	Personal property		Yes	
Illinois	8	Alternative housing, personal property, medical expenses, lost earnings or other support, repair of property, legal fees, moving expenses, restaurant meals	Yes		
Indiana	7	Car, personal effects, legal fees, alternative housing, medical expenses, counseling, and repair of property	Yes		
Iowa	1	Legal fees		Yes	

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Kansas	3	Alternative housing, legal fees, personal property	Yes		
Kentucky	0		Yes		
Louisiana	3	Legal fees, medical care, and psychological care		Yes	
Maine	6	Personal property, loss of earnings, expenses for personal injuries, property damage, reasonable moving expenses, and legal fees	Yes		
Maryland	0		Yes		
Massachusetts	9	Loss of earnings, restoring utilities, losses for injuries sustained, replacement of locks, personal property destroyed, medical care, moving expenses, reasonable attorney's fees, other remedies		Yes	
Michigan	0		Yes		
Minnesota	1	Restitution		Yes	
Mississippi	8	Medical expenses, loss of earnings, losses for injuries sustained, moving expenses, legal fees, counseling, medical treatment, and other remedies		Yes	
Missouri	7	Alternative housing, automobiles, checkbooks, keys, other personal effects, legal fees, and medical care		Yes	
Montana	2	Automobile and other personal property	Yes		
Nebraska	1	Such other relief deemed necessary	Yes		
Nevada	1	Legal fees		Yes	
New Hampshire	8	Automobile, household furniture, insurance, health care, utilities, rent, legal fees, and other relief	Yes		
New Jersey	14	Loss of earnings, out-of-pocket losses for injuries, cost of repair or replacement of personal property, counseling, moving expenses, other travel expenses, legal fees, compensation for pain and suffering, punitive damages, rent, automobile, checkbook, other personal effects, and emergency monetary relief	Yes		

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New Mexico	5	Medical care, counseling, temporary shelter, replacement or repair of damaged property, and lost wages	Yes		
New York	4	Restitution not to exceed \$10,000, legal fees, health insurance, and medical care	Yes		
North Carolina	2	Personal property and legal fees	Yes		
North Dakota	2	Legal fees and personal property		Yes	
Ohio	4	Alternative housing, car, personal property, and other relief	Yes		
Oklahoma	1	Legal fees		Yes	
Oregon	2	Legal fees, emergency monetary assistance		Yes	
Pennsylvania	10	Health insurance, rent, medical care, dental care, moving expenses, counseling, loss of earnings, repair of property, other out-of-pocket losses for injuries, and legal fees	Yes		Yes, if other parent has been convicted of first degree murder of the other parent
Rhode Island	0		Yes		
South Carolina	2	Personal property and legal fees	Yes		
South Dakota	0			Yes	
Tennessee	1	Suitable alternative housing	Yes		
Texas	2	Legal fees and personal property		Yes	Yes, if there is credible evidence that shows a history of past or present domestic violence
Utah	2	Car and essential personal effects	Yes		
Vermont	0		Yes		
Virginia	1	Car, alternative housing, legal fees	Yes		
Washington	3	Legal fees, personal effects, and car			Yes, if one party has a history of domestic violence
West Virginia	5	Personal property, medical care, transportation, shelter, and other expenses			

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Wisconsin	1	Legal fees		Yes	
Wyoming	1	Medical care	Yes		
<b>TOTAL</b>	<b>Average = 3.1</b>		<b>26</b>	<b>22</b>	<b>4</b>

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<sup>3</sup> RADAR Services, Inc: Justice denied: Arrest policies for domestic violence. Rockville, MD: 2008. <http://www.radarsvcs.org/docs/RADARreport-Justice-Denied-DV-Arrest-Policies.pdf>

<sup>4</sup> Young C. Domestic violence: An in-depth analysis. Washington, DC: Independent Women's Forum, 2005.

<sup>5</sup> Family Code, Division 10, Prevention of Domestic Violence, Part 1. Short Title and Definitions, Sections 6200–6218.

<sup>6</sup> RADAR Services, Inc: Expanding definitions of domestic violence, Vanishing rule of law. Rockville, MD: 2008. <http://www.radarsvcs.org/docs/RADARreport-Vanishing-Rule-of-Law.pdf>

<sup>7</sup> [www.WomensLaw.org](http://www.WomensLaw.org). Accessed June 2006. To view state laws, select the desired state, then select “Legal Statutes” and “How to Get a Protective Order.”

<sup>8</sup> Title XXX. Domestic Relations, Chapter 455, Abuse – Adults and Children – Shelters and Protective Orders.

<sup>9</sup> Title 39: Health and Safety, Chapter 63: Domestic Violence Crime Prevention.

<sup>10</sup> 750 ILCS 60/Illinois Domestic Violence Act of 1986.

<sup>11</sup> Section 42: Husband and Wife, (a) Protection From Abuse Act.

<sup>12</sup> Chapter 209A, Abuse Prevention.

<sup>13</sup> Title 2C Code of Criminal Justice, 2C:25-17 through 35 “Prevention of Domestic Violence Act.”

<sup>14</sup> McDonald R, Jouriles EN, et al. Estimating the number of American children living in partner-violent families. Journal of Family Psychology Vol. 20, 2006. <http://www.smu.edu/experts/study-documents/family-violence-study-may2006.pdf>

<sup>15</sup> Department of Justice. Intimate partner violence and age of victim, 1993–99. Washington, DC: Bureau of Justice. NCJ 187635, October 2001, Figure 4. <http://www.ojp.usdoj.gov/bjs/abstract/ipva99.htm>

<sup>16</sup> American Bar Association. Custody decisions in cases with domestic violence allegations. Accessed May–June 2006. [http://www.abanet.org/legalservices/probono/childcustody/domestic\\_violence\\_chart1.pdf](http://www.abanet.org/legalservices/probono/childcustody/domestic_violence_chart1.pdf)

<sup>17</sup> Census Bureau. Custodial Mothers and Fathers and Their Child Support. Current Population Reports, 1999. <http://www.census.gov/prod/2002pubs/p60-217.pdf>

<sup>18</sup> Horn WF and Sylvester T. Father Facts. Gaithersburg, MD: National Fatherhood Initiative. 2004.

<sup>19</sup> Rohner RP and Veneziano RA. The importance of father love: History and contemporary evidence. Review of General Psychology, December 2001.

<sup>20</sup> Administration for Children and Families. Who typically abuses children? Accessed August 15, 2006. [http://faq.acf.hhs.gov/cgi-bin/acfrightnow.cfg/php/enduser/std\\_adp.php?p\\_faqid=70](http://faq.acf.hhs.gov/cgi-bin/acfrightnow.cfg/php/enduser/std_adp.php?p_faqid=70)

<sup>21</sup> Department of Health and Human Services. Charting Parenthood: A Statistical Portrait of Fathers and Mothers in America, Figure P12.1. <http://fatherhood.hhs.gov/charting02/Parenting.htm#figp12.1>

<sup>22</sup> Federal Interagency Forum on Child and Family Statistics. America’s Children: Key National Indicators of Well-Being. Washington, DC, 2001. Table ECON1.A.

<sup>23</sup> Shanley MK. *When I Think About My Father: Sons and Daughters Remember*. Sta-Kris, 1996.