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ANALYSIS

## Domestic Violence and Child Custody: Know the Law and Write a History

Toby Kleinman & Daniel Pollack | April 27, 2023



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Over many years of practice, we have learned that context is one of the imperatives to give to a court to avoid pitfalls in litigation in a domestic violence, child custody case. Obtaining a domestic violence restraining

order may require only the testimony of a single incident, but the history of the relationship is imperative and provides context. While an entire history may not be necessary to prove the case to obtain the restraining order, the relationship history is strategically essential to chronicle if there are children and custody is in dispute.

Every jurisdiction has its own legal standard to grant domestic violence protections. It is important for the attorney and client to know the law in their jurisdiction. It is well known that domestic violence cases can become among the most contested child custody cases, in part because abusers fight to try to maintain control. Therefore, the attorney representing a victim must also know the actual science and seek to keep unscientific testimony from being used in testimony. It is imperative for the attorney to know what is acceptable scientific evidence and what the standard for proof is regarding a protective order and custody and be able to object to its improper usage as well as what the actual science is.

For instance, in the case of child custody, the use of language of parent alienation began initially with language of a “syndrome,” but the language has been honed to create the appearance of having scientific underpinnings when, in fact, the diagnosis of parent alienation has been recently rejected by the World Health Organization and the most recent version of the Diagnostic and Statistical Manual (DSM).

Family courts must adhere to rules of evidence, whether they follow the cases of *Daubert* or *Frye*. *Daubert* requires reliability and a determination regarding whether the methodology used is valid. *Frye* requires community acceptance within the relevant scientific community. Some states have “catch all” phrases in the rules of court that permit rules to be

loosened in certain circumstances and this is often utilized supposedly in the interest of justice. Indeed, some who use this recommend harsh remedies such as removing a primary attachment figure from children.

How then does one prepare and write a history for a court when the case involves abuse and custody? The history should:

- be written in the first person;
- be detailed and comprehensive;
- demonstrate patterns that have emerged in the relationship. Does the abuser use pejorative labels to describe the victim's behavior? Are threats used? Is there a pattern of denigration?

Does the abuser demand certain public behaviors, especially in the presence of others? Are there consequences of failure to comply? Have they ever been carried out?

- Is there gaslighting?
- Detail any coercive control where an abuser demands the victim "do this, or else ..."

An abusive relationship may seem to start like any other. It is important to convey this history to the court. So, for example, one party appears charming; the other is eager to please. Unaware of the abuse to come, the person who becomes a victim tries to please and do the things the abuser likes and goes along with their requests and socializes with those the abuser likes. Over time, the abuser becomes more demanding, completely refusing to socialize with the victim's friends or do the things the victim suggests. The "victim partner" often starts out by "giving in" when there is an apparent minor dispute between the parties. Initially,

this may include simple things like where the couple goes and with whom. Over time, it may change and may be regarding how to discipline children or anything that is a significant difference between them. The victim's behavior comes from good will and a desire to please and make the partner happy.

A perpetrator understands "going along" as the ability to control. Eventually, the partner who "abuses" comes to assume control of things that matter in the relationship. When the victim then balks at going along over a particular issue or event, the perpetrator may try to get their partner to go along with promises of "next time," or something else, but if the victim refuses, or even strongly balks, the ante may be heightened by the abuser with anger, a threat, or a violent assault. The level of anger of the perpetrator may be a shock to the victim and the victim may back off their position on an issue and again "go along." After one or more of these incidents, the victim may hold their ground and refuse to go along or the controlling partner may assume the partner will not go along. At that point the perpetrator may become violent. It may be just the level of violence necessary to keep control. Yet, the victim stays in the relationship. The partner apologizes and professes love and demonstrates remorse. This pattern may go on for a long time. At some point the victim may persist in their position where it differs from the perpetrator's and there may be a violent outburst when the victim fears for their well-being and/or for a child's well-being. At that point, the victim may leave or call the police and may seek restraints.

Thus, once the decision is made to go to court the victim needs to write the relationship history in detail and explain how it unfolded, even when initiating a protective order.

The history must answer many questions. Were there children involved? Were they present during any violence or threats of violence? Were there threats about the perpetrator taking custody of the children if the victim leaves? The perpetrator may also make up lies about the victim if the victim leaves. Whether a victim leaves a relationship after a first physical assault or a threat of assault, or whether there have been several or many acts of violence, there is invariably a troubling history. That history is a critical first step to elucidate, write and testify to when asking for protective order from a court. To do so provides an important context to a court about possibly escalating violence and threats. If the abusive partner carries out those threats, the victim can demonstrate to the court that the court itself has already been alerted and it should be included in any filed complaint for divorce, if filed. Absent this history, the victim is in a defensive position and it is a more difficult case as to custody and safety issues.

Abusers may be charming and victims may have been succumbed to that charm. Part of the history should describe the charm, how they were charmed and that despite their going along threats and violence may have increased.

Attorneys may be reluctant to spend so much time assisting in preparing and writing the victim's personal history because it may not seem relevant at first blush. But in domestic violence cases, this history is extraordinarily relevant as a case moves forward. Even if no protective order is sought, and the case begins with a divorce or custody action. abusers often accuse a victim of lying when a victim raises an issue where a detailed history has not been filed with the court. Writing and filing a detailed history before any major litigation is underway can

prevent that from occurring, or, if it occurs, mitigate its impact on the court.

Acts of violence that permit the granting of a restraining order may also constitute independent criminal acts. The difference in obtaining the order may be the ease of an attorney in assisting in the seeking of a protective order and the standard of proof required to obtain one. The question often arises as to whether to seek criminal charges as well as civil orders and whether and how that changes the information given to the court.

In summary, the victim should carefully write the history in the first person, in chronological order, noting the date and time of events, describe the events that happened in detail, including specific threats of violence to themselves and to children and detailed coercive control, include their own and others' emotional responses and reactions, and 5) be thorough and accurate.

The combination of knowing the law with the ability to testify to history is a great advantage going forward.

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