

Battered Mothers Speak Out:
A Human Rights Report
on Domestic Violence and Child Custody
in the Massachusetts Family Courts

Executive Summary

**This Executive Summary was produced by
the Battered Mothers' Testimony Project
at the Wellesley Centers for Women**

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Ordering Information

For a copy of the full report and/or a copy of the video about our human rights tribunal on domestic violence and child custody, please contact:

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Endorsements

Amnesty International USA's Women's Rights Program

"This is a critical report and action plan for everyone concerned about violence against women, the welfare of children and the integrity of the justice system. Although the report focuses on Massachusetts, we know from our intake calls that the problems it documents are true of courts nationwide."

NOW Legal Defense and Education Fund

"The Battered Mothers' Testimony Project has done a real service to the courts and the nation by producing this report. It raises critically important issues that affect the safety and well-being of children and families, not just in Massachusetts but in every part of the country. Applying a human rights standard to family court practices underscores the fact that failing to protect women and children from family violence denies them their basic human rights. This report is a powerful call to action that no responsible person can ignore."

Esta Soler, President, Family Violence Prevention Fund

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The Universal Declaration of Human Rights

All human beings are born free and equal in dignity and rights, art. 1

Everyone has the right to life, liberty and security of person, art. 3

No one shall be subjected to torture or to cruel, inhuman or degrading treatment, art. 5

Massachusetts Presumption of Custody Law

[A] probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of [partner or child] abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent.

The U.N. Convention on the Rights of the Child

[Governments] shall take all appropriate [steps] to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child, art. 19

The court shall provide for the safety and well-being of the child and the safety of the abused parent [including by ordering that visitation be] supervised by an appropriate third party, visitation center or agency...[and] prohibiting overnight visitation...[if such steps are necessary].

OVERVIEW

Battered Mothers Speak Out is a human rights report produced by the Battered Mothers' Testimony Project at the Wellesley Centers for Women. Begun in 1999, the Battered Mothers' Testimony Project (BMTP) is the first human rights initiative in the United States to address domestic violence and child custody issues. Our mission is to assess whether the Massachusetts family court system is acting in accordance with internationally accepted human rights standards and norms in selected cases and to identify and promote the changes necessary to ensure that the family courts meet their human rights obligations.

The project is a multi-year effort with four distinct stages:

1. Documentation and research,
2. Human rights tribunal on domestic violence & child custody (May 9, 2002),
3. Human rights report, and
4. Community education and organizing for positive change in the family courts.

Battered Mothers Speak Out documents and analyzes instances in which the Massachusetts family courts have violated internationally accepted human rights laws and standards in selected child custody cases where there is a history of partner abuse.

We found that there are state actors who have committed one or more of the following human rights violations:

- I. Failure to protect battered women and children from abuse;
- II. Discrimination and bias against battered women;
- III. Degrading treatment of battered women;
- IV. Denial of due process to battered women;
- V. Allowing the batterer to continue the abuse through the family courts; and
- VI. Failure to respect the economic rights of battered women and children.

The report also covers the history of and need for the BMTP, our research methodology, and a discussion of relevant human rights principles, standards, and laws. The report concludes with a series of detailed, practical recommendations for change that are based on our findings.

Above all else, *Battered Mothers Speak Out* is intended as a call to action. We call in particular on the Massachusetts family courts and the Massachusetts Legislature to take swift action to meet their human rights obligations to battered women and their children by implementing – without delay – the recommendations for change outlined in this report.

PROBLEMS ADDRESSED

Throughout the world, partner and child abuse have been recognized as violations of fundamental human rights, particularly the right to freedom from violence.¹ International human rights laws and principles clearly delineate government responsibilities for protecting individuals from violence by other individuals (such as spouses or parents) and recognize that violence against women in particular is a global problem requiring government action to prevent and end it. Further, research demonstrates that women are more often the victims of partner abuse than men. For instance, one-fourth of women in this country² and one-tenth to two-thirds of women internationally³ are reported to be physically abused by husbands or men with whom they are in an intimate relationship. In Massachusetts, male partners have been found to be the group most responsible for murders of adult women.⁴ Women's husbands and boyfriends are also the group identified as most responsible for murders of children nationally.⁵

The negative impact on children of exposure to partner abuse has also been well documented. Children of women who have been abused by a male partner are at high risk for being abused by these same men: 40 to 70 percent of children of battered women are found to be directly abused by their mother's batterer.⁶ These children have been found to suffer high rates of mental and physical health concerns (e.g., headaches, failure to thrive, vomiting, diarrhea)⁷ and are more likely to report distress related to post-divorce parental visitation.⁸ In Massachusetts, more than 40,000 children are exposed to domestic violence in their homes every year.⁹

Researchers are now identifying critical links between partner abuse, child abuse, and child custody disputes. For example, child custody and visitation arrangements often provide a context for abusive men to continue to control and victimize women and their children¹⁰ and a majority of highly disputed child custody cases involve a history of partner abuse.¹¹ The tendency of batterers to escalate their violence after their victims leave them is also well documented in the research literature.¹²

Despite these recent advances in research and their implications for policy reform, practitioners and policymakers throughout the United States continue to overlook the critical subject of post-separation violence against women and their children in the context of child custody disputes.

Largely as a result of reforms prompted by the efforts of the Massachusetts battered women's and children's advocacy communities, the Commonwealth has emerged as a national leader in confronting domestic violence. State government leaders have consistently recognized that a coordinated response at all levels of government is needed to effectively address this problem. In 1992, for example, the Commonwealth declared domestic violence a public health emergency in reaction to increasing numbers of severe domestic violence cases, and the executive branch responded by creating the Governor's Commission on Domestic Violence.

Massachusetts also has taken steps to address the links between domestic violence and child custody issues. For instance, Massachusetts was among the first states to recognize that gender bias negatively affects the administration of justice for battered women, in a report commissioned by the Supreme Judicial Court in 1989 on gender bias in the courts. With regard to child custody decisions in particular, this gender bias study found that family court judges and probate probation officers often do not consider violence toward women relevant and that family courts are ordering shared legal custody even when there is a history of partner abuse.¹³ Moreover, the report found that, regardless of the presence or absence of partner abuse, fathers who actively seek custody obtain either primary or joint physical custody 70 to 90 percent of the time, and that when fathers contest custody, mothers are held to a different and higher standard than fathers.¹⁴

The Massachusetts Legislature also responded to increasing concerns about children's safety in child custody and domestic violence cases by passing the Presumption of Custody law in 1998.¹⁵ This law acknowledges the harm to children of exposure to partner abuse (as well as child abuse) by creating a rebuttable presumption that it is not in children's best interests to be placed in the sole custody, shared legal custody, or shared physical custody of an abusive parent upon a court finding that a pattern or serious incident of abuse has occurred.¹⁶

NEED FOR THE BATTERED MOTHERS' TESTIMONY PROJECT

To our knowledge, few of the recommendations made in the 1989 Massachusetts gender bias study have been implemented. Similarly, no systematic steps appear to have been taken, either by the courts or by the Legislature, to ensure that the Presumption of Custody law is applied uniformly, beyond an initial distribution of basic information about it.¹⁷

Moreover, the Massachusetts court system does not collect specific data on the number of family court cases it hears each year that involve partner abuse and child custody issues, thereby making quantitative research on this topic extremely difficult to conduct. Thus, there has been no body of research in Massachusetts that documents the specific problems that battered mothers encounter in the family courts, the range of these problems, or their long-term impact on battered mothers and their children.

The BMTP begins to meet this critical need for information through an innovative research approach that records and amplifies the voices and experiences of those most directly affected by the problems being studied – the battered mothers themselves.

Because current research data demonstrate that the majority of partner abuse cases involve male violence against female partners, the BMTP chose to limit its primary interviews to female victims of partner abuse. In doing so, we make no claim that women are generally better individuals or better parents than men. Rather, we wish to draw attention to the fact that when *any* individual's human rights are violated, it is cause for grave concern and provides justification for demanding that the government take swift action to remedy the violating practices.

Further, while the BMTP could have been conducted in any state in this country (because of the common nature of these violations), we chose Massachusetts because the parent organization for the project is located in this state and because Massachusetts has demonstrated leadership on domestic violence issues in the past.

PROJECT DOCUMENTATION AND RESEARCH STRATEGIES

The BMTP instituted a multi-year, four-phase study in which human rights fact-finding was complemented by qualitative and quantitative social science research methodologies.

Human rights fact-finding aims to uncover patterns of state practices that may indicate where human rights violations are occurring, who is responsible for the violations, and who is affected by them. Thus, in contrast to traditional social science research which sets forth a hypothesis and then seeks evidence either to support or disprove it, human rights fact-finding sets out to document problems that are known or suspected to exist.

Our four-phase study methodology is outlined briefly below. (Details of our research methodology are provided in the Introduction and Appendix C of the full report.)

❑ PHASE 1: ONE-TO-ONE INTERVIEWS WITH 40 BATTERED MOTHERS

The primary participants in the study were 40 battered mothers who experienced family court litigation in 11 of the 14 Massachusetts counties.¹⁸ Participants were recruited through social service agencies and legal providers. Battered women's advocates who volunteered as testimony-takers for the study also contributed significantly to participant recruitment. All reasonable efforts have been made to ensure the confidentiality of participants. All names in the report are pseudonyms, including those of women's ex-partners and children.

❑ PHASE 2: WRITTEN SURVEY OF 31 ADVOCATES FOR BATTERED WOMEN AND THEIR CHILDREN

Our second group included advocates across Massachusetts who agreed to complete a written survey about their experiences with how the Massachusetts family courts are handling child custody and visitation issues when there is a history of partner abuse.

❑ PHASE 3: FOCUS GROUPS WITH SURVIVORS OF PARTNER ABUSE AND ADVOCATES FOR BATTERED MOTHERS

The project conducted five focus groups with advocates and survivors of partner abuse to explore how intersecting issues of race, gender, socioeconomic status, immigration status, and/or sexual orientation may come into play for battered mothers in the family courts. These focus groups included a total of 23 women in five separate focus group sessions.

❑ PHASE 4: INTERVIEWS WITH 16 STATE ACTORS IN MASSACHUSETTS WHO WORK WITHIN OR IN RELATION TO THE FAMILY COURT SYSTEM

The BMTP conducted one-hour, confidential interviews with 16 selected state actors designed to elicit their understanding of and attitudes toward domestic violence and child custody cases. The project interviewed state actors from each major state actor category discussed in this report (seven were female and eight were male). State actors were asked to be interviewed for one of three reasons: (1) at least two women in our study made specific complaints about them, (2) women and/or advocates identified them as handling partner abuse and child custody issues well, or (3) they possessed specific knowledge about an aspect of the family court system based on their professional affiliation or position. The state actors interviewed included family court judges, guardians ad litem, Massachusetts Department of Social Services workers, a probate probation officer, a representative from the Massachusetts Commission on Judicial Conduct, and a representative from the Massachusetts Division of Professional Licensure. No names of state actors appear in the report.

Limitations of the study

While the individuals who participated in the multiple phases of this study are diverse in many respects, this study does not purport to represent all battered mothers who have experienced litigation in the Massachusetts family court system, all battered women's advocates, or all state actors in the Massachusetts family court system. Furthermore, because the interviews, focus groups, and surveys were conducted in English, participation was limited to individuals with English proficiency. The project also makes no claim regarding statistical significance, ability to generalize to a larger population, or the overall extent of the reported problems either in Massachusetts or elsewhere.

What the numbers mean

The nature, range, and overlap of the problems reported by the 40 women participants were echoed by advocates and, in some instances, by state actors as well. Given the extent of the similarities in the injustices that these women reported they faced in the Massachusetts family courts, and the extent to which their reports matched those of the advocates we contacted, our findings:

- ♦ Offer a critical and detailed understanding of the range of specific problems and injustices encountered by battered mothers and their children in family court litigation;
- ♦ Establish that human rights violations have occurred in the Massachusetts family courts and that Massachusetts is obligated to take steps to remedy them; and
- ♦ Indicate practical recommendations for change based on input from multiple stakeholders.

Human rights inquiry

The BMTP shaped its human rights investigation and analysis of the Massachusetts family courts around the following questions, each of which is grounded in the principles of international human rights law and standards:

- ♦ Are the Massachusetts family courts respecting, protecting, and fulfilling battered mothers' and their children's fundamental human rights to bodily integrity, freedom from violence, non-discrimination, equal protection of the law, due process, freedom from torture and degrading treatment, free speech, a fair hearing, and an adequate standard of living? ¹⁹
- ♦ Are the Massachusetts family courts exercising due diligence with respect to violence against women and children?
- ♦ Are the Massachusetts family courts acting in children's best interests in child custody and visitation cases where there is a history of partner and/or child abuse?
- ♦ Where the Massachusetts family courts are found to be violating the human rights of battered mothers and their children, what remedies and reforms must be made in order for the courts to respect, protect, and fulfill the human rights of battered mothers and their children?

Key Findings

This human rights report is organized around six distinct human rights violations that, based on our findings, appear to occur because of specific actions, inactions, and attitudes by family court judges, probate probate officers, guardians ad litem, Department of Social Service workers, and court-appointed psychological evaluators (“state actors”). The following is a summary of our key findings and human rights analysis.

I. FAILURE TO PROTECT BATTERED WOMEN AND CHILDREN FROM ABUSE

Problem

Some Massachusetts family courts are placing battered women and their children in danger by issuing child custody and visitation orders that require them to have ongoing, unprotected contact with batterers and child abusers. These women and children are harmed and/or threatened physically, sexually, emotionally, and/or economically by the abuser as a result. There are family court judges, guardians ad litem, probate probate officers, Department of Social Service workers, and court-appointed psychological evaluators who fail to protect battered women and their children by:

1. Granting or recommending custody of children to batterers;
2. Granting or recommending unsafe visitation with batterers;
3. Ignoring or minimizing mothers’ reports of partner abuse or child abuse/mistreatment, including by:
 - ♦ Omitting women’s descriptions of, or concerns about, abuse from official reports and recommendations;
 - ♦ Inappropriately or inaccurately characterizing women’s reports of abuse;
 - ♦ Failing to pay attention to women’s concerns about their children’s safety and well-being;
 - ♦ Taking punitive actions against women for attempting to protect their children; and
 - ♦ Blaming women for the abuse, its impact on the children, or for the children’s refusal to visit with their fathers.
4. Failing or refusing to investigate partner abuse or mothers’ allegations of child abuse;
5. Failing to examine or credit documented evidence of partner or child abuse; and
6. Mishandling child sexual abuse allegations (guardians ad litem specifically).

Human rights violated

When the Massachusetts family courts fail to protect battered mothers and their children from partner and/or child abuse, they violate women’s and children’s human rights to freedom from violence and, in some circumstances, their right to freedom from torture and degrading treatment and to non-discrimination. They also are failing to uphold the government’s human rights obligations to exercise due diligence and to act in children’s best interests. These rights and obligations are central to human rights laws and standards, and can be found in such key instruments as the Universal Declaration of Human Rights, the U.N. Covenant on Civil and Political Rights, the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, the U.N. Declaration on the Elimination of Violence Against Women, and the U.N. Convention on the Rights of the Child.

In these instances, the family courts may also be violating Massachusetts law and policy as stated, for example, in the Presumption of Custody law mentioned above and the Guidelines for Judicial Practice in Abuse Prevention Proceedings.

DISCRIMINATION AND BIAS AGAINST BATTERED WOMEN

Problem

There are Massachusetts family court judges, guardians ad litem, probate probation officers, Department of Social Service workers, and court-appointed psychological evaluators who are:

- ♦ Conducting investigations and evaluations and producing reports that unfairly or baselessly favor fathers over mothers;
- ♦ Holding battered mothers to higher behavioral and parenting standards than fathers;
- ♦ Stereotyping battered mothers as hysterical and unreasonable; and
- ♦ Discriminating against battered mothers on the basis of sex, race, ethnicity, socioeconomic status, and/or sexual orientation.²⁰

Human rights violated

There are state actors in the Massachusetts family courts who are violating battered mothers' human rights to:

- ♦ Non-discrimination;
- ♦ Equal protection of the law;
- ♦ Equality in judicial proceedings; and
- ♦ Due process.

Equality is a bedrock principle of human rights law. The right to non-discrimination and related rights are found in such documents as the Universal Declaration of Human Rights, the U.N. International Covenant on Civil and Political Rights, the U.N. International Convention on the Elimination of All Forms of Racial Discrimination, and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women. Massachusetts law and policy also contain strong anti-discrimination provisions, such as in the Massachusetts Constitution, the Massachusetts Civil Rights Act, and the Massachusetts Code of Judicial Conduct.

DEGRADING TREATMENT OF BATTERED WOMEN

Problem

There are state actors in the Massachusetts family courts, primarily judges, guardians ad litem, and probate probation officers, who are treating battered mothers with condescension, scorn, and disrespect. As a result, battered mothers may be re-victimized and their allegations of abuse dismissed or not responded to effectively. This can contribute to the courts' ordering custody and visitation arrangements that endanger women and that are not in children's best interests.

Human rights violated

There are state actors in the Massachusetts family courts who are violating battered mothers' human right to freedom from degrading treatment. This right is contained in the Universal Declaration of Human Rights and the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The Massachusetts Code of Judicial Conduct is also clear that judges should treat litigants with respect.

IV. DENIAL OF DUE PROCESS TO BATTERED WOMEN

Problem

- ♦ There are state actors in the Massachusetts family courts, particularly judges, who are failing to provide battered mothers an adequate opportunity to be heard in court.
- ♦ There are state actors in the Massachusetts family courts, particularly probate probation officers, who are pressuring battered mothers to engage in unsafe, face-to-face mediation and/or dispute intervention with their abusers.
- ♦ There are state actors in the Massachusetts family courts, particularly judges, who are denying battered mothers access to guardian ad litem reports.

Human rights violated

There are state actors in the Massachusetts family courts who are denying battered mothers their human rights to:

- ♦ Freedom of speech;
- ♦ Equal protection of the law; and
- ♦ A fair hearing for resolving disputes.

These rights are enshrined in a number of international human rights declarations and treaties, including the Universal Declaration of Human Rights, the U.N. International Covenant on Civil and Political Rights, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Massachusetts Guidelines for Judicial Practice in Abuse Prevention Proceedings make clear that the Commonwealth should not mediate or conduct face-to-face dispute intervention between couples when there is a restraining order in effect, and that judges should give every person “the full right to be heard according to the law.”²¹

V. ALLOWING THE BATTERER TO CONTINUE THE ABUSE THROUGH THE FAMILY COURTS

Problem

There are batterers who use the family court system in ways that amount to harassment, retaliation, and intimidation of battered mothers. Battered mothers (and therefore children) are harmed emotionally and financially. There also are state actors in the Massachusetts family courts, particularly judges, who fail to identify and, thereby, sanction this abuse of the court process, rendering them complicit in it and in any resulting harm to women and children. Specific litigation abuse tactics used by batterers that our study uncovered include:

- ♦ Filing multiple harassing, baseless, or retaliatory motions;
- ♦ Making false allegations against women;
- ♦ Manipulating the court process to avoid paying child support or to receive a reduction in child support; and
- ♦ Using parallel actions in courts of different jurisdictions to their advantage.

Human rights violated

The family courts’ tolerance of batterers’ litigation abuse tactics amounts to a failure to exercise due diligence. It also violates battered mothers’ and their children’s human rights to:

- ♦ Due process;
- ♦ Equality in judicial proceedings; and
- ♦ Adequate standard of living.

This tolerance of batterers' litigation abuse tactics also violates children's right to receive economic support from their parents.

The due diligence standard is found most relevantly in the U.N. Declaration on the Elimination of Violence Against Women. Women's right to equality in judicial proceedings is articulated in, for example, the Universal Declaration of Human Rights and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women. The right to an adequate standard of living is found in the Universal Declaration of Human Rights and the U.N. International Covenant on Economic, Social and Cultural Rights. Children's right to economic support from their parents is found in the U.N. Convention on the Rights of the Child. The court's tolerance of batterers' litigation abuse tactics may also violate Massachusetts' Anti-SLAPP (strategic lawsuit against public participation) statute.

VI. FAILURE TO RESPECT THE ECONOMIC RIGHTS OF BATTERED WOMEN AND CHILDREN

Problem

There are state actors in the Massachusetts family courts—particularly judges—who are negatively affecting battered women's and children's economic well-being through their actions and failures to act. In some cases, this hinders women's abilities to provide for their children. Specific problems include:

- ♦ Judges' making unfair or unreasonable child support orders;
- ♦ Judges' failing to hold batterers accountable for nonpayment of child support;
- ♦ Judges' reducing child support orders to compensate for the cost of abuse-related services such as supervised visitation;
- ♦ Judges' allowing batterers' financially draining litigation abuse tactics, which cause women to miss work or to lose their jobs, among other problems; and
- ♦ The Commonwealth of Massachusetts' failing to provide and allocate sufficient resources for poor or pro se litigants.

Human rights violated

There are state actors in the Massachusetts family courts who are failing to respect battered mothers and their children's economic human rights to an adequate standard of living and continuous improvement of living conditions. These state actors are also failing to meet their human rights obligations to:

- ♦ Provide a standard of living adequate for children's development;
- ♦ Take all appropriate measures to secure economic support for the child from parents or others having financial responsibility for the child; and
- ♦ Ensure equal protection of the law and due process to battered women.

These rights are enshrined in, for example, the Universal Declaration of Human Rights, the U.N. International Covenant on Economic, Social and Cultural Rights, and the U.N. Convention on the Rights of the Child. In some of these cases, the family courts also may be failing to adhere to the Massachusetts Child Support Guidelines.

♦ ♦ ♦

CONCLUSION

Our findings leave no doubt that there are state actors in the Massachusetts family court system, both female and male, who are committing human rights violations in a number of child custody and visitation cases where there is a history of domestic violence and/or child abuse. The Commonwealth is obligated under human rights laws and principles to remedy the violations identified and described in this report.

Recommendations for Change

The BMTP acknowledges that the Commonwealth, as well as the women's and children's advocacy communities, already have taken important steps to address issues related to domestic violence and child custody cases. We also recognize that there are no easy fixes, and that many of the reforms we propose will require additional funds or a reallocation of existing funds. Indeed, the state's 50 family court judges hear 155,000 cases a year, and roughly 22,000 of these cases involve divorce.²² In addition, the courts are suffering from the effects of shrinking resources in the face of growing demand, and the Commonwealth's most recent budget crises have greatly deepened the divide between services needed and services provided by the court system.

That said, our findings indicate that there is an urgent need for the Commonwealth to act swiftly and thoroughly to remedy the problems identified in this report. At stake are the lives and well-being of countless women and children, as well as public confidence in the justice system itself. For battered mothers (and therefore their children), loss of confidence in the family courts poses a particularly serious problem because it can mean that they choose to remain with the batterer rather than face a family court system that may deny justice to them and their children. In addition, it is clear that the Commonwealth needs to sustain and expand its current statewide efforts on domestic violence to address effectively issues around custody and visitation; indeed, this is an essential part of the executive branch's leadership and responsibility.

The BMTP supports parents' rights to involvement in their children's lives. Our proposed reforms seek to ensure, however, that child custody and visitation arrangements promote healthy and safe parenting. We acknowledge that concerns about false or exaggerated claims of abuse exist, just as they do with regard to false denials of abuse. All of our proposed reforms therefore are designed to ensure that investigations, evaluations, and court orders in domestic violence and child custody cases are thorough and unbiased, so that *both* false denials of abuse and false allegations of abuse are identified and responded to appropriately. All of our reforms also draw directly from our findings from battered women, advocates, and state actors. All individuals in our samples were asked for their recommendations for change in the family court system, and their responses are incorporated into our recommendations as well.

KEY RECOMMENDATIONS TO THE MASSACHUSETTS PROBATE AND FAMILY COURT

The following is a summary of our primary recommendations for change. Details can be found in the full report.

I. REPLACE THE INDIVIDUAL GUARDIAN AD LITEM SYSTEM WITH MULTI-DISCIPLINARY CUSTODY EVALUATION TEAMS

In cases involving allegations of domestic violence and/or child abuse, we recommend that multi-disciplinary teams, rather than a single guardian ad litem, conduct custody investigations and evaluations.²³ Members of these "custody evaluation teams" should have, at a minimum, expertise in partner abuse/battering, child protection/abuse, and mental health, as well as strong investigative skills. In addition, we recommend that the court:

- ♦ Create mandatory custody evaluation team practice standards;
- ♦ Create a Commission on Custody Investigator and Evaluator Conduct;
- ♦ Create an official court form listing the required elements of the team's evaluation report;
- ♦ Create a certification program for custody evaluation teams and only appoint certified teams; and
- ♦ Create a sliding-fee scale structure and blind fund for the private payment of custody evaluation teams.

REQUIRE TRAINING FOR FAMILY COURT PERSONNEL ON DOMESTIC VIOLENCE, CHILD ABUSE, CHILD DEVELOPMENT, AND MENTAL HEALTH

We call on the Probate and Family Court to require frequent, mandatory training on partner and child abuse for all family court personnel, including specific sections on post-separation issues and batterers' tactics in court ("litigation abuse"). We urge the Chief Justice of the Probate and Family Court to use his or her power to sanction judges who fail to complete this training, including by requiring them to participate in a judicial enhancement program (in accordance with Mass. Gen. Laws ch. 211B, § 10, xv).²⁴

ENFORCE AND EXPAND PRACTICE STANDARDS FOR JUDGES FOR CASES INVOLVING ALLEGATIONS OF PARTNER AND/OR CHILD ABUSE

We call on all Probate and Family Court judges to adhere to the Guidelines for Judicial Practice and to apply the Presumption of Custody Law (Mass. Gen. Laws ch. 208, § 31A). We recommend that judges order batterers to pay the costs of custody evaluators and supervised visits without a reduction in child support, as well as order batterers to pay for all or part of the victim's legal fees. We call on the Chief Justice of the Probate and Family Court to discipline any judges who fail to adhere to the Guidelines for Judicial Practice, and to require any judges who have failed to adhere to do so to participate in a judicial enhancement program (in accordance with Mass. Gen. Laws ch. 211B, § 10, xv).

IV. ENFORCE AND EXPAND PRACTICE STANDARDS FOR PROBATE PROBATION OFFICERS

We call on all probate probation officers to adhere to section 12:05 of the Guidelines for Judicial Practice. We call on the Administrative Office of the Trial Court to reform section 12:05 of the Guidelines for Judicial Practice to forbid any mediation or face-to-face dispute intervention even if the victim agrees to it (to avoid any possible coercion) and even in cases where there is no active restraining order but where one party alleges partner abuse. We call on the Commissioner of Probation to discipline those probate probation officers who have failed to adhere to the Guidelines for Judicial Practice.

V. CREATE AN INDEPENDENT OFFICE OF THE STATE OMBUDSPERSON

This office would serve as a single point of contact for family court litigants who have complaints, and ensure that these complaints are resolved to the satisfaction of litigants. This ombudsperson would report to the Chief Justice for Administration and Management.

VI. CONDUCT STUDY OF SUPERVISED VISITATION SYSTEMS

We call on the Commonwealth of Massachusetts to conduct a statewide supervised visitation needs assessment to quantify the demand for such services and to study the supervised visitation systems of other states in order to collect models for improving the system in Massachusetts. We recommend that the state increase the number and quality of supervised visitation centers as needed, based on the findings of the needs assessment and study.

VII. CONDUCT AUDITS OF EVERY FAMILY COURT

We recommend that there be an audit of every family court in Massachusetts every three to five years. This audit should include an evaluation of gender bias, racial and ethnic bias, sexual orientation bias, custody and visitation outcomes, and litigant satisfaction. The audit should be overseen by an independent commission or similar entity.

VIII. COLLECT MORE DETAILED ANNUAL DATA ABOUT DIVORCE AND CUSTODY PROCEEDINGS

We call on the court system to collect more detailed annual data about divorce and custody proceedings. At a minimum, these data should include:

- ♦ The number of contested and uncontested divorces initiated in and processed by the probate and family courts;
- ♦ The number of cases (both contested and uncontested) that involved custody and visitation disputes;
- ♦ The number of divorce cases and child custody/visitation disputes that involved allegations of domestic violence and/or child abuse;
- ♦ The disposition of the various types of divorce and custody cases; and
- ♦ The numbers of cases where guardians ad litem and/or expert entities and/or psychological evaluators were used and the types of recommendations they made to the court.

KEY RECOMMENDATIONS TO THE MASSACHUSETTS LEGISLATURE

I. FUNDING

We call on the Massachusetts Legislature to fund all of the above steps as needed and as elaborated upon below:

- ♦ Provide greater funding for free legal services for children who have been exposed to batterers, including children whose mothers have left the batterer.
- ♦ Provide greater funding for free (or very low cost) legal services for battered women in custody and visitation litigation.
- ♦ Provide greater funding for court interpreters in the family courts for battered mothers whose first language is not English and ensure the interpreters' impartiality and level of skill.
- ♦ Fund victim/witness advocates to assist battered women who are involved in custody, visitation, or child support litigation in family courts (not just for restraining orders, as is currently the case). Every family court should have at least one victim/witness advocate.
- ♦ Fund battered women's programs, especially legal advocacy and support groups, to provide services to battered women undergoing the family court process (i.e., to deal with post-separation issues).

II. STATUTORY REFORM

We call on the Massachusetts Legislature to take the following steps toward statutory reform:

- ♦ Mandate by law that all custody evaluators/guardians ad litem be trained in both partner abuse and child abuse issues. (For a model, see Rule 1257.7 of the California Rules of Court).
- ♦ Reform the Presumption of Custody law in the following ways:
 - Create a rebuttable presumption that a person who has perpetrated either a pattern or a serious incident of partner or child abuse should be required to have supervised visits with his or her children for at least one year post-separation;
 - During this time, require the perpetrator to complete a state-certified program for batterers and show additional evidence of addressing seriously his or her battering problem;
 - Require visitation to take place at a supervised visitation center; and
 - Require batterers to pay for the costs of visitation. Child support orders should not be lowered to compensate for the cost of supervised visitation.

- ♦ In cases involving allegations of domestic violence, require family court judges to make written findings of fact regarding which parent has been the primary caretaker before making a custody determination, even in temporary orders. This “primary caretaker” standard should be incorporated as an explicit component of the “best interests of the child” standard that is currently in use;
- ♦ In cases involving allegations of domestic violence, require family court judges to investigate and consider the alleged batterer’s criminal record as a key factor in making custody and visitation decisions;
- ♦ Require family court judges to use only state-certified batterer intervention programs when sending batterers or alleged batterers to counseling; and
- ♦ Make it more difficult for parties to use repetitive court dates for intimidation and control and to file baseless court motions.

KEY RECOMMENDATIONS TO NON-GOVERNMENTAL ORGANIZATIONS AND INSTITUTIONS

I. BATTERED WOMEN’S AND/OR CHILDREN’S ORGANIZATIONS

We call on battered women’s and children’s organizations in Massachusetts to consider:

- ♦ Providing legal resources specifically for battered women involved in custody and visitation litigation in the family courts;
- ♦ Offering assistance to battered women regarding how to file official complaints against state actors in the family court system; and
- ♦ Creating hotlines, support groups, and counseling programs specifically designed to meet the needs of battered women in family court custody and visitation litigation.

II. LEGAL PROFESSION AND BAR ASSOCIATIONS

We call on the legal profession (including legal aid and private law firms) to:

- ♦ Increase pro bono representation to battered women in custody and visitation litigation, especially to those women whose incomes are too high to receive legal aid;
- ♦ Provide pro bono legal advice to pro se battered women;
- ♦ Refrain from misusing abuse prevention (209A) orders; and
- ♦ Fulfill the ethical obligation to zealously represent clients when working with battered women by:
 - Raising the Presumption of Custody law early and often during child custody proceedings;
 - Forcefully objecting to baseless court motions and frivolous court actions made by batterers, and making use of Massachusetts Anti-SLAPP law²⁵ to accomplish these aims;
 - Thoroughly questioning findings and recommendations made by guardians ad litem, probate probation officers, experts, and other key players in these cases;
 - Objecting to all ex parte hearings and meetings;
 - Insisting that guardian ad litem reports and other, similar documents be made available to their clients and that clients have the opportunity to respond to these reports; and
 - Ensuring that their clients have an adequate opportunity to be heard by the court.

Endnotes

- ¹ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III), A/810 at 71, 1948; the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200(A) (XXI), A/6316, 1966; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), G.A. Res. 39/46, A/39/51, 1984; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, A/34/46, 1979; the Convention on the Rights of the Child (CRC), G.A. Res. 44/25, A/44/49, 1989; and the Declaration on the Elimination of Violence against Women (DEVAW), G.A. Res. 48/104, A/48/49, 1993.
- ² U.S. Department of Justice, National Institute of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence against Women Survey*, by P. Tjaden and N. Thoennes, July 2000, 5.
- ³ L. Heise, M. Ellsberg, and M. Gottmoeller, "Ending Violence against Women," *Population Reports* 24, no. 4 (1999): 1-44.
- ⁴ L. Langford, N. Isaac, and S. Kabat, "Homicide Related to Intimate Partner Violence in Massachusetts," *Homicide Studies* 2, no. 4 (1998): 353-377.
- ⁵ M. E. Herman-Giddens et al., "Underascertainment of Child Abuse Mortality in the United States," *Journal of the American Medical Association* 282, no. 5 (1999): 463-467.
- ⁶ See G. H. Huges, "Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims," *American Journal of Orthopsychology* 58 (1988): 77-90. See also S. M. Ross, "Risk of Physical Abuse to Children of Spouse Abusing Parents," *Child Abuse and Neglect* 20, no. 7 (1996): 589-598.
- ⁷ See P. Jaffe et al., "Emotional and Physical Health Problems of Battered Women," *Canadian Journal of Psychiatry* 31 (1986): 626-629. See also G. W. Holden and K. L. Ritchie, "Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women," *Child Development* 62 (1991): 311-327; and J. R. Johnston, "High-Conflict Divorce," *Future of Children* 4, no. 1 (1994): 165-182.
- ⁸ R. J. Racusin, S. A. Copans, and P. Mills, "Characteristics of Families of Children Who Refuse Post-divorce Visits," *Journal of Clinical Psychology* 50, no. 5 (1994): 792-801.
- ⁹ S. Adams, *The Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders In Massachusetts*, report prepared for the Commonwealth of Massachusetts Office of the Commissioner of Probation. Boston, 1995.
- ¹⁰ L. Bancroft and J. G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks, Calif.: Sage Publications, 2000), 110-113. See also N.K.D. Lemon, "The Legal System's Response to Children Exposed to Domestic Violence," *Future of Children* 9, no. 3 (1999): 67-83; and N.K.D. Lemon, "Custody and Visitation Trends in the United States in Domestic Violence Cases," *Journal of Aggression, Maltreatment, and Trauma* 3, no. 1 (2000): 329-343.
- ¹¹ C. C. Ayoub, R. M. Deutsch, and A. Maraganore, "Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence," *Family and Conciliation Courts Review* 37, no. 3 (1999): 297-314.
- ¹² B. J. Hart, "Children of Domestic Violence: Risks and Remedies," in Minnesota Center against Violence and Abuse Electronic Clearinghouse, available online at <<http://www.mincava.umn.edu/hart/risks&r.htm>> (visited Oct. 6, 2002), citing E. Stark and A. Flitcraft, "Women and Children at Risk: A Feminist Perspective on Child Abuse," *International Journal of Health Services* 18, no. 1 (1988): 97-118; U.S. Department of Justice, Bureau of Justice Statistics, *Preventing Domestic Violence against Women*, a special report by P. A. Langen and C. A. Innes, 1986; G. W. Bernard et al., "Till Death Do Us Part: A Study of Spouse Murder," *Bulletin of the American Academy of Psychiatry and the Law* 10 (1982): 271-280.
- ¹³ Supreme Judicial Court of Massachusetts, *Gender Bias Study of the Court System in Massachusetts* (Boston: 1989), 59.
- ¹⁴ *Ibid.*, 59, 62.
- ¹⁵ Mass. Gen. Laws ch. 208, § 31A (1998).
- ¹⁶ The Legislature's most prominent recent work on domestic violence has been that of Senator Cheryl Jacques who, together with the Senate Committee on Post Audit and Oversight, released a report on the Massachusetts guardian ad litem program in March 2001. That report placed a much-needed spotlight on the guardian ad litem system. See *Guarding Our Children: A Review of Massachusetts' Guardian Ad Litem Program within the Probate and Family Court*, available at <<http://www.state.ma.us/legis/bills/st01828.htm>>.
- ¹⁷ This information was provided to the Battered Mothers' Testimony Project by a knowledgeable anonymous source.
- ¹⁸ Barnstable, Berkshire, Bristol, Essex, Franklin, Hampden, Hampshire, Middlesex, Norfolk, Suffolk, and Worcester Counties.
- ¹⁹ These rights are enshrined in numerous human rights laws and standards, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC).
- ²⁰ One woman, Jessica, reported to us that she felt discriminated against by the judge in her case because she is disabled: "I'd say that [the judge] discriminated against me as a battered woman and as a disabled woman, and he has discriminated against the children as disabled children with special needs. I wasn't going to be able to care for the kids, I couldn't drive, which was a lie."
- ²¹ Supreme Judicial Court Rule 3:09.
- ²² These numbers are approximate and based on figures reported in the Supreme Judicial Court's fiscal-year 2000 and fiscal-year 2001 *Annual Reports on the State of the Massachusetts Court System*.
- ²³ In the Victims of Child Abuse Act of 1990, the U.S. Congress recognized the need for multi-disciplinary teams to improve the investigation of child abuse cases (42 U.S.C.A. § 13001). Pub. L. 101-647.
- ²⁴ "The power to discipline any justice assigned or appointed to his department who refuses or fails to comply with any order concerning the performance of his duties as justice or any other lawful order of the chief justice of his department; provided, the chief justice shall also have the power to require any justice assigned to his department to participate in a judicial enhancement program in response to any action of such justice which brings the judiciary into disrepute, which lowers the public confidence in the judiciary or which impedes the administration of justice." Mass. Gen. Laws ch. 211B, § 10, xv (2002).
- ²⁵ Mass. Gen. Laws ch. 231, § 59H