



# Prosecutors, Kids, and Domestic Violence Cases

*by Debra Whitcomb*



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**P**olice and prosecutors say they sometimes feel like they are walking a tightrope when they intervene in domestic violence cases. Each step into a heated domestic situation requires careful balance. On the one hand, the justice system must hold batterers accountable for their violent behavior; on the other hand, a woman needs to control her life and find safety and security for herself and her children as best she can.

As research reveals more about the effects of domestic violence on children, prosecutors are finding that both the law and public opinion have raised expectations for what criminal justice professionals should do and actually can do.

Some States have enacted legislation to better protect children exposed to violence, but the new laws are raising concern about the impact

on mothers. Critics hypothesize that battered women will be increasingly charged with criminal child abuse or failure to protect their children if they do not take action against their batterer and could eventually lose custody. Others fear that children who are exposed to domestic violence will increasingly be forced to testify and therefore to “choose sides” in the cases against their mother or father.

This article describes some of the issues prosecutors should be aware of when they handle domestic violence cases involving children, especially in light of recent legislation aimed to protect children. It

is the product of an NIJ-funded exploratory study that relied on two sources of data: a national telephone survey of prosecutors and field research in five jurisdictions. (See “The Survey and Its Findings.”)

The exploratory study sought answers to the following questions:

- How are new laws, now in effect in a small number of States, affecting practice?
- What challenges do prosecutors face when children are exposed to domestic violence?
- What can prosecutors do to help battered women and their children?

## The Survey and Its Findings

The study involved a telephone survey of prosecutors and in-depth site visits to five jurisdictions to collect information about current practice and to identify “promising practices” in response to cases involving domestic violence and child victims or witnesses.

The final report, *Children and Domestic Violence: Challenges for Prosecutors*, (NCJ 185355; grant 99-WT-VX-0001) is available from NCJRS for \$15. To order a copy, call 1-800-851-3420.

### Findings from the Telephone Survey

The 128 prosecutors who completed the telephone survey worked in 93 offices in 49 States. The offices had jurisdiction over both felony and misdemeanor cases at either the county or district level. Nearly half

(48 percent) of the jurisdictions had units or prosecutors responsible for all family violence cases, 38 percent had separate domestic violence and child abuse prosecutors or units. The other respondents represented the singular perspectives of domestic violence (10 percent) or child abuse (4 percent).

Specific findings include the following:

**Most respondents (78 percent) agreed that the presence of children provides added incentive to prosecute domestic violence cases.** A few individuals pointed to the children’s capacity to testify as an important factor in their decisions.

**A majority of prosecutors’ offices (59 percent) are aggressively pursuing enhanced sanctions for domestic violence offenders when incidents**

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## Why the New Laws?

Children who witness domestic violence often manifest behavioral and emotional problems, poor academic performance, and delinquency.<sup>1</sup> Sadly, violence against women and violence against children often coexist in families—the frequency of child abuse doubles in families experiencing intimate partner violence, compared to families with nonviolent partners, and the rate of child abuse escalates with the severity and frequency of the abuse against the mother.<sup>2</sup>

Domestic violence is also a known risk factor for recurring child abuse reports<sup>3</sup> and for child fatalities.<sup>4</sup> In addition, domestic violence frequently coexists with substance abuse, so that children are exposed to the effects of dangerous substances and the parental neglect that usually comes with addiction.<sup>5</sup> One large study involving 9,500 HMO members revealed that the

1,010 people who reported that their mothers had been treated violently also reported being exposed to other adverse childhood experiences, such as substance abuse (59 percent reported exposure), mental illness (38 percent), sexual abuse (41 percent), psychological abuse (34 percent), and physical abuse (31 percent).<sup>6</sup>

It is generally recognized that the well-being of children who witness domestic violence is tied closely to that of their mothers,<sup>7</sup> but the mother's interests and the child's may not always be identical or even compatible. A mother may face serious concerns about her financial and physical well-being if she separates from her violent partner. She may lack resources or social networks to extricate herself from dangerous relationships, and the community's support system may be inadequate. Her efforts to seek help may be thwarted by waiting lists, lack of insurance, or high fees for services. She may believe that she and her children are better off staying with the violent partner despite the consequences.<sup>8</sup>

Meanwhile, the children remain in perilous environments. Child protection agencies may feel compelled to intervene to forestall the escalating risk of harm to children. Unfortunately, in many jurisdictions, a referral to the child protection agency is perceived as a mixed blessing. Many child protection agencies do not have adequate resources to respond to the volume of domestic violence reports they receive when exposure to violence is defined as a form of child maltreatment by law or policy. Elsewhere, critics charge, protective services workers are too quick to remove children from violent homes, inappropriately blaming women for the actions of their abusive partners.

Police officers are being encouraged to note the presence of children when they respond to domestic violence incidents and to collaborate with mental health professionals to address the children's trauma and anxiety.

### How Are New Laws Affecting Practice?

The words of San Diego City Attorney Casey Gwinn capture the climate of growing concerns related to children and violence in the home:

...children must be a central focus of all we do in the civil and criminal justice system...from the initial police investigation through the probationary period, we must prioritize children's issues.<sup>9</sup>

Police officers are being encouraged to note the presence of children when they respond to domestic violence incidents and to collaborate with mental health professionals to address the children's trauma and anxiety.<sup>10</sup> Battered women's shelters are hiring staff to work with children and developing policy for alerting child protection agencies when needed.<sup>11</sup> Juvenile and family courts are sponsoring programs to meet the needs of battered women whose children are at risk for maltreatment.<sup>12</sup> Child protection agencies are instituting training and protocols to better identify domestic violence; some are hiring

domestic violence specialists to help develop appropriate case plans.<sup>13</sup> Legislators, too, are taking action by enhancing penalties when domestic violence occurs in front of children and creating new criminal child abuse offenses for cases involving children who are exposed to domestic violence.

The new laws are affecting prosecutors in different ways. For example, district attorneys in Multnomah County, Oregon, where a new law recently upgraded domestic violence offenses to felonies when children are present,<sup>14</sup> issued nearly 150 percent more felony domestic violence cases in the year that the new law was passed.

In both Salt Lake County, Utah, and Houston County, Georgia, where committing domestic violence in the presence of a child is a new crime of child abuse,<sup>15</sup> prosecutors tend to use these charges as "bargaining chips" to exert leverage toward guilty pleas on domestic violence charges.

In these jurisdictions, the new State laws remind law enforcement investigators to document children as witnesses and to take statements

from them whenever possible, which may strengthen prosecutors' domestic violence cases even if the children cannot testify.

To understand how prosecutors are responding to the changing attitudes, researchers asked them to explain how they would respond to three different scenarios involving children and domestic violence:

1. An abused mother is alleged to have abused her children.
2. Both mother and children are abused by the same male perpetrator.
3. Children are exposed to domestic violence, but not abused themselves.

For each scenario, respondents answered these questions:

- Would your office *report* the mother to the child protection agency?
- Would your office *prosecute* the mother in the first scenario for the abuse of her children?
- Would your office report or prosecute the mother in scenarios 2 and 3 for failure to protect her children from abuse or exposure to domestic violence?

Many respondents noted the lack of statutory authority in their States to prosecute mothers for failure to protect their children, especially from exposure to domestic violence. Some explained that they consider mothers' experience of victimization in their decisions to report or prosecute battered mothers for their children's exposure to abuse or domestic violence.

Factors in these decisions commonly include the severity of injury to the child, chronicity of the domestic violence, the degree to which the mother actively participated in the



Photo source: PhotoDisc and Eyewire

abuse of her child, and prior history of failure to comply with services or treatment plans.

Prosecutors in States with laws either creating or enhancing penalties for domestic violence in the presence of children were significantly more likely to report battered mothers for failure to protect their children from abuse or from exposure to domestic violence, but there was no significant difference in the likelihood of prosecution. (See table 1.)

The more tangible benefits of the new laws—particularly those in Utah and Georgia—may accrue

to the children. By identifying children as victims, these statutes:

- Allow children access to crime victims compensation funds to address health or mental health needs resulting from their exposure to domestic violence.
- Enable the courts to issue protective orders on the children's behalf (potentially affording prosecutors another tool for monitoring offenders' behavior).
- Signal a need to file a report with the child protection agency, even in the absence of laws naming domestic violence as a condition of mandatory reporting.

**Table 1: Prosecutors' Responses to Scenarios Involving Children and Abuse**

Scenario	Would Report At Least Sometimes	Would Prosecute At Least Sometimes
<b>Mom Abuses Children</b>	94% (n=90)	100% (n=82)
<b>Mom Fails to Protect from Abuse</b>	63% (n=87)	77.5% (n=80)
<b>Mom Fails to Protect from Exposure</b>	40% (n=86)	25% (n=73)

## What Can Prosecutors Do?

Research suggests a number of steps prosecutors can take to help children who are exposed to domestic violence:

- Employ every available avenue to enforce the terms of no-contact orders and probationary sentences. Field research suggests that these measures may offer the most powerful means of holding domestic violence offenders accountable for their behavior.
- Establish protocols within prosecutors' offices to encourage information sharing among prosecutors with responsibility for domestic violence and child abuse caseloads.
- Identify avenues for early intervention (e.g., by placing greater emphasis on misdemeanor prosecution).
- Train law enforcement investigators to note the presence of children in domestic violence incidents and to take statements from them whenever appropriate to do so.
- Encourage law enforcement agencies to adopt a model of law enforcement–mental health partnership that was pioneered in New Haven, Connecticut, as a means of ensuring that children who are exposed to violence receive timely and appropriate therapeutic intervention.<sup>16</sup> Be prepared, however, to develop policies or protocols to guide law enforcement officers' decisions to report these incidents to the child protection agency.
- Wherever possible, prosecute domestic violence offenders on concurrent charges of child endangerment, emotional abuse,

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or other available charges reflecting the danger to children who witness violence. These additional charges can be used to argue for stricter conditions of pretrial release or probation, or perhaps for upward deviation from sentencing guidelines.

- Provide training on domestic violence, child abuse, and the impact of domestic violence on children for all prosecutors, victim advocates, and other court personnel whose job responsibilities include responding to allegations of family violence.
- Promote increased attention to services for battered women. Women cannot reasonably be expected to extricate themselves from dangerous relationships if the financial and social supports are not available in their communities. Particular attention should be paid to substance abuse treatment; one recent study suggests that substance abuse predicts noncooperation

with prosecution among battered women.<sup>17</sup>

- Ensure that social service agencies will connect with families that have been reported for domestic violence, both to offer referrals for needed services and to monitor future incidents. Some avenues need to be available for offering needed services to children in troubled families before they suffer serious harm.

No other institution in the community has the capacity and power to force offenders to confront and change their behavior. As political leaders in their communities, prosecutors have the status and opportunity to advocate for needed change, whether legislative, fiscal, or programmatic in nature. Prosecutors can bring together people with disparate views and hammer out ways to overcome distrust and conflict toward a common goal: protection of battered women and their children.

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## The Survey and Its Findings *(continued from page 3)*

**involve children as victims or witnesses.** Most commonly, prosecutors argue for harsher sentencing or file separate charges of child endangerment. Responding offices in which prosecutors had received at least some training on the co-occurrence of domestic violence and child maltreatment (65 percent) were significantly more likely to report employing these avenues in applicable cases.

**Most jurisdictions lack a policy for prosecutors and investigators to identify co-occurring cases of domestic violence and child maltreatment.** None of the 35 responding offices with separate domestic violence and child abuse units had protocols directing prosecutors in these units to inquire about co-occurrence or to communicate with one another when relevant cases arise. About half were aware of protocols directing law enforcement officers to ask about child victims or witnesses when investigating domestic violence reports. About one-fourth knew of protocols directing investigators to inquire about domestic violence when responding to child abuse reports.

### Findings From the In-Depth Site Visits

**Dallas, Texas.** Prosecutors in Dallas pursue a fairly strict “no-drop” policy for domestic violence cases, and the presence of children only strengthens their resolve to move cases forward. However, with reluctant women, the officials can offer the option of filing an “affidavit of nonprosecution.” This document helps women who fear retribution from their abusive partners because it allows the women to demonstrate their efforts to terminate law enforcement’s intervention. However, it has no effect

on the prosecutor’s decision making or the court’s proceedings.

Where there are concurrent charges of domestic violence and child abuse, prosecutors try to coordinate the cases to optimize the sanctions against the offender and the safety of the mother and children. For example, the family violence prosecutor can use child abuse cases to support the domestic violence charge. Even if the child abuse is a felony and the domestic violence is a misdemeanor, prosecutors may accept a plea to jail time on the domestic violence charge and a 10-year deferred adjudication on the child abuse charge, which typically carries with it numerous conditions (e.g., no contact, participation in substance abuse treatment, and so on). This avenue ensures a domestic violence conviction while imposing strict court oversight on the child abuse charge.

Respondents observed that deferred adjudication or a probation sentence is, in some ways, more severe and more effective than jail time, precisely because of the conditions that can be imposed, the length of time that the offender can remain under the court’s supervision, and the threat of revocation and incarceration.

#### San Diego, California.

Prosecutors in San Diego are both aggressive and creative in finding ways to enhance sanctions for perpetrators of domestic violence and child abuse. For example, domestic violence offenders can be charged with child endangerment when a child:

- Calls 911 to report domestic violence.
- Appears fearful, upset, or hysterical at the scene.

- Is an eyewitness to the incident.
- Is present in a room where objects are being thrown.
- Is in a car during a domestic violence incident.
- Is in the arms of the victim or suspect during an incident.<sup>1</sup>

Anyone convicted of child endangerment and sentenced to probation will be required to complete a yearlong child abuser’s treatment program.

Several programs support the prosecutors. For example, the Child Advocacy Project (CAP) provides services to children and families in reported incidents of abuse, neglect, exploitation, or domestic violence that are *not* investigated for criminal justice system intervention. Through a collaboration with the San Diego Police Department and Children’s Hospital Center for Child Protection, the San Diego City Attorney’s Office reviews these reports with an eye toward any angle that might support a misdemeanor prosecution with the goal of creating an avenue for service delivery. Most defendants plead guilty and receive informal probation with referrals to parenting and counseling programs.

**Salt Lake County, Utah.** In May 1997, Utah became the first State to enact legislation specifically addressing the issue of children who witness domestic violence. Notable elements of this statute include the following:

- It creates a crime of child abuse, not domestic violence.

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## The Survey and Its Findings *(continued from page 7)*

- It does not require the child to be physically present during the incident of domestic violence. The perpetrator simply must be aware that a child may see or hear it.
- Unless the precipitating domestic violence incident is quite severe, it requires at least one previous violation or act of domestic violence in the presence of a child. A police incident report documenting an earlier act in the presence of a child will suffice for this purpose.

Although criminal justice agencies in Salt Lake County were not able to provide statistical data, anecdotal evidence suggests that:

- The law is infrequently applied to mothers. But it could be applied if the women were arrested in the underlying incident of domestic violence.
- The law is largely symbolic. It adds minimal time to the offender's sentence—perhaps 6 months if the sentences for the domestic violence and child abuse charges run consecutively.
- The crime is relatively easy to prove, requiring either (a) testimony from the responding officer, (b) testimony or excited utterances from the victim parent, or (c) a 911 tape that records children's voices.

Concurrent with the enactment of the new criminal statute, Utah's Department of Child and Family Services created a new category of child abuse and neglect: "Domestic Violence-Related Child Abuse," or DVRCA, defined as "violent physical or verbal

interaction between cohabitants in a household in the presence of a child."

In adopting the new category, the department hired domestic violence advocates and developed a protocol to guide child protection workers in their determinations.

### **Houston County, Georgia.**

Prosecutors in Houston County, Georgia, actively use new provisions of Georgia's "cruelty to children" statute that pertain to domestic violence committed in the presence of children. Because cruelty to children is almost always a misdemeanor offense, it makes little difference in the penalties imposed on a batterer; indeed, the sentence typically runs concurrently with the underlying domestic violence charge. However, the law does give prosecutors a stronger argument for no contact as a condition of bond. Violations of no-contact orders are charged as aggravated stalking, a felony offense in Georgia.

Prosecutors perceive the severe consequences of violating no-contact orders as perhaps the most effective response to domestic violence among the sanctions available to them.

Also, by identifying children as victims of the family violence battery, the new law accomplishes at least three things:

- It helps to counter batterers' threats to gain custody of a child.
- It makes the children eligible for crime victims compensation.
- It enables the court to impose no-contact orders on the children's behalf.

**Multnomah County, Oregon.** The study team selected Multnomah County (Portland), Oregon, because Oregon enacted legislation upgrading certain assault offenses from misdemeanors to felonies when a child witnesses the crime. The felony upgrade applies only to assault in the fourth degree, a misdemeanor offense that applies to many incidents of domestic violence. Assaults in the first, second, or third degree are felonies that require more serious injuries or the use of weapons.

Even though the felony upgrade applies to defendants with prior convictions (either one against the same victim or three against any victims) regardless of the presence of children, prosecutors observe that the large majority of elevated cases are those involving child witnesses.

The felony upgrade law has had a noteworthy impact on the District Attorney's Office: The number of felonies reviewed more than tripled in 1998 (the year in which the law became effective), while the number of misdemeanors reviewed remained nearly constant. Also, the number of felonies issued exceeded the number of misdemeanors for the first time.

In that same year, the proportion of issued domestic violence cases declined. This pattern held true for misdemeanors as well as felonies. Prosecutors may have imposed higher standards as they began to interpret and apply the new law.

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## Notes

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