

A Judicial Guide to Child Safety in Custody Cases

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Family Violence Department

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[§8.5] Suggestions: In appropriate cases, consider an award of substantial attorneys fees at the outset of the case. This corrective action is important where, for example, the abusive parent controls access to the financial information or controls the purse strings, so the at-risk parent lacks the means to finance necessary discovery.

E. [§8.6] Litigation Abuse during the Pretrial⁵⁴ Process

A parent who uses tactics of coercive control may find litigation to be an effective means of controlling the other parent.⁵⁵ Contact with the at-risk parent is critical to effectuating control strategies, and family court processes allow many opportunities for contact. Often court proceedings are the only contact available if the two parents are living separate and apart, with a protection order in place.

When both parents are *pro se*, court processes permit them direct access both in and out of court. When the abusive parent has legal representation, frequent court hearings reinforce the imbalance of power for unrepresented, at-risk parents and run up legal costs for at-risk parents who have retained counsel. For the at-risk parent, multiple pretrial appearances tend to maximize emotional trauma and increase the risk of losing employment by requiring time away from work.

Pretrial restrictions on custody and visitation are an especially powerful trigger for abusive behavior. Very often, abusive parents make multiple appearances seeking to undo orders that they perceive to be unfavorable to them, even in the absence of any change in circumstance between hearings. In addition, abusive parents may make multiple requests for continuance or otherwise seek to postpone final judgment. A final judgment will provide one less means of access to the at-risk parent and possibly to the child.

Technique of Abuse

What You Can Do

Excessive filings or court appearances

- Order the parent bringing excessive motions to pay the attorneys fees and costs of the other parent
- Order the parent who files frivolous motions to reimburse lost wages and other expenses of the other parent
- Excuse the at-risk parent from appearing at hearings or permit the at-risk parent to appear by telephone
- Order that no court appearances may be scheduled without your prior approval

54. Litigation abuse is not limited to the pretrial process and can occur at any point in the case, whether pre- or post-trial.

55. Legal process tactics of control can be present whether or not a party is represented by counsel.

Technique of Abuse

What You Can Do

<p>Excessive requests for discovery</p>	<ul style="list-style-type: none">• Prohibit any discovery or court appearances that directly involve the children, like depositions• Ensure that the at-risk parent has adequate resources to comply with appropriate discovery• Control the discovery process by requiring that the abusive parent show the relevancy of requested deposition testimony and other potentially harassing discovery• Ensure that the abusive parent has no physical access to the at-risk parent during the discovery process• Ensure that the at-risk family members are adequately protected during the pretrial process (e.g., private security, to be paid for by the controlling party, or orders that the abusive parent not be present during depositions)
<p>Filing motions to change unfavorable orders</p>	<ul style="list-style-type: none">• Keep in place any orders you have made that enhance the safety of the at-risk parent or child• Require compliance with your orders unless there has been a significant change in circumstances• Prohibit contact between the parents, including during visitation exchanges• Keep all protections in place, including no contact with the child, if that term was part of your original order, absent strong evidence of change and compliance
<p>Multiple requests for continuance</p>	<ul style="list-style-type: none">• Deny requests for excessive or unnecessary delay

Technique of Abuse	What You Can Do
Abuse of the <i>ex parte</i> process	<ul style="list-style-type: none"> • Determine whether the at-risk parent is available for the hearing and whether adequate notice was given • Determine whether a true emergency exists • Use collateral information to assist you in making a decision; for example, determine whether any protection orders have been entered against either parent • In post-divorce proceedings, attempt to determine whether the claims asserted in the <i>ex parte</i> motion were raised in prior litigation • Consider the length of time since any prior custody litigation • Consider whether prior allegations of abuse have been raised in prior court proceedings or with children's protective services

IX. Mediation and Other Forms of Negotiation

Most jurisdictions, including tribal courts, favor resolution of disputes without the need for litigation. Many family law courts automatically refer a dispute regarding children to some form of mediation. Mediation may even be mandatory in your court for all child custody matters.

To be successful, mediation requires an equal balance of power across the table. Situations that involve coercion, whether physical violence has occurred, are generally not suited for mediation. Although there are circumstances under which mediation can be configured to maximize safety, it is best avoided in cases where coercion and safety are factors for either a parent or a child.⁵⁶ This is so even if no civil protection order has been entered in the case.

A. [§9.1] Reasons Why Mediation Might be Inappropriate

Mediation assumes that if communication skills can be improved, the parties will be able to work together.⁵⁷ However, abuse is not a communication problem. Indeed, any communication between the parties may increase the safety risks for the at-risk parent by providing opportunities for control by the abusive parent.

56. NCJFCJ, MODEL CODE § 408(A) and § 408(B) (1994).

57. Michael Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHSJDR 321, 330 (2007), citing ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH IMPOWERMENT AND RECOGNITION* (1994).