



TOBY G. KLEINMAN • DANIEL POLLACK

Domestic Abuse, Child Custody, and Visitation

WINNING IN FAMILY COURT

OXFORD

DOMESTIC ABUSE, CHILD CUSTODY, AND VISITATION

DOMESTIC ABUSE, CHILD CUSTODY, AND VISITATION

Winning in Family Court

Toby G. Kleinman

AND

Daniel Pollack

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

© Toby G. Kleinman and Daniel Pollack 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

CIP data is on file at the Library of Congress
ISBN 978-0-19-064157-3

1 3 5 7 9 8 6 4 2

Printed by Sheridan Books, Inc., United States of America

*To Robert Adler, my Partner in life and my partner in law,
whose love and support I can always count on.*

To Rivka Rachel Pollack, my wife for life.

CONTENTS

<i>Preface</i>	<i>vii</i>
<i>Introduction</i>	<i>xv</i>
1. A Great Judicial Fallacy	1
2. Defining the Problem: Representing a Battered Woman in Divorce	16
3. <i>Memory</i>	28
4. Language Is Important to Victims	34
5. Understanding the Impact of Violence on Children	43
6. The Attorney-Client Interview: Its Importance and Implications	59
7. Pleading the Case	67
8. <i>The Litigation Continued</i>	83
9. Using and Choosing Experts	87

CONTENTS

10. Developing Strategies	97
11. Family Courts Must Demand Science	118
12. The “Best Interest” Standard versus Changing the Standard to Assure Child Safety	126
13. The Intersection of Forensic Opinion and Therapist Testimony	133
14. Custody Evaluations, Therapy, Child Protection, and Ethics	139
15. Mental Health Professionals Take Risks When Evaluating Children	148
16. Domestic Abuse and Child Protection: Is What We Are Doing Working?	153
17. Conclusion: An Open Letter to a Young Lawyer: A Critical Look at the Child Custody System and What Every Mental Health Person Should Know about Lawyers	156
18. <i>Kids Grow Up</i>	164
<i>References and Suggested Reading</i>	167
<i>Index</i>	173

PREFACE

Tears stream down my face as I stop the car to make the phone call, my heart racing. My instincts tell me not to stop. I left because I was forced to leave, and my instincts tell me not to call home now. I am certain that if I call I will feel worse. Yet I feel an intense pressure to speak to "Him." I try to assess the situation. I'm glad I'm gone, yet I'm frightened because I had finally been so provoked that I actually left. I made many threats in the past ten years. I finally carried one out.

This afternoon feels different somehow.

I know I am really leaving for good, not just for the weekend. I cannot recount the number of times I'd felt like leaving. But today, I actually packed a suitcase, put the children in the car, and made my exit. Why then am I feeling so confused now? Why am I having so much difficulty driving the car? I know I have been unhappy for a long time. I know "He" has also been unhappy. Can I not stand to risk being rejected if I call? Will I run back out of fear? It makes no sense. Is everything I am feeling just based on economics because I believe "His" lie that I am incapable of sustaining myself and my three children?

Randy and Ramona are asleep in the car. David, eight years old, is asking me if I am sad. I mumble something that is barely audible. I can hardly see to drive through my tears. Of course, David knows I am unhappy. Of course, he knows there is trouble between his father and me. But he did not witness the scene this time. At least I feel good about that. This morning I behaved like a crazy person. Was I crazy? I feel a tremendous pressure in my head, as if an explosion is about to take place inside my brain. I must relieve the pressure. In an attempt to feel better, I stop the car. I make the call. There is no answer. The pressure is building. My guilt is rising. Did He have another heart attack?

I get back on the road. I am driving to Woodbury. I have a destination! That is different from the past. I never told anyone. This time I called my parents. I called right away. I called when my insides felt like ripping apart. I know that if I did not call, then I would not go. "Be involved," I said out loud to myself. "Call your mother," I urged myself. Tell her you have a rotten son-of-a-bitch husband. Tell her you need help. Tell her you want to run away from yourself. Tell her that if you stay another day, you will do something drastic.

I have got to protect the children. You can throw your own life away, but you do not have the right to destroy the children. They will be destroyed if you stay.

This morning I shouted at him, "David is unhappy and depressed. Randy is a mess. He is starting to stutter and stammer with you!" I screamed at him, "Ramona is such a tiny baby. I can spare her if I leave now."

With that, I had called my mother in Woodbury to ask if I could come for the weekend for which she had previously invited us. Even as I called, I wondered if I had the right to leave. Maybe I am the source of all the kids' ills. Maybe my unhappiness is all my fault. After all, I had started the scene this morning. It was I who woke up ready to fight. "I hate you," I had said to Him. "You are so mean and selfish. How long

can I continue to fight you? How long can I continue to prove to you that I am a good person? Why is it that I can never do enough for you? Why is everything always my fault, yet I always feel sorry for you?"

As I feel the anger now, my tears subside. I tell myself that he loves me. I tell myself that he will realize how terrific I am and beg me to come back. But I know better. I know I will, in the end, feel sorry for "Him." I will, in the end, apologize for having hurt his feelings, though he destroyed mine. People will think that I am the strong-willed one and that "He" is meek and giving. That is the image he forced me into creating. I have been living the lie for so long now, it almost feels like me. I must break that lie.

I have only driven a few short miles in the hour I have been driving. I think I should turn back. The little ones won't know the difference. Randy has never been to my parents' country house in Woodbury in his three-and-one-half years. David tells me about the fun he is going to have when he gets there. He enumerates all the things he loves about Woodbury. They all involve Grandpa—my father. I feel glad that David has experienced the love of my father. He has had glimpses of generosity and love from a man. He has seen that a man can really care.

I feel that I must go on, but I am not sure if I can. I cannot stop crying. Again the pressure in my head mounts. I cannot stop the pain. I know I would end up crazy if I stayed. Why, then, am I having so much trouble leaving? It makes no sense. He was always angry with me. He was always angry with the kids. I was always trying to prove to him that he had no reason to be angry. I was always trying to prove my worth to him. He was constantly denigrating my family, my roots. He always was so certain that he knew everyone's motives for their behavior. I had swallowed that lie for so long.

Even as I drive I continue to ask if he is right. Are my parents awful people? I hate myself for even asking. It has always been the knowledge that I could count on them that has sustained me in the past, when

I was hurt. I feel grateful that they never gave up on me, that they still love me. I even suspect they have an idea of the pain I have been living with, the isolation and the desolation. I know they will help if I can only get there. I stop the car again. David wonders why I keep calling. I mumble another answer. My eyes are so puffy I can barely see. I finally know that I can't drive anymore.

Woodbury may take me four more hours at this rate. But if I turn around, I'll be home in an hour. I turn off the road. There is a gas station. I leave the kids in the car. I make the call. As the phone rings, I can already hear the tension in "His" voice. I hear a quiet "hello." I slur over apologies for starting a fight this morning. He is cold. "I am not the same person I was when you left me an hour ago," he tells me. "I took a walk to the post office after you left. I felt free, Tammy. I feel terrific." Rejection! I knew it! I feared it! I start to say that I'll go back anyway. I'll show him I am a good person.

I'll show him that he is free with me as a wife. I force myself, instead, to say goodbye.

First, I had better call Dad and tell him I am not coming. After all, I am expected. I dial the number but there is no answer. Why are they not home when they expect me shortly? I remind myself that I want to go home. I decide I had better keep driving until I reach Dad. I urge myself on.

I drive onto the highway. The scenery is a blank to me. I try to stop the tears, but they continue to flow as the pain of the rejection smarts.

He feels good. I replay our conversation. I feel agony, and "He" feels good. As always! He is always happiest when I hurt. I wonder why I stayed so long. He has never really shared any joy with me. He is selfish. He is arbitrary.

He is incessantly angry and full of wrath toward the world around him. I decide to continue in the same direction. The tears are worse than ever. David expresses concern. Randy wakes up and so does Ramona.

I am not certain if I can drive any longer. Randy is cranky. David tries to entertain him. David tells Randy how much fun Woodbury is.

I feel like I must turn around. My head is pounding! I can hear my heart thumping in my ears. The noise is crushing. That awful place in the mountains. I hate it there! Certain I can drive no more, I stop the car again. I find a station and I call "Him." There is no answer. I had better call Dad and tell him I am going back "home." I get an operator and put my call through. It seems to be taking forever. The phone rings and rings and rings. Finally, "Hello." "Dad—I don't know what to do. I can hardly drive." "Keep coming, Tammy" he says. "Drive slowly and carefully." He reassures me that it will take only a little longer that way. "You might as well come, since you are on the way." He is so cool and calm. Maybe I am imagining the pain I am in. But he says to come, so I will. I feel like a robot with no mind of my own. If "He" had answered and asked me to come home, would I have listened to him? I reflect on my parents' invitation to visit the country. It was so timely. I had refused at first. But this morning I just could not bear the pressure any longer. I had called to accept the invitation, but I had said nothing about our fight. I merely accepted an invitation to visit. I am not even certain they know. I am leaving "Him" and leaving the marriage. I really must be cracking up. I feel relieved, as if I needed someone to make a decision for me. I must get away from him. I must get my life back together. I have three little children who need protection from that man. The children need a sane existence. I must keep driving. I try not to think. I try to stay free from feeling. I just want to drive and get there safely. I watch the odometer. I keep guessing how much farther I have to go. I sing songs. "When you walk through a storm keep you head up high and don't be afraid of the dark." I cry. I try to think of a happy children's song. I draw a blank. Randy liked that song and asks me to sing it again. I do. I drive on. As I approach Exit 21 on the Thruway, I know I am almost there. We will make it! Only fifteen more minutes.

I drive on. I sing for Randy. I round the bend into Woodbury. I turn the corner onto Ohio Road. There is the house. Mom rushes out. We hug. I did it! I left "Him!" We are helped out of the car and into the house. It feels free in Woodbury.

The kids are glad to be here. Ramona is hungry. I nurse her and relax a little with her in my arms. Four hours of driving and she did not utter a sound. I made it and I am okay. Somehow, I know I can make it now.

Write a chronology of cruelties. How can I do that? I cannot indulge myself and expose my family to the horrors from which I have just emerged. I want to get on with the business of living, but the lawyer insists. He must have a list of cruelties on which to build a case. It has been three months of living apart. He has given me almost no money to support myself for the kids. I am living with my parents in North Bergen. It has been a difficult time. My feelings are quite tender. I am easily swayed by others. I am often not in touch with my feelings. I only know that I can never again be "His" target. Never again can I allow "Him" to spew his wrath upon me. Never again will I permit his diabolique to destroy my sense of self, my feelings, and my critical judgment.

Living in my parents' home has not been without problems. It has also given me a special joy and fulfillment. My children are getting to know their grandparents. So am I. I have not really lived at home since I left for college almost sixteen years ago. That is half my lifetime. I never got to know my parents as an adult. I am getting to know them now. I am fortunate that they have the space, the finances, and the will to help sustain us all since I left.

But my lawyer wants a chronology now, and I can't seem to get off the first page. We got married. We had lived together for six months before our marriage. I knew he was rigid. I knew he was demanding and somewhat unyielding, but I thought he was also capable of love

and caring. I believed in what he told me. I believed in his intentions which spoke of love and commitment, although his behavior said hate. His diabolique! I felt it for ten years. I cursed it for ten years. I questioned it for ten years. Yet I never failed to believe in it. He says he loves me, therefore he does. He has sent no money and speaks cruel words to me. I am certain he does not mean his hateful words. I feel that if I explain to him how awful his words are, and how confusing it is to say something one day and deny saying it the next, that he will promise never to do that again. I feel it, yet I know I am wrong. I know that I have explained it hundreds of times. I know he has apologized for his humiliations countless times. He has sworn his love and promised to end the contradictions between his words and his deeds. I thought he had integrity. I have learned he has none.

I do not want to spend any more time dredging up the past. I want to start to live. But he won't send money. I have three children, one an infant. So I have to fight. Here I sit, reflecting on my past. Ten years. A chronology.

ACKNOWLEDGEMENT

Thank you so much to our wonderful editor, Dana Bliss. We could not have done it without you. TK & DP

INTRODUCTION

This book is about litigating child custody and divorce in the context of domestic violence; however, we are going to use the term “domestic abuse” because often there is emotional abuse and no physical violence, but the emotional effects are the same.

Domestic abuse is subtle, harsh, controlling, raw, selfish, emotional, and a host of other similar terms. In short, it is volatile and often physically violent. Attorneys who litigate domestic abuse cases must follow many rules: rules of court, rules of evidence, and rules of civil and criminal procedure—but more—they must be attuned to and be able to follow themes. To accurately see a particular domestic abuse case is to understand its discordant themes. These discordant themes are the “rules” of the abusive relationship. The job of the attorney, judges, and mental health professionals, and even the victims, is to accurately identify these themes. Only then can they be dealt with from both an effective legal and therapeutic perspective.

This book is not anti-male. It is anti-abuse. It is not pro-female. It is pro-family and particularly pro-children. It tries to give the

reader an accurate description of how domestic abuse cases are really handled and mishandled by family courts, and how mental health professionals and attorneys can strive to better assist their clients and their clients' children.

A note about language. Classically, most—but not all—victims of domestic abuse are wives or girlfriends (Vagianos, 2015). Victims can of course exist in same gender relationships; they can be men, transgender, etc. For ease of writing and because most victims are women this book identifies the victim of abuse as “she,” the “wife,” or other similar terms.

The reader will note two typefaces. The first is plain type. This typeface is used to present our professional observations and perspectives. The second is *italic*. *It is used to convey a storyline*. We hope this interplay of professional information and storyline will be effective and engaging. When the word “I” is used in *italics* in several chapters the chapter is relating a true story.

Some of chapters of this book were previously published. All of them have undergone revisions for purposes of this book.

Finally, there are several chapters that may appear to be primarily written for lawyers. It is done that way for several reasons, despite the fact that the book is intended for mental health professionals. A majority of women who raise the issue of child abuse during the pendency of a divorce lose custody of their child to the named perpetrator (Saunders, 2011). While lawyers need to learn many lessons from that, it is the authors' experience that most lawyers do not really care to learn the specifics relating to dealing with a custody case that involves domestic violence, as it is a small part of their practice.

Even when this is a primary area of an attorney's work, there are factors that mitigate zealous representation in a contested custody case that are not present in other cases. Therefore the mental

health professional may find it essential to have an understanding of the process of the legal system in divorce and custody to help assist his or her clients and the attorney representing them. In criminal cases, the lawyer is expected to do everything within ethics and the law to make the government prove its case. He is not asked to be “reasonable” and judges do not generally hold him to account for being zealous.

On the other hand, in family matters both attorneys are frequently called upon by the court to be “reasonable.” They often present an outwardly strong position but are strongly encouraged to settle within a range of what the judge thinks is reasonable. The lawyers that use strong tactics become known to the courts and that may affect their effectiveness in other courts in the future. There is a saying among lawyers that the client they are representing will one day be gone but the judge will still be there. They seem to feel they must set aside zealous representation. Mental health professionals that are knowledgeable about how the courts work can assist their clients to set appropriate standards of representation for their lawyers and also assist in selecting new or changing lawyers where necessary.

Matrimonial cases, especially cases involving abuse and/or abused children take place in what may appear to be a lawless or reckless environment because judges do not always strictly adhere to court rules, purportedly in the interest of justice. Attorneys may even be punished with threats of contempt and other sanctions for objecting to “off the record” meetings in judges’ chambers, and they may fear that actual zealous representation could hurt, compromise, or dilute their effectiveness in future cases. Mental health professionals who know the client can assure the lawyer of what is required for their client and can assist the client in dealing with the attorney. Both affect the outcomes of cases.

Most lawyers are trained to simply be reactive rather than proactive. They must be cognizant of cost to the client. Too often this approach will hurt the client. A mental health professional who understands the problems inherent in the family court can help the client be assertive with their attorney and can help them create appropriate strategies, including giving direction and instruction to their attorney, such as having all conferences on the record.

Many social workers work within the court system and can benefit from understanding the perspective explained in the book. Mental health professional working outside the court system can assist their clients, understand a sense of urgency in certain circumstances, and be patient with others. All these professionals can benefit when working with battered women and children if they know and understand the system from the outside and the problems that often happen on the inside and within the system.

Mental health professionals working outside the court system can assist their clients understand a sense of urgency in certain circumstances and to be patient in others. They can only do this if they see how the system works and how it gets tainted and understand how to navigate these sometimes treacherous waters.

Ms. Kleinman's mantra to her clients has always been to "take the power you have and use it effectively." Mental health professionals are best at assisting clients to do just that. They can work with their clients and assist to undo the powerlessness and helplessness that is a hallmark of having been battered. They A mentl health professional can then work to figure out strategies with the client if the professional understands how to do so. This book will help.

In child custody cases, the urgency of child protection must trump procrastination. Yet "hurry up and wait" is what happens in court. What a parent believes is a child safety issue may be put

off for months, and in other cases requests for relief may be heard without a second party present and it may take months after court action for the other parent to have a day in court. Knowledgeable mental health professionals are often treating victims and understand what their clients are going through. This book will help them navigate through that journey and may help them assist the lawyers. The legal road is not a straight one. It can take many unpredictable curves along the way. Therefore this book is written in such a way that regardless of what an adversary may file in court, the mental health professional can keep perspective with the client and help the client understand the process of going to court.

Indeed, it is also important that mental health professionals and their clients know what a lawyer should be doing and thinking about and how the process should be done. In this way, mental health experts involved with courts can better partner with lawyers, better advocate for their clients, and appropriately critique lawyers.

Sometimes strategies are suggested. This may seem strange to a mental health person. But in order to better assist one's clients it is important to have some ideas for how to create strategies for protection in the court and how some strategies may be viewed by the court. Family court decisions are made by a judge, not a jury. The judge may be cynical or biased. The mental health professional can help by helping their clients view positions from the eyes of a court. In this way the clients will be better served.