

## **Workgroup to Study Child Custody Court Proceedings Involving Domestic Violence or Child Abuse Allegations**

Meeting Minutes – January 28, 2020

*Prepared by the staff of the Secretary of State's Office*

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The Workgroup to Study Child Custody Court Proceedings Involving Domestic Violence or Child Abuse Allegations held its twelfth meeting on Tuesday, January 28, 2020, in the Fourth Floor Conference Room in the Office of the Secretary of State in Annapolis, Maryland.

The following members were present:

Secretary of State John C. Wobensmith, Chair

Mr. Paul Griffin

Ms. Sonia Hinds

Ms. Anne Hoyer

Ms. Ruby Parker

Ms. Claudia Remington

Ms. Laure Ruth

The protective parent member was also present.

### **Welcome and Introduction**

The chairman of the workgroup, Secretary of State John C. Wobensmith, commenced the meeting at 10:10 am by welcoming everyone and thanking them for their attendance. He informed everyone that the workgroup was meeting exclusively for a presentation and, in deference to the legislative members of the workgroup who were unable to attend as the meeting occurred during the legislative session, there would be no deliberations on recommendations.

Secretary Wobensmith then introduced Professor Deborah Epstein, Co-director of the Domestic Violence Clinic at Georgetown University Law Center, citing her extensive experience in DC Superior Court representing and overseeing the representation of clients, establishing the court's domestic violence unit, and training law enforcement.

### **Presentation by Professor Deborah Epstein**

Professor Epstein presented on her article *Discounting Credibility: Doubting the Testimony of Domestic Violence Survivors and Other Women*. Professor Epstein stated that she began this project as the Me Too movement was gaining prominence, and she felt that the numerous narratives exposed by that movement made it clear that society and, especially the justice system, does not accord women the same level of trust and belief that it accords men.

### **Plausibility – Internal Consistency**

Professor Epstein examined the ways that society credits a story, beginning with the plausibility of the story itself, apart from the individual who is telling the story. She explained that narrative theorists and cognitive scientists agree that the human brain is hard-wired for stories. Human beings hear a set of facts and cannot understand or believe them to be true unless they can conceptualize the facts as a story. This information is important because stories are central to the justice system and the way that judges and juries think about evidence and decide how to credit facts. Professor Epstein explained that for a story to be plausible, it must have internal consistency by making sense logically and emotionally and following a coherent, linear thread without significant gaps in the plot.

### **Traumatic Brain Injury**

Professor Epstein pointed out that for many survivors of domestic violence, however, telling a truthful story about their experiences necessitates a narrative that does not fit with the generally accepted conception of plausibility. Professor Epstein argued that one major reason for this is due to traumatic brain injury (TBI) caused either by blunt force trauma to the head or oxygen deprivation resulting from strangulation. Both blunt force trauma and strangulation are common among domestic violence survivors and often experienced repeatedly. TBI can result in a profound impact on memory, with symptoms including confusion, poor recall, the inability to link parts of the experience together, and the inability to articulate a logical sequence of events.

Professor Epstein highlighted that research on the connection between TBI and domestic violence is relatively new and that few emergency rooms screen for TBI when a patient presents for domestic violence-related injuries. Few women survivors are aware of TBI; they do not know the short- or long-term effects. She also stated that few judges are aware of the connection, and the lack of understanding leads judges to hear a victim's story as internally inconsistent.

Professor Epstein shared the story of a survivor who experienced strangulation from a telephone cord. The survivor could only recall the experience in flashes when she could remember it at all. She remembered being outside and, at other times, being inside. She provided different dates for the incident. Sometimes she believed it occurred as they were about to eat dinner, at other times she thought it was caused by an argument over an apple. She could not tell the story as a linear narrative. Professor Epstein pointed out that, to a trauma expert, the disjointed way this survivor told her story makes it quite likely that she was actually the victim of a strangulation incident and that the loss of oxygen to her brain resulted in the inconsistencies of the story. For a

trauma expert, the way the survivor told her story is consistent with symptoms of TBI, which would make the story all the more plausible. However, for a police officer determining whether or not to arrest an alleged abuser, or for a judge deciding whether or not to issue a protective order, the way that the survivor told her story likely would have the opposite effect. For justice system gatekeepers, the inconsistent, disjointed way that the survivor shares the narrative sounds internally inconsistent and, therefore, not plausible.

### **Psychological Trauma**

In response to a question, Professor Epstein stated that she personally believes that shaking can cause some symptoms similar to blunt force trauma, but she does not have specific supporting information. She said that aside from neurological trauma, most survivors of intimate partner violence experience significant psychological trauma. The majority of survivors meet the diagnostic criteria for Post-traumatic Stress Disorder (PTSD). Psychological trauma operates very similarly to neurological trauma to undermine the plausibility of a survivor's story by causing memory lapses. The symptoms of PTSD are intense emotional reactivity to triggers or reminders of the incident. For many survivors, reviewing the details of an abusive incident in a small courtroom with the perpetrator present can be incredibly triggering. On the witness stand, survivors may experience a flashback or become overwhelmed with intense emotion. This typically results in the inability of the survivor to articulate large parts of the story. While disjointed storytelling and gaps in testimony may actually be evidence supporting a victim's story, to someone who is not a trauma expert, it sounds internally inconsistent and, therefore, not plausible. Psychological trauma can combine with neurological trauma to create a situation where the more a victim tries to be faithful to her actual memory, the more likely it is that the victim will suffer a credibility discount.

### **Plausibility – External Consistency**

Professor Epstein then introduced the concept of external consistency, another factor that contributes to a story's plausibility. Human beings are more likely to believe stories that resonate with an established understanding of how the world works. For example, if a person enters a room with a wet umbrella and announces that the person has just walked through a fire, most individuals would doubt the plausibility of the story because it does not fit with the general understanding of fire. One would expect the person to be singed or smelling of smoke, not dripping wet, so the plausibility of the story would be doubted.

### **False Consensus Bias**

The problem with external consistency is, Professor Epstein stated, false consensus bias. Most people tend to assume that their own experience of how the world works is universal. However, this assumption is wrong. The particular life experiences of an individual contribute greatly to how the individual understands and reacts to the world. For example, a passenger who has survived a very serious car crash reacts very differently when a driver suddenly slams on the brakes than someone who has never been in a car accident. Another example is combat veterans who react differently to sudden loud noises than someone who has never seen combat.

The effects of a similar experiential gap were seen in the early days of domestic violence advocacy, when many people questioned why a person would not leave an abusive situation. Individuals who have experienced violence or who have worked closely with survivors of domestic violence understand that the decision to stay is often a normal response to an abnormal situation where realistic options do not exist. This is in sharp contrast to those people fortunate enough not to have been exposed to interpersonal violence. Individuals without these experiences do not understand the physical, emotional, and spiritual obstacles to fleeing abuse and almost obsessively question why a victim did not leave. This is the false consensus bias: in her shoes, I would have left. Because I would not let this happen to me, I cannot believe that she would allow it to happen to her, so it must not be true. Research demonstrates that the decision to stay in an abusive relationship is often viewed negatively by judges and policy makers. Because it is inconsistent with how their own world works, the story appears less plausible, and credibility is discounted. This is classic false consensus bias.

Professor Epstein shared an example from a protection order case that was denied in DC Superior Court because the judge did not find the petitioner credible. Photographs introduced by the accused perpetrator showed the petitioner and the accused dining in a restaurant only two days after an alleged incident that was particularly violent. In the photos, the petitioner appeared happy and romantically engaged with the accused. Professor Epstein pointed out that the behavior of the petitioner at the restaurant might have been driven by many things, including a desire to maintain a relationship for the children, an effort to appease the perpetrator and avoid further violence, ambivalence about ending a long relationship, *etc.* The judge, however, did not question any of this, but instead decided that no one would do these two things so close together in time. The judge did not consider the petitioner to be credible, discounted her story, and denied the order.

### **Prioritization of Harms**

Professor Epstein explained that, statistically, most judges do not experience intimate partner violence and that many judges tend to assume that in domestic violence cases, the physical abuse far outweighs the psychological harm. There is a common judicial expectation that a “real” victim, a person telling the truth, would lead with physical violence when talking about their experience. However, for many women, although their relationships are characterized by episodic outbursts of physical violence, the pervasive abuse tends to be psychological and emotional. Research on domestic violence demonstrates that victims of domestic violence cite psychological, not physical, harm as the greatest contributor to their distress.

In court, where 80% to 90% of people are not represented by lawyers, Professor Epstein stated that this often results in a victim who is seeking protection detailing the psychological aspects of an abusive relationship and sometimes not raising the physical violence until prompted by a judge. Then, judges who lack experience tend to engage in false consensus bias and assume that an individual in an abusive relationship would find physical violence worse than psychological violence and would therefore lead with telling about the physical violence. As a result of this bias, courts may perceive someone who highlights psychological or emotional abuse over physical abuse as telling a story that is not externally consistent, and therefore less credible. A woman who details psychological rather than physical harms, and shares her story as she experiences it, mentioning physical violence only when asked about it, may be perceived as fabricating or exaggerating.

Survivors have learned the hard way about this obstacle to justice. Lisa Goodman, co-author of the article presented by Professor Epstein, found examples of this when she interviewed *pro se* litigants in custody cases during her study of Massachusetts family court. Professor Epstein shared a quote by a woman in the study “, my advice to other women trying to get custody is just don’t say anything about the violence. The way the system is now, you better talk to your priest, talk to your family; tell them your story . . . but don’t bring it into the courtroom because the judge will say, ‘there is no way that could happen to me, there is no way it happened to you.’”

### **Trustworthiness – Demeanor**

Professor Epstein then discussed the importance a listener places on the demeanor of a story teller. We all know intuitively that the demeanor of the person telling the story affects the likelihood that we will credit the story. People tend to believe a story teller whose emotional affect matches the substantive content of the story and tend to give less credit to those who are deadpan

or highly emotive. Unfortunately, the core dimensions of PTSD all result in disconnect between the emotional demeanor of the person with PTSD telling the story and the customarily expected emotional demeanor for the type of story being relayed. For example, dissociation is a core dimension of PTSD that produces a numbing response that may result in a very flat affect. Professor Epstein relayed that, practically speaking, this might result in a victim sharing experiences of sexual assault as if talking about the weather. Alternatively, a central symptom of PTSD is hyperarousal, which is a constant state of alertness that may result in a survivor sounding paranoid. A victim suffering from hyperarousal often has very intense emotions and even appears hysterical when talking about the victim's experience. The psychological symptoms associated with PTSD caused by the domestic violence undermine the ability of a survivor to present experiences in a way that seem credible, especially in court.

### **Trustworthiness – Motive**

Professor Epstein also discussed the impact that a number of different gender-based, cultural stereotypes have in court proceedings when women allege abuse. One of the pervasive stereotypes discussed was the grasping, system-gaming “woman on the make.” The trustworthiness of a woman who seems to be trying to get something, particularly when it is from a male partner or the government, is suspect culturally. This was seen in the Reagan-era image of the welfare queen, an intersection of race and gender stereotypes, where women were portrayed as having more children in order to increase their monthly welfare check. We distrust their credibility because we think they are grasping. A more contemporary example is the image of the “gold digger,” women who target wealthy men for child support. The grasping woman stereotype is pervasive in our society.

However, most women seeking to leave an abusive relationship require concrete resources because classic patterns of coercive control characteristic of domestic violence isolate a victim from family and friends. Because of this, legislatures in every state have provided resources for victims of domestic violence, such as priority in shelter access or requesting that an abusive partner be vacated from a shared residence. The issue, as explained by Professor Epstein, is that when women request the resources provided by law, they risk being seen as system manipulators and suffering from a credibility discount. Professor Epstein recounted that during her years of judicial training in DC, she heard veteran judges from domestic violence court warn incoming judges that women come to domestic violence court as a workaround to get their partner rapidly vacated from a shared residence rather than waiting for the divorce case. This judicial skepticism persists despite a complete lack of evidence.

Professor Epstein revealed that she recognized the power behind such stereotypes and relied on them at times for closing arguments. For example, when she had a client with resources who did not need to ask for much from the court, she would argue that her client's testimony should be credited because she was not requesting much. Professor Epstein stated that she now deeply regrets the harm caused by such arguments that work to undermine the credibility of women who are actually in need of the full scope of the resources provided by law. The idea that women survivors are grasping and system gaming and motivated by obtaining something other than safety or justice falls on really receptive ears in our society because of these virulent and discriminatory stereotypes. A woman who seeks a protective order is presented with a serious double-bind. One option is to go to trial and seek the full scope of relief needed for safety, and risk being discredited and denied all relief, or limit the amount of relief requested as a tradeoff in order to be believed by the court.

Another negative stereotype discussed was that of women seeking unfair advantage in custody cases. Courts distrust women when they seek custody of their children. Custody statutes across the country require judges to consider parent-on-parent violence when deciding custody cases because witnessing violence without experiencing it can still have a harmful effect on children. When women pursue these rights, however, they are frequently discredited in family court. Joan Meier's study, among others, revealed that mothers who allege intimate partner violence are more likely to lose custody of their children than mothers who do not assert intimate partner violence. Women gain advantage by remaining silent.

Judges tend to credit, based on no actual evidence, a father's uncorroborated allegation that the woman is fabricating the abuse allegation in order to alienate the children from the father. The experience of intimate partner violence is turned on its head to support the perpetrator's claim that he is the better parent. There is a pattern of disbelieving women more when they allege violence, even though we know that incidents of parent-on-parent abuse are high in contested custody cases. Judges find it easier to believe that women are lying than that men are abusing the mothers of their children.

### **Trustworthiness – Social Location**

Professor Epstein then discussed how society distrusts women because they are women. In our culture, we routinely devalue the trustworthiness of historically less powerful groups. We distrust women, we distrust people of color, and we distrust people in poverty. Many of Professor Epstein's clients fit into all three categories. Professor Epstein argued that this devaluation is based on commonly held derogatory stereotypes that are associated with attributes related to poor truth telling: for example, over emotionality, lack of an ability for logical thinking,

and inferior intelligence. We discount the credibility of people who fall into these categories. Professor Epstein then shared some examples to demonstrate that if you start looking at the popular culture images of women, you will see depictions everywhere of women grasping or trying to get something, and women not being trustworthy simply because they are women.

### **Experiential Discounting**

Professor Epstein continued by addressing the fact that women face a societal discount not only to their credibility but also to their actual experience. All too frequently our society, and justice system gatekeepers in particular, will dismiss the importance of women's actual experience of harm. To understand why credibility discounting is so devastating, we need to understand it in the broader context; when harm is inflicted on women, society does not care about it as much as when harm is inflicted on men. This is known as experiential discounting. Regardless of the plausibility of a story or the trustworthiness of the individual, even when a woman is believed, society tends to trivialize the harm she experienced.

Professor Epstein shared an example of this in the context of public subsidized housing. Many counties and cities across the United States, including the 20 largest cities, have crime control or nuisance ordinances known as the three-strike rule. Under such a rule, if 9-1-1 is called three times for the same public housing residence within a set statutory period, the occupant is required to be evicted from public housing. Landlords have no choice and will be fined or lose their license if they do not evict; there is no room for individual decision making. Of the 59 jurisdictions that have these crime control measures, 39 expressly include calls to 9-1-1 for domestic violence, even if the result will be the eviction of a victim. Very few make an exception if the call is from the victim, despite the fact that the purpose of the laws is to evict the person creating a nuisance or perpetrating the crime, not the victim of a crime. A study from Milwaukee found that roughly one-third of the excessive 9-1-1 call citations over a two-year period were based on emergency reports to the police about domestic violence, and that 57% of those cases resulted in a victim being evicted.

Professor Epstein shared the story of a victim in Pennsylvania whose adult daughter called the police when her former boyfriend attacked her in her subsidized apartment. When the police came, they warned her that this was her second strike and that another would result in her eviction. She was paranoid about calling the police; she had a three-year old daughter and did not want to lose housing. One night, her boyfriend cut her throat with a broken ashtray. When the victim awoke from being unconscious, her only thought was to prevent 9-1-1 from being called. She tried to get as far from her apartment as she could, but a neighbor saw her and called 9-1-1. She was airlifted to the hospital, released after three days, and evicted. The American Civil Liberties Union (ACLU)

sued the city of Norristown, Pennsylvania on her behalf and won, the law was subsequently repealed, and the victim moved back into her apartment. These laws continue to appear across the county without appropriate exceptions for a victim of a crime despite the efforts of ACLU for such exceptions. Only 4 of the 59 jurisdictions that have these ordinances have created exceptions for victims. In this example, no one doubted the story of the victim, but no one took the harm that she suffered seriously. This context helps to understand the way that discounting experience affects people in real life.

### **Harm Caused by Discounting Credibility**

The obvious harm caused by discounting credibility is the lack of appropriate crediting of witnesses, victims not being taken seriously, and perpetrators not being held accountable by the justice system. Beyond this, there are several distinct harms from the experience of not being believed. Many victims in violent intimate partner relationships experience this discounting on an individual level, then again on an institutional level. Individual perpetrators of domestic violence often discredit the plausibility of a woman's story, claiming "I didn't do it, it is all your fault, you caused it..." They also frequently discredit the credibility of a survivor "you're so hysterical, you are too emotional, you cannot think straight, no one will believe you." They often dismiss the experience of harm "why do you make such a big deal out of everything?" This technique of manipulation is often referred to as gaslighting. For many women, being subjected to the credibility discounting by the justice system replicates the credibility discounting they experienced in their intimate partnerships. Women are experiencing a gauntlet of disbelief in the system and in their personal lives.

Research shows that there are real psychological consequences to being disbelieved. Women tend to develop a sense of powerlessness and futility. They try to take action by going to court, only to find that there is nothing they can do. They develop a sense of worthlessness and self-doubt. They are not believed so many times that they begin to doubt their own experiences. These individual experiences of doubt that cause a victim to doubt herself also cause her to sound unsure when sharing her story, which makes her sound less credible. It is a vicious cycle.

### **Solutions**

Professor Epstein then addressed possible steps that could be taken to improve the handling of domestic violence in the courts. Professor Epstein mentioned training for judges about neurological trauma, PTSD, prioritization of harms, *etc.*, but warned that sometimes judicial training is effective and sometimes it is not. Success depends on whether judges are open and receptive and, if they are, the idea then must translate to judicial work. Judicial training is no panacea. Professor Epstein noted that there are other pieces, conscious and unconscious, that

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cannot be fixed through training. Change will not come easily to this gendered way we credit or discredit. We, as a society, need to collectively take responsibility to shift away from the deeply ingrained, automatic tendency to disbelieve women and their stories. We need to distrust our own distrust. Once we recognize that our judgements about credibility are inherently flawed, it makes sense to impose a self-distrust rule. This does not mean that because we do not do a good job at assessing credibility, we must believe every woman and everything she says without question. Rather, we must resist this reflexive presumption against crediting women. We must accept a broader range of people as potentially credible and a broader range of stories as consistent with how the world works. We must follow the philosophy of Jose Medina and engage in virtuous listening.

### Questions

Professor Epstein cut her presentation short to allow time for questions. The first was from a member of the audience who asked for a recommendation to people in these relationships. Professor Epstein responded that we need to get away from the “he said, she said” paradigm and that is more possible these days with cell phones offering corroborative evidence. She noted that this workaround skips the fundamental social problem of discrediting. In response to a question, Professor Epstein said that there is not a lot of judicial training or training in law schools about credibility beyond trusting your instinct and deciding with your gut. She stated that she has not seen much judicial training offered on how to assess credibility, and even the extensive workshops on implicit bias do not connect it concretely to determining credibility.

Someone asked about judicial accountability. Professor Epstein replied that monitoring the predominantly *pro se* cases and mechanisms like court watch and fatality review boards are important to help reflect back to judges the patterns in their decision making of which they might not be aware.

Ms. Laure Ruth thanked Professor Epstein for a study with actual results supporting what so many have experienced to be true. She said that based on judicial interviews, within two weeks of being appointed to the bench, the whole approach to domestic violence cases changes, due to the older seasoned judges warning the incoming judges not to believe women. It goes beyond the mandatory and self-selected judicial training. She mentioned a bill in the legislature in the 2020 session that would require the judge’s name to be made available on judicial case search as a mechanism to support judicial accountability. Though she has no position on the bill, she invited anyone who does support it to involve themselves in democracy and offer testimony.

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In response to a question, Professor Epstein said that she understands the skepticism judges and others have when a training instructor is an advocate. Trainings need to be more concrete. If a judge finds himself not believing a person in front of him, what questions should he ask? Judges have no problem pushing for facts about what actually happened, but they do not push for facts about credibility.

Secretary Wobensmith said it sounds like these issues around discounting credibility need to be addressed at the grammar school level, long before even law school. Ms. Remington agreed and asked about social norms campaigns on this topic expanding beyond the justice system. She asked if any states have addressed the three-strike law on the state level. Ms. Ruth responded that Maryland passed a law allowing a victim of domestic violence to use that as a defense to eviction, or to terminate a lease early without penalty.

The discussion circled back to providing feedback to judges. Ms. Ruby Parker mentioned a specific jurisdiction in Virginia where all case filings were reviewed and later presented to the judges so they could see, among other things, how frequently they awarded custody to an abusive parent. A rule was put in place so judges have the opportunity to see their own biases. Professor Epstein said that while she is all in favor of feedback to judges, it takes a lot of resources, and the cases must be carefully examined. In response to a final question, Professor Epstein said that she observed, in recent years, no distinction between male and female judges; no gender distribution.

### **Closing Remarks and Adjournment**

Secretary Wobensmith made brief closing remarks and the meeting was adjourned.