Domestic Violence Bench Guide

For Judicial Officers

Revised 2015

Prepared by:
Washington State Supreme Court Gender & Justice Commission
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170
(360) 704-4031
www.courts.wa.gov
Published June 2016
©2016. Administrative Office of the Courts. All rights reserved.

CHAPTER 1
SCOPE AND PURPOSE OF THE DOMESTIC VIOLENCE BENCH GUIDE FOR JUDGES

The *Domestic Violence Manual for Judges, 2015,* is a product of the Washington State Supreme Court Gender and Justice Commission.

'This project was support by sub-grant No. F15-31103-315 awarded by the state administering office for the STOP formula Grant Program. The options, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state of the U.S. Department of Justice, Office on Violence Against Women. Grant funds are administered by the Office of Crime Victims Advocacy, Community Services and Housing Division, Washington State Department of Commerce."

The manual is an updated version of the *Domestic Violence Manual for Judges, 2006,* and is designed for two purposes:

- To serve as a practical reference guide for judges and other court personnel; and
- To serve as a textbook for judicial education in the area of domestic violence.

Although emphasis is given to the role and responsibilities of the judge, some portions of the manual will also be of interest to court clerks and others who have administrative responsibilities.

The superior courts and the courts of limited jurisdiction have concurrent jurisdiction in many areas of domestic violence law. Thus, the *Domestic Violence Manual for Judges* is designed for use in either level of court, with any procedural or jurisdictional differences highlighted.

For purposes of this manual, the term *domestic violence* is used in two ways: (1) broadly, as a pattern of assaultive or abusive behavior exercised by one adult intimate against another (see Chapter 2 for explication); and (2) more narrowly, according to Washington statutes. The authors have attempted to clarify when they refer to the behavioral definition and when they are using statutory definitions.

I. CHAPTER OVERVIEW

Chapter	Title and Short Description
Chapter 1	**Scope and Purpose of the Domestic Violence Manual for Judges –** Includes manual overview, effective date, and authorship.
Chapter 2	**Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases –** Discusses the realities of domestic violence in terms of the current knowledge about behavioral descriptions of battering as a pattern

Chapter	Title and Short Description
	of control, the underlying causes of domestic violence, the characteristics of perpetrators, and the issues related to victims.
Chapter 3	**The Legislative Response to Domestic Violence –** Provides an overview of the various legal responses to domestic violence. The legislative framework is described, as well as the types of orders that are available for the protection of the domestic violence victim.
Chapter 4	**Criminal Pre-Trial Issues –** Provides a detailed review of the most common pretrial issues that arise in domestic violence cases, including release orders under CrR 3.2 and the imposition of no-contact orders under RCW Chapter 10.99. Discovery issues are also discussed.
Chapter 5	**Criminal Trial Issues –** Covers those trial issues concerned with the presence and treatment of the victim, including procedures for compelling the presence of the victim, continuances to secure the presence of the victim, dismissals when a victim fails to appear, substitutes for live testimony when the victim is not present (including deposition testimony), dismissals, and jury issues.
Chapter 6	**Evidentiary Issues –** Covers selected evidentiary trial issues, such as privileged communications, hearsay, children as witnesses, and expert witnesses including discussion of the battered woman syndrome.
Chapter 7	**Criminal Case Dispositions –** Discusses case dispositions. Pretrial options, such as diversion and Stipulated Orders of Continuance, are discussed, as well as sentencing under both the Sentencing Reform Act (SRA) and non-SRA procedures, and statutory requirements for domestic violence treatment providers.
Chapter 8	**Civil Protection Orders –** Provides an overview of the purpose and effectiveness of protection orders, statutes, and case law regarding the court's role in enforcement of protection orders. The legal responses to domestic violence, legislative framework, and policy issues for the issuance, modification, and extension of protection orders are discussed, as well as full faith and credit and firearms surrender.
Chapter 9	**Domestic Violence Database –** Provides an overview of the domestic violence database and the Judicial Access Browser System (JABS).

Chapter	Title and Short Description
Chapter 10	**Parenting Plans –** Introduces purpose and objectives of parenting plans in domestic violence cases. Included in the section are residential placement and residential time considerations, evidentiary issues, court procedures when issuing orders, and use of mediation.
Chapter 11	**Child Abuse and Neglect Cases Where Domestic Violence is a Factor –** Discusses the considerations for the court in determining the best interest of the child in domestic violence proceedings, termination of parental rights, and coordination of multiple cases. A summary of the Washington State Department of Social and Health Services Social Worker Domestic Violence Practice Guide is included.
Chapter 12	**Dissolution of Marriage –** Reviews Washington dissolution statutes and domestic violence, and discusses property division, maintenance, attorney fees, child support, and bankruptcy issues.
Chapter 13	**Domestic Violence and Tribal Courts –** Describes Native American communities and legal systems in the state; reviews unique characteristics of domestic violence, victims, and batterers in tribal communities; identifies state and federal full faith and credit laws and court rules relating to enforcement of protection orders; describes the typical protection order process among tribes; explains criminal jurisdiction in Indian country; describes child custody and visitation issues.
Appendix A	**Domestic Violence Evaluations and Assessments –** Contains suggested practices for interviewing, evaluating, and assessing the lethality risk of domestic violence.
Appendix B	**Court Mandated Treatment for Domestic Violence Perpetrators –** Provides an overview of court-mandated treatment for domestic violence offenders based on current psychological and rehabilitation research.
Appendix C	**Federal Domestic Violence Law –** Contains a summary of the Gun Control Act and the Violence Against Women Act.
Appendix D	**Domestic Violence in Lesbian, Gay, Bisexual, and Transgender (LGBTQ) Relationships –** Contains an overview on issues and lists resources for addressing domestic violence in the LGBT communities.

Chapter	Title and Short Description
Appendix E	**Title 26 Family Law Guardian Ad Litem Guidebook and Training Curriculum –** Contains guidelines addressing domestic violence for individuals appointed as guardian's ad litem in family law (Title 26) matters.
Appendix F	**Domestic Violence: The Overlap Between State Law and Immigration Law –** Presents an overview of cultural and immigration concerns with domestic violence law. Includes a synopsis of issues that arise in the confluence of domestic relations law and immigration law, and immigration law and criminal proceedings.
Appendix G	**The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence –** Discusses how the Hague Convention on International Child Abduction, and its enabling statute, have been applied in courts in Washington State and around the country.
Appendix H	**Abusive Litigation and Domestic Violence Survivors –** Contains general information on collateral consequences of misdemeanor and felony domestic violence convictions**.**
Appendix I	***Domestic Violence Manual for Judges* History and Authorship**
Appendix J	**Guidelines for Domestic Violence, Sexual Assault, Stalking, and Anti-Harassment Protective Orders**
Appendix K	**Resource Materials on Domestic Violence –** Includes selected domestic violence information links and audio/visual library resources.

II. EFFECTIVE DATE

The statutes, rules, and case law in the *Domestic Violence Manual for Judges, 2015,* were updated by various chapter authors in 2013 and 2014. The reader is advised to check for amendments, case law updates, or other changes in the law after December 2014.

III. PRODUCTION AND AUTHORSHIP

The *Domestic Violence Manual for Judges, 2015,* was produced by the Washington State Supreme Court Gender and Justice Commission. The Commission provides leadership and guidance as to both form and content of this manual.

For more than fifteen years, Washington State judges, attorneys, law school professors, and students have contributed their time and expertise to review, revise, write, and recommend information to be include in the manual, so that it is a valuable resource for Washington State judicial officers. Chapter 2, Appendix A, and Appendix B were written by Anne L. Ganley, Ph.D. and emphasize social science research in the area of domestic violence, treatment, and assessment.

The *Domestic Violence Manual for Judges, 2015,* is provided by the Gender and Justice Commission to Washington State judicial officers and law libraries. The manual is available on the Washington Courts website at www.courts.wa.gov. Individual copies may be purchased from the Administrative Office of the Courts, PO Box 41170, Olympia, WA 98504-1170, (360) 753-3365.

The Commission expresses appreciation to the following individuals who contributed their time and expertise to writing and revising the *Domestic Violence Manual for Judges, 2015.* The list of individuals who contributed to previous versions of the *Domestic Violence Manual for Judges* is contained in Appendix I.

Domestic Violence Manual for Judges, 2015

Editor:

Grace Huang, J.D., Washington State Coalition Against Domestic Violence

Content Revisions:

Anne L. Ganley, Ph.D.
Megan Dorwin, M.S.W. Washington State Coalition Against Domestic Violence
David Martin, J.D., King County Prosecutors Office
Honorable Sheryl Gordon McCloud, Washington State Supreme Court
Honorable Judy Jasprica, Pierce County District Court
Honorable Marilyn Paja, Kitsap County District Court
Honorable Christopher Wickham, Thurston County Superior court
Honorable Regina Cahan, King County Superior Court
Honorable Joan DuBuque, Ret., King County Superior Court
Honorable Anne Hirsch, Thurston County Superior Court
Honorable Elizabeth Berns, King County Superior Court
Margaret Hobart, Ph.D., Northwest Network of Bisexual, Trans, Lesbian & Gay Survivors of Abuse
Antoinette Bonsignore, J.D.
Honorable Rich Melnick, Washington State Court of Appeals Division II
Honorable Michael H. Evans, Cowlitz County Superior Court
Honorable Eric Z. Lucas, Snohomish County Superior Court
Honorable Randy A. Doucet, Tulalip Tribal Court

Honorable Mark W. Pouley, Swinomish Tribal Court
Honorable Tom Tremaine, Kalispel Tribal Court
Sara Ainsworth, Seattle University School of Law

New Appendix:

David Ward, J.D., Legal Voice

Law Student Legal Researchers:

Rachel Bryant
Nicole Gainey
Emily Henry
Lindsey Kim
Angela Linhardt
Lauren Ludwick
Natalia Morozova
Ariana Orford
Breane Schuster
Katherine Shipman
Tristin Sullivan-Leppa
Julie Turley
Sarah Villian

Technical Editing:

Erin Doherty, Editrix Services

Coordination:

Pam Dittman, Program Coordinator
Danielle Pugh-Markie, Administrative Office of the Courts

CHAPTER 2
DOMESTIC VIOLENCE: THE WHAT, WHY, AND WHO, AS RELEVANT TO CRIMINAL AND CIVIL COURT DOMESTIC VIOLENCE CASES[1, 2]

By Anne L. Ganley, Ph.D.

Author's Note:

It has been 30 years since the Washington Courts Administrative Office of the Courts (AOC) provided its first judicial training on domestic violence in 1984, and 22 years since the Washington AOC published its first Domestic Violence Manual for Criminal Court Judges (1992).[3] Most of what was written for the 1992 Chapter 2 and for subsequent versions (1993, 1997, 2001, 2006) regarding "the what, why, and who of domestic violence" remains the same in 2014. That understanding has been enriched and honed by years of debate and additional data from many diverse communities. Washington State domestic violence–specific laws, policies, interventions, research, and prevention efforts have also evolved. There have been twists and turns in our understanding of how the courts can respond to the realities of domestic violence, often more influenced by economics than by the reality of domestic violence. While it is beyond the scope of a judicial manual to review that history, this author notes the 30-plus year history as the context for this 2014 version. A review of the post-2006 literature affirms overwhelmingly that what was written in earlier versions still stands. While not all that research is cited here in chapter 2, a sample of additional footnotes is provided to reflect that the points made in earlier versions are still supported by current research.

As always, the Washington Domestic Violence Manual for Judges is shaped and informed by the women, children, and men whose lives have been shattered by domestic violence but whose resiliency allows them to move all of us forward in working to end domestic violence in our communities. *A. Ganley, PhD, 2014*

---

[1] This chapter is an updated version of **Domestic Violence Manual for Judges** (Olympia, WA: published by the Administrative Office of the Courts, 1992, 1993, 1997, 2001, 2006)

[2] Sections of the chapter have been adapted from other Washington publications of this author: A. Ganley & M. Hobart, *Social Worker's Practice Guide to Domestic Violence* (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services; A. Ganley, *Domestic Violence, Parenting Evaluations and Parenting Plans*, 2009. King County Coalition Against Domestic Violence and from *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases: A National Model for Judicial Education* (1991*), Domestic Violence in Civil Court Proceedings: A National Model for Judicial Education* (1993), A. Ganley & C. Warshaw, *Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* (1995); A. Ganley & S. Schechter, *Domestic Violence: A National Curriculum for Family Preservation Practitioners* (1995), *Domestic Violence: A National Curriculum for Child Protective Services* (1996) (San Francisco, CA: all published by Futures Without Violence).

[3] See Washington Domestic Violence Laws, Chapter 3, for review of DV specific laws (1979-present).

I. Introduction

Domestic violence (DV) continues to be a widespread[4] societal problem with consequences both inside and outside the family. Once considered merely a symptom of other underlying individual problems such as poverty, substance abuse, mental illness, or a dysfunctional relationship, domestic violence now is understood to be a problem in and of itself that is found independent of or co-occurring with other individual, family, or community problems.

Domestic violence has devastating short- and long-term effects on the abused parties and their children, as well as entire communities. It impacts all areas of a person's life: physical and mental health, housing, education, employment, family stability, social relationships, spirituality, and community participation. There is continuing evidence[5] that violence within the family becomes the breeding ground for other social problems such as substance abuse, juvenile delinquency, and violent crimes of all types. As such, the financial costs of domestic violence are enormous, not just for individuals but also for their communities.

Given that the roots of domestic violence are embedded in our social structures and customs,[6] the courts and the law have a unique role in addressing domestic violence at both a societal and an individual level. While this manual focuses on the role of Washington judicial officers in state and tribal courts, it is with the understanding that the courts cannot address this problem alone. To eliminate the abuse and to bring about change, a coordinated community response is required.[7, 8] Each segment of a community has a role both to intervene and to prevent domestic violence: state and tribal courts, the legislature, mental/medical health providers, victim advocates, educators, child welfare workers, faith leaders, the media, and social activists. How each segment of the community carries out its respective role in responding to domestic violence is greatly influenced by its understanding of the realities of domestic violence: what it is, why it occurs, who is involved, and what the impact is on the adult victims, the children, and the community.

To strengthen and continue to improve the unique roles of judicial officers, this chapter provides an overview of domestic violence:

- The What: Behavioral and Legal Definitions of Domestic Violence
- The Why: Causes of Domestic Violence
- The Who: The Domestic Violence Perpetrator, the Abused Party, the Children, and the Community
- The Impact of Domestic Violence on Criminal and Civil Court Proceedings

---

[4] Black, M.C., Basile, KC, Breiding, M.J., Smith., S.G., Walters, M.L., Merrick, M.T., Chen, J. & Stevens, M.R. (2011). *The National Intimate Partners and Sexual Violence Survey. (NISVS): 2010 Summary Report*, Atlanta, GA. National center for Injury Prevention and Control, Centers for Disease Control and Prevention.

[5] J. Silverman, A. Raj, L. Mucci and J. Hathaway, "Dating Violence Against Adolescent Girls and Associated Substance Abuse, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality," *Journal of the American Medical Association* 286, no. 5 (2001): 572-579.

[6] E. Pence and M. Paymar, *Criminal Guide for Policy Development* (Domestic Abuse Intervention Project, 1985).

[7] S. Schechter and J.L. Edleson, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* (Reno, Nevada: The National Council of Juvenile and Family Court Judges, 1999), the Greenbook Initiative Resources 2000- 2009, http://www.thegreenbook.info/read.htm.

[8] *National Consensus Guidelines on Identifying and Responding to Domestic Violence Victimization in Health Care Settings* (San Francisco, CA: The Family Violence Prevention Fund, 2002).

The presence of domestic violence is salient to both criminal and civil court proceedings. Criminal courts for adults and juveniles must respond to the multiple issues raised by the DV perpetrator's criminal conduct, and by the resulting safety issues for domestic violence victims/witnesses, their children, and the public. The criminal court may also have to respond to a DV survivor's conduct[9] (whether or not conduct was self -defense, or whether DV is a mediating factor in the DV survivor's criminal case). Civil courts face multiple issues raised by the presence of domestic violence in proceedings for dissolution of marriages, parenting plans, dependency issues, court orders, and even in tort actions.

Understanding the what, why, and who, as well as the impact of domestic violence, enables judicial officers to improve the court's fact-finding and decision-making in domestic violence cases, and to develop appropriate court procedures to handle these cases more effectively, efficiently, and safely.

II. The What: The Behavioral[10] and Legal Definitions of Domestic Violence

Understanding domestic violence (whether it is called domestic violence,[11] intimate partner violence (IPV)[12], coercive control[13], battering, spousal assault, wife beating, etc.) requires an understanding of both the behavioral definition[14] (see Section II) and the legal definitions of domestic violence (see Section III). The Washington State behavioral and legal definitions delineate both (1) the relationship between the parties that constitutes the context for the abusive conduct, and (2) the behaviors that constitute that domestic violence conduct. There is significant overlap between the two definitions.

---

[9] B. E. Richie *Compelled To Crime: The Gender Entrapment of Battered Black Women* (New York: Routledge Press, 1996), multiple other publications related to Domestic Violence victims as defendants have been published, e.g., *Intimate Partner Violence Victims Charged with Crimes*, 2010.

[10] *U.S. v. Castleman,* 695 F.3d 582 (2014) (citing A. Ganley, *Understanding Domestic Violence, in Im-proving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 18 (2d ed. 1996).

[11] Department of Justice, Office of Violence against Women, March 2013 "domestic violence as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."

[12] Intimate Partner Violence (IPV), Center for Disease Control designation for this category of family violence (1999).

[13] Evan Stark, *Coercive Control, How Men Entrap Women in Personal Life***,** New York, Oxford University Press (2007).

[14] Ganley publications 1991, 1996, 2001, 2006, 2009, 2010.

A. Domestic Violence Relational Context

Behavioral definition of DV	Washington State legal definition of DV

"adults or adolescents … against their intimate partners"
• focused on intimate partners
• former, current or future
	"One (16 or older adult) family or household member by one (16 or older adult) family or household member."
	• more inclusive: both
	  o former, current, or future intimate partners: dating, cohabitating, married, separated, divorced, etc. and
	  o adult household members (family or nonfamily relationships)

- Intimate partner violence (IPV) is the most prevalent type of adult family or household member violence as defined in Washington legal definitions.
- Both the Washington behavioral and legal definitions of domestic violence focus on IPV, rather than on non-intimate partner violence between other adult household members (e.g., adult relatives, roommates).[15]

B. Domestic Violence Conduct

Behavioral Definition of DV	WA Legal Definitions of DV
"pattern of assaultive and coercive behaviors" … " Including physical, sexual, and psychological attacks, as well as economic coercion" • more inclusive regarding the conduct • pattern includes both criminal and non-criminal conduct • includes but is not limited to the conduct noted in the legal definition	"a. physical harm, bodily injury, assault, or the infliction…of fear of imminent physical harm, bodily injury or assault… (b) sexual assault… (c) stalking … (RCW 26.50.010)." • notes only certain conduct and harm; does not define the conduct that constitutes the infliction of fear of imminent physical harm, bodily injury or assault

The behavioral definition ("pattern of assaultive and coercive behaviors") is particularly salient:

[15] While violence towards other family members and cohabitants is also very important for the community to address, the dynamics, sources and solutions to such violence in those adult family/household relationships are different than those for intimate partner violence and as such need to be addressed separately. Moreover, other types of family violence (child maltreatment, elder abuse, and violence by a child/youth against an adult caregiver, etc.) are already addressed in other legal and court contexts and are beyond the scope of this manual.

- for understanding the multiple consequences that the pattern of conduct has on the adult victim, children, the community and the DV perpetrator,
- for assessing lethality/dangerousness, and
- for developing interventions and prevention strategies.

Focusing only on an isolated incident rather than the pattern or just on assaults that result in physical harm is inadequate for 1) the assessment of lethality, risks, or impacts, and 2) for developing effective interventions. Using *both* the Washington behavioral and legal definitions of DV is critical for making the complex decisions facing judicial officers hearing these cases in criminal, family law, juvenile, dependency, or protection order courts. Section II provides the overview of the behavioral definition of domestic violence and Section III provides the legal definition.

III. The What: Behavioral Definitions of Domestic Violence [16]

Domestic violence, also known as intimate partner violence, is a *pattern of behavior* that consists of multiple, often daily behaviors, including both criminal and non-criminal acts, injurious and non-injurious acts. While the criminal justice and sometimes even the civil court proceedings tend to focus on individual events, it is the entire pattern of the perpetrator's conduct that shapes how the abused party, their children, and the abuser are affected and function. Whether or not children injured physically by the DV perpetrator, children are impacted by IPV as they are used by the perpetrator to control the adult victim and as they are exposed to one parent abusing the other. The entire pattern of the DV perpetrator's conduct needs to be considered as civil and criminal courts deliberate about the most appropriate findings, sanctions, and court orders for a case involving DV.

A. Behavioral Definition of Domestic Violence

1. **Domestic Violence is:**
   - A pattern of assaultive and coercive behaviors;
   - Including physical, sexual, and psychological attacks, as well as reproductive and economic coercion;
   - That adults or adolescents use against their intimate partners.

   a) Assaultive and Coercive Tactics

[16] The behavioral definition ("pattern of assaultive and coercive behaviors… against intimate partner") has been used to varying degrees in Washington courts since 1984 and is very similar to the definitions used nationally and internationally. There have been shifts in emphasis on which part of the definition captures the full reality of domestic violence. This behavioral definition of domestic violence (and those similar to it) have been discussed, researched, and tweaked. And 30 years later the WA behavioral definition has stood the test of time and remains in combination with the legal definition the viable framework for WA courts. For comprehensive discussion of the behavioral definition as Intimate Partner Violence (http://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html) or as Coercive Control. see Evan Stark, (2007) *Coercive Control, How Men Entrap Women in Personal Life*, New York, Oxford University Press.

(1) **Physical attacks**
Spitting at, poking, shaking, grabbing, shoving, pushing, throwing, hitting with open or closed hand, restraining, blocking, strangulation, hitting with objects, kicking, burning, using weapons, etc. Physical attacks where the DV perpetrator uses physical force directly against the DV victim's body with or without injury.

(2) **Sexual Attacks**
Pressured, coerced, or physically forced sexual activity of all types.

(3) **Psychological attacks**

a. **Acts of violence against others, property, or pets**.
b. **Intimidation through**: referencing acts of past violence, threats of violence against victims, children, others, or self (suicide), surveillance, stalking, hostage-taking, screaming, controlling victim's sleep, nutrition, or medications, and abuse of victims through legal proceedings, immigration status, etc.
c. **Physically and or psychologically isolating** victims from family, friends, community, culture, and accurate information.
d. **Humiliation; emotional abuse:** repeated attacks against victim's self-esteem and competence, forcing victims to do degrading things, humiliating victim in front of others, controlling victim's activities, controlling decision making, etc.
e. **Reproductive coercion:**[17] Explicit behaviors the abuser uses to manipulate and control the victim's reproductive health and decision making, including controlling family planning decisions, forcing unprotected sex, engaging in birth control sabotage and condom manipulation, and pressuring the victim to continue or terminate a pregnancy.
f. **Alternating use of indulgences:** promises, gifts, being affectionate, etc.

[17] Linda Chamberlain & Rebecca Levenson, *Addressing Intimate Partner Violence Reproductive and Sexual Coercion: A Guide for Obstetric, Gynecologic, Reproductive Health Care Settings*, 3rd Edition, Futures Without Violence, 2013, available at http://www.futureswithoutviolence.org/userfiles/file/HealthCare/Reproductive%20Health%20Guidelines.pdf

(4) **Economic coercion**

- **a. Control of funds:** not contributing financially to family, withholding funds, impoverishing victims through legal system, etc.
- **b. Control of victim's access to resources:** money, health care, transportation, communication, child care, employment, housing, immigration status, legal representation, etc.

(5) **Use of children to control victim**

- **a.** Threats or use of physical or sexual attacks against children to control the other adult;
- **b.** Forcing child to participate in the physical or psychological abuse of adult victim;
- **c.** Using children as hostages, using visitation with children to monitor adult victim or to send messages to victim through children, interrogating children about victim's activities, being under- or over-engaged with children in order to control the victim, etc.;
- **d.** Undermining parenting of adult victim, prolonged custody or visitation conflicts, seeking parenting plans that allow them to maintain control over the adult victim post separation or divorce, etc.;
- **e.** False reports to Child Protective Service, refusal to participate in Child Welfare proceedings.

B. Domestic Violence (DV) Relational Context: Adult or Adolescent Intimate Relationships

1. **Variety of intimate relationships:**
   a) adult or adolescent intimate relationships.
   b) DV perpetrator and victim are known to each other.
   c) are or have been or may become intimate partners.
   d) may be or have been dating, cohabiting, married, divorced, or separated.
   e) may or may not have children in common.
   f) may be of very short or very long duration.
   g) may involve partners who identify as heterosexual, gay, lesbian, or bisexual, as well as transgender or non-transgender individuals.[18]

[18] **Pronouns, terminology:** For the purposes of this manual, masculine pronouns are sometimes used when referring to DV perpetrators, while feminine pronouns are sometimes are used to reference adult victims. This is not meant to detract from those cases where the victim is male or the perpetrator is female. This pronoun usage reflects the fact that in heterosexual relationships the majority of domestic violence victims are female and perpetrators are male (US

2. **Increased DV perpetrator access and control due to this intimate context**
   a) DV victims are known to the perpetrator.
   b) DV perpetrator has ongoing access to the victim, uses their extensive knowledge of the victim (daily schedule, employment, children, resources, vulnerabilities) to exercise considerable power and control over the victim's daily life, both physically and emotionally, even if separated. Most perpetrators of stranger violence usually do not have this continued access or control over their victims.
   c) The intimate context of domestic violence shapes the behavior of both the abused party and the perpetrator during criminal and civil court process. (See Sections IV and V.)

3. **Entitlement and social supports for domestic violence**
   DV victims not only deal with the particularities of a specific trauma (e.g., head injury) and the fear of future assaults by a known assailant, but they also must deal with the complexities of an intimate relationship with that assailant (shared history, social relationships, children, finances, etc.).
   a) Unlike victims of stranger violence, DV victims face many social barriers to separation from the DV perpetrators, as well as other barriers to their protection of themselves and their children.[19] (See Section V, H. Barriers.)
   b) Many DV perpetrators believe that they are entitled to use specific tactics of control with their partners and too often find social supports for those beliefs. For example, DV abusers, regardless of their conduct against the other parent, believe they have "parental right" to access to the child and to decision making about the child. This is too often supported by practices in both family law and in child welfare proceedings.
   c) DV perpetrators blame their DV tactics on the victims and are often successful in moving the focus off their conduct onto the alleged deficits of the DV victim.
   d) The intimate context frequently leads those outside the relationship
      (1) to take DV less seriously than other types of violence.
      (2) to inadvertently collude with the DV perpetrator in abusing and controlling the adult victim.

Department of Justice Report 243300, *Intimate Partner Violence: Attributes of Victimization, 1993-2011,* Shannon Catalano, Ph.D., BJS Statistician, November 2013,.and in the previously cited 2010 The National Intimate Partner Survey by the CDC , November 2011). This latter survey (NISVS, 2011) also reports the findings on Victimization by Sexual Orientation as those self- identifying lesbian, gay or bi-sexual have equal or higher prevalence experiencing IPV, SV, and stalking as compared to self-identified heterosexual. Consequently, there are examples in this manual specific to gay, lesbian, bisexual or heterosexual relationships, while other examples can be found in all intimate relationships.

[19] B. Hart, "Battered Women and the Criminal Justice System," *American Behavioral Science* 36 (1993): 624-38.

e) It is the "intimate partner" or "family" nature of the relationships that sometimes gives the perpetrator social, if not legal, permission to use abuse.

4. **Child victims of domestic violence**
   a) This behavioral definition of domestic violence focuses on the pattern of abuse and coercive control in adult or adolescents against their intimate partners and does not technically include child abuse or **neglect**. In Washington State, domestic violence is not in of itself child maltreatment (see Chapter 11).
   b) However, for some DV cases with children present, the children *may be* physically harmed or emotionally and developmentally impacted due to their being used as weapons against the DV adult victim by the perpetrator or as a result of being exposed to the violence. This is not true for all children and has to be carefully assessed. (For discussion on the impact of domestic violence on children, see Section VI, Children as Victims.)

5. **Adolescent domestic violence**
   a) The perpetrator and/or the victim may be an adolescent rather than an adult.
   b) **In cases involving adolescents, there is the same pattern of assaultive and coercive behaviors as in adult relationships.[20] For the purposes of the behavioral definition, domestic violence includes the abusive control done by one adult intimate to another, or by one adolescent intimate to another.**[21]

C. Domestic Violence Conduct

1. Wide variety of behaviors**: Assaultive as well as coercive conduct**
   a) **Some criminal:** acts of domestic violence such as hitting, choking, kicking, assault with a weapon, shoving, snatching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, harassment at work, attacks against property, attacks against pets, stalking, harassment, kidnapping, arson, burglary, unlawful imprisonment, etc.
   b) **Some non-criminal:** Other behaviors may not constitute criminal conduct, such as degrading comments, interrogating children or other family members, suicide threats or attempts, or false reports to CPS, INS, employers, family, and friends. Coercive conduct may also include controlling the victim's access to family resources: time, money, food, clothing, and shelter, as well as controlling the abused party's time and activities, etc. Whether or not there has been a finding of criminal conduct, evidence of such

[20] Barrie Levy, ed., *Dating Violence: Young Women in Danger* (1991).
[21] In Washington, individuals 16 years or older come within the scope of both RCW 26.50 (orders for Prosecution of Domestic Violence Offender) and RCW 10.99 (criminal provisions concerning domestic violence).

behaviors indicates a pattern of assaultive and abusive control that is considered domestic violence.

c) **Wide range of consequences** due to DV perpetrator's pattern of conduct: some life threatening, some not; some physically injurious and some not; some health shattering, some not; depriving victims of agency and of resources (funds, employment, housing, education, etc.); all tactics are damaging. (See Section V.)

2. **Pattern of behavior, not an isolated, individual act.**
   a) The pattern may be evidenced either by
      (1) **multiple tactics in one episode:** physical assault combined with threats of violence against self or others, isolating victim, control of resources or children, etc., and/or
      (2) **multiple episodes of varying tactics over time:** multiple assaults, repeated stalking, repeated threats, repeated violation of protection orders, or assault followed by repeated episodes of harassment through the courts, the victim's employment, etc.
   b) One battering tactic or episode builds on past tactics or episodes and sets the stage for the future. All incidents or tactics of the pattern interact with each other and have a profound effect on the abused party. Abuse parties constantly have to calculate what to do in the present based on their knowledge of what the perpetrator did in the past and is likely to do in the future.
   c) The intermittent use of physical force against person or property combined with psychological coercion establishes a dynamic of power and control in the relationship.

3. ***Ongoing* pattern of abusive and controlling tactics**
   a) While DV perpetrators may shift tactics, they continue their pattern of abusive control before and after court proceedings, before and after separation, and before and after entering into new relationships (both against new partners as well as continuing to be abusively controlling of past partners).
   b) Until the DV perpetrator directly engages in changing their conduct, the coercive control will continue.

4. **Attacks against others or property or pets to control the adult victim**.
   a) Some of the acts may appear to be directed against or target children, other family members, friends, property, or pets when in fact the perpetrator is committing these acts to control or punish the intimate partner (e.g., physical attacks against a child, throwing furniture through a picture window, strangling the adult victim's pet cat). Often DV perpetrators will reference their violence elsewhere as a reminder to victims that they should comply.

Although someone or something other than the abused party is physically damaged, that particular assault is actually part of the DV perpetrator's pattern of abuse directed at controlling the intimate partner.

5. **Psychological attacks through verbal, emotional abuse; humiliation.**
    a) Verbal/emotional abuse as a tactic of control: repeated verbal attacks against victim's parenting, family, friends, faith, employment, appearance, intelligence, or competence; often in front of others significant to the victim (children, family, employers, friends, the courts, etc.) or in public.
    b) Not all verbal insults between intimates are necessarily psychological battering. A verbal insult by a person who has not also been physically assaultive or threatening is not the same as a verbal attack by a person who has been violent in the past.
    c) It is the perpetrator's use of physical force against property or persons that gives power to their psychological abuse by instilling a dynamic of fear that physical force could be used against their victims.

6. **DV perpetrator's use of reproductive coercion**
    a) Reproductive and sexual coercion is a unique form of domestic violence used by predominantly male batterers to exercise control over their partner's body and reproductive health choices, to ensure economic dependency through unplanned pregnancies, and to secure a long-term presence in her life. Abused women's decision making is undermined or ignored regarding her access to health care, her reproductive health needs, and contraceptive use and family planning methods.
        (1) Pregnancy Coercion: The abuser threatens to leave the relationship or have a child with someone else if a child is not conceived; injures a pregnant partner in a way that leads to a miscarriage; threatens physical and psychological violence if the partner does not become pregnant or refuses to end a pregnancy.
        (2) Birth Control Sabotage: The abuser hides, withholds, or destroys the victim's birth control pills and removes contraceptive rings or patches; intentionally breaks, pokes holes in, or removes condoms; fails to withdraw when that is the agreed upon method of contraception; threatens physical harm if birth control is used; inhibits or stops the victim's ability to obtain contraception.

    b) Although sexual and reproductive coercion can occur outside the context of abuse in an intimate partner relationship, the use of reproductive and sexual coercion as a tool to gain control over a

partner is especially damaging to DV victims, as it exposes them to increased rates of unplanned pregnancy, sexually transmitted infections, and HIV.[22]

7. **Stalking as a tactic to monitor and control victim movements, activities, and contacts.**[23]
   a) Common stalking tactics include: physical surveillance (following, spying on, watching, or approaching the victim); making unwanted phone calls or other unwanted contact (letters, e-mails, text messages); sending gifts or photos; property invasion or damage; and making threats to harm the victim, her children or family, a new partner, or even themselves.[24]
      - Approximately 1 in 6 women in the United States has experienced stalking at some point in her lifetime in which she felt very fearful or believed that she or someone close to her would be injured as a result, with 62 percent of female stalking victims reporting the aggressor as a current or former partner.[25,26] Stalking limits the victim's basic personal freedoms with drastic economic, social, legal, psychological, and physical consequences.[27]
      - Cyber-stalking and the use of technology to track victims has become an integral tactic for stalkers. Telephone technologies, GPS and location services, and computer and internet technologies are often used to track the victim's every move.[28,29]

---

[22] In one of the largest studies on reproductive coercion to date, 35 percent of surveyed women who reported intimate partner violence (IPV) also reported birth-control sabotage. Approximately 75 percent of women reporting pregnancy coercion or birth control sabotage also reported a history of partner violence, with risk for unintended pregnancy doubling within this group. Elizabeth Miller, etc. al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, Contraception, 81, 316-322, 2010.

[23] For a complete overview of partner stalking and its relationship to intimate partner violence, please refer to T.K. Logan & Robert Walker, *Partner stalking: Psychological dominance or "business as usual?"* Trauma Violence Abuse, 10, 247-270, 2009, available at http://is.jabok.cz/el/JA10/zima2012/S2041/um/stalking_ENG.pdf

[24] For more information on stalking behaviors, please visit http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf

[25] Michele C. Black, et. al., *The National Intimate Partner and Sexual Violence Survey 2010 Summary Report,* National Center for Injury Prevention and Control Centers for Disease Control and Prevention, 2014, available at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

[26] T. K. Logan, *Research on Partner Stalking: Putting the Pieces Together*, National Institute of Justice, 2010, available at http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf

[27] For a complete review of the impact of stalking on victims, please visit https://www.stalkingriskprofile.com/victim-support/impact-of-stalking-on-victims

[28] For more information on cyber-stalking and the use of technologies to control victims, please visit http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/pages/tactics.aspx#note48

[29] Cynthia Fraser, et. al., *The New Age of Stalking: Technological Implications for Stalking,* Juvenile and Family Court Journal, 61(4), 39-55, 2010.

- Additionally, abusers often engage in acts of procedural stalking and paper abuse. Abusers use legal systems to stalk and control their partners through frivolous lawsuits, false reports of child abuse, and other system-related manipulations; exerting power, forcing contact, and financially burdening their ex-partners.[30,31] For more information about "abusive litigation," see Appendix H.

8. **Coercive control maintained by intermittent use of physical force and psychological attacks.**
   - The control of abused parties through intermittent use of physical assault or the credible threat of physical harm to the victim or others along with psychological abuse (verbal abuse, isolation, threats of violence, etc.) is domestic violence.
   - **The non-physical battering becomes an effective weapon** in controlling abused parties because they know through experience that perpetrators may back up the threats or taunts with physical assaults. The use of physical force does not have to be frequent or even recent. The reality that the perpetrators have used violence in the past, against this victim or against someone else, to get what they want gives the DV perpetrator additional power to coercively control the victims in other non-physical ways.

     Examples: an abuser's interrogation of the abused party about the victim's activities becomes an effective non-physical way to control the abused party's activities when the perpetrator has assaulted the victim in the past. Sometimes abusers are able to gain compliance from the abused party by simply referencing their past violence against the victim or others: "Remember what happened the last time you tried to get a job/to leave me/etc.?" Because of past assaults, there is the implied threat in the simple statement, "Remember…"

9. **Perpetrator's use of indulgences to control victim**.
   - Domestic violence perpetrators, like captors of prisoners of war, may also alternate their abusive tactics with occasional indulgences, such as flowers, gifts, sweet words, promises to get help, paying attention to children, etc. Some victims may think that the abuse has stopped, but for batterers this is usually a shift in their control tactics. Early domestic violence literature sometimes referred to this conduct as part of a "honeymoon phase" when, in fact, these are merely different tactics of control.

---

[30] Susan L. Miller & Nicole L. Smolter, *"Paper Abuse:" When All Else Fails, Batterers Use Procedural Stalking*, Violence Against Women, 17(5), 637-650, 2011.
[31] For a complete list of suggested stalking response tips for judges, please visit http://www.ovw.usdoj.gov/docs/tips-for-judges.pdf

- **Some mistakenly argue that both the perpetrator and the abused party are "abusive," one physically and one verbally**. While some abused parties may resort to verbal insults, the reality is that verbal insults are not the same as a fist in the face or a credible threat of physical harm. Furthermore, domestic violence perpetrators use both physical and verbal assaults. Research indicates that domestic violence perpetrators are more verbally abusive than either their victims or other persons in distressed/non-violent or in non-distressed intimate relationships.[32,33]

10. **Primary aggressor.**
    - Some argue that there is "mutual battering" where both individuals are using physical force against each other. Careful fact-finding often reveals that one party is the primary aggressor and the other party's violence is in self-defense (e.g., she stabbed him as he was choking her) or that one party's violence is more severe than the other's violence (e.g., punching/choking versus scratching).[34] Sometimes the domestic violence victim uses physical force against the batterer in retaliation for chronic abuse by the perpetrator, but this retaliation incident is not part of a pattern of assaultive and coercive behavior that would constitute domestic violence.
    - Research of heterosexual couples indicates that typically, women's motivation for using physical force is self-defense, while men use physical force for power and control.[35]
    - So called "mutual combat" among gay and lesbian partners is also rare. Even though gay and lesbian partners may be the same gender and similar size and weight, there is usually a primary aggressor who is creating the atmosphere of fear and intimidation that characterizes battering relationships.[36]

---

[32] G. Margolin, L. Gleberman, J. John and T. Ransford, *Interpersonal Factors Associated with Marital Violence* (paper presented at the Third National Family Violence Research Conference, University of New Hampshire, Durham, 1987).

[33] M A Dutton, L. Goodman; R, James Schmidt, *Development and Validation of a Coercive Control Measure for Intimate Partner Violence, Executive Summary*, 2005, National Institute of Justice.

[34] D. Saunders, "When Battered Women Use Violence: Husband-Abuse or Self-Defense?" *Violence and Victims* 1, no. 1 (1986): 47-60; L. K. Hamberger and T. Polente, "Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice," *Violence and Victims* 9, no. 2 (1994): 125-37.

[35] D. Saunders and A. Browne, "Domestic Homicide," *Case Studies in Family Violence*, ed. R. Ammerman and H. Michel (1991); M. Wilson and M. Daly, "Til Death Do Us Part," in *Femicide: The Politics of Woman Killing*, ed. J. Radford and D. E. Russell (1991).

[36] P. Letellier, "Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence," *Violence and Victims* 9, no. 2 (1994): 95-106; K. Lobel, ed., *Naming the Violence: Speaking out about Lesbian Battering* (1986); C. Renzetti, *Violent Betrayal: Partner abuse in lesbian relationships* (1992).

IV. The What: the Legal Definition of Domestic Violence

A. Relationship Context:

1. **Washington State defines domestic violence as certain crimes committed** by one family or household member against another. The majority of the family or household members defined by the state in 10.99.020 RCW fit the behavioral definition of intimate partner: "spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time . . . persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.. "

2. However, RCW 10.99.020 also includes household or family members who are not, nor have they ever been, intimate partners: "adult persons who are presently residing together or who have resided together . . . persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren."

3. While intimate partner violence is the most common form of domestic violence, non-intimate partner violence as defined by Washington law may also appear in the courts. The dynamics are different for intimate partner violence and domestic violence perpetrated by household members who are not, nor have they ever been, intimate partners with their victims (adult siblings, adult child to parent, roommates, etc.). This chapter, as well as Appendix A on DV evaluations and Appendix B on DV perpetrator ttreatment, focus on IPV, although the statutory framework does not make this distinction.

The following charts are provided to assist the court in identifying these cases.

Relationships Provided for by Domestic Violence Statutes:

Relationship Between Parties	Applicable Statutes
Current Spouses	RCW 26.50.010(2); 10.99.020(3)
Former Spouses	RCW 26.50.010(2); 10.99.020(3)
Parents of Child in Common	RCW 26.50.010(2); 10.99.020(3)
Adult Persons Related by Blood or Marriage	RCW 26.50.010(2); 10.99.020(3)
Unmarried Persons of Same or Different Genders Currently or Previously Residing Together	RCW 26.50.010(2); 10.99.020(3)
Intimate Partners of Same Gender	RCW 10.99.020(1); 10.99.020(3)
Dating Relationships	RCW 26.50.010(2); 10.99.020(3)
Biological or legal parent-child relationship	RCW 26.50.010(2); 10.99.020(3)

Behaviors Included in Domestic Violence Statutes:

Behavior	Statute Citation
Physical Harm, Bodily Injury	RCW 26.50.010(1)
Assault	RCW 26.50.010(1)
Infliction of Fear of Imminent Physical Harm, Bodily Injury, or Assault	RCW 26.50.010(1)
Sexual Assault of One Family or Household Member by Another	RCW 26.50.010(1)
Stalking	RCW 9A.46.010; 10.14.020; 26.50.010(1)

Criminal Charges that Can Result from Domestic Violence

The following chart (pp.16-17) is not an exhaustive list but illustrates both the behavioral and legal definitions of domestic violence as well as the criminal charges that can result from these acts. Note that some of the behaviors are not considered criminal, but they are nonetheless used by the perpetrator as part of the pattern to control the victim. The chart on pp. 18-19 indicates how these same DV tactics may appear in family court, dependency court, or protection order proceedings.

DOMESTIC VIOLENCE: BEHAVIORS AND CRIMINAL CHARGE

Type of Domestic Violence	Behaviors (examples of both criminal and non-criminal acts)	Criminal Charges/Procedures	Relevant RCWs
Physical Attacks	Shoving, spitting at, grabbing, pushing, slapping, punching, kicking, shaking, choking, hitting, burning, assault with a weapon, or physically restraining, imprisonment, etc.	Assault Manslaughter or Murder Reckless Endangerment Drive by Shooting, Criminal No Contact Orders. Arrest, bail, imprisonment	9A.36.011-.041 9A.32.060-.070 9A.32.010-.050 9A.36.050 9A.36.045
Sexual Attacks	Forced sex, attacks against genitals, forcing sex in front of children or others, coerced sex, pressured sex, unwanted sexual touching, pimping, etc.	Rape Rape of a Child Indecent Liberties Assault with Intent to Commit Rape	9A.44.040-.060 9A.44.073-.079 9A-44.100 9A.36.021(2)(b)
Psychological Attacks	Threats of violence against victim or others, suicidal threats or acts, false reports to third parties (CPS, INS, employers), child snatching, reckless driving to intimidate victim, isolating, interrogating, controlling, verbal assaults, degrading victim, surveillance, distributing intimate images, etc.	Coercion Telephone Harassment Custodial Interference Harassment Criminal Trespass Stalking Cyber stalking Unlawful Imprisonment Reckless Driving Violation of Court Orders Wrongful Distribution of Intimate Images	9A.36.070 9.61.230 9A.40.060-.070 9A.46.020 9A.52.070-.080 9A.46.110, 9A.86 9.61.260 9A.40.040 46.61.500 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063,

Type of Domestic Violence	Behaviors (examples of both criminal and non-criminal acts)	Criminal Charges/Procedures	Relevant RCWs
			26.44.150, 26.50.060, 25.50.070, 26.50.130, 26.52.070, 74.34.145
Attacks against Property/Pets	Attacks against property to control victim, hitting walls, destroying objects, giving away property, setting fire to property, tormenting/abusing pets, etc.	Cruelty to Animals Malicious Mischief Theft Arson or Reckless Burning Burglary	9.08.070 9A.48.070-.090 9A.56.030-.050 9A.48.020-.050 9A.52.025
Use of Children to Control Victim	Injury to child during assault on victim, physical or sexual abuse of child, threats of violence, kidnapping, hostage taking, child concealment, children witnessing violence, etc.	Assault of a child Kidnapping Custodial Interference Criminal Mistreatment Homicide by Abuse	9A.36.120-.140 9A.40.020-.030 9A.40.060-.070 9A.42.020-.035 9A.32.055
Economic Coercion	Control of family resources: money, transportation, health care, telephone, retirement/investment funds, lengthy court battles to impoverish victims, etc.	Theft Fraud Embezzlement	9A.56 9A.60

DOMESTIC VIOLENCE: BEHAVIORS IN CIVIL, FAMILY LAW, AND DEPENDENCY COURT PROCEEDINGS

Type of Domestic Violence	Behaviors	Civil, Family Law, Dependency Court Descriptors	Relevant RCWs
Physical Attacks	Spitting, shoving, grabbing, pushing, slapping, punching, kicking, strangulation, hitting, burning, assault with objects or weapon, etc.	Domestic Violence Protection Order; DCFS Child Protective Order, Restrictions in Parenting Plans; Termination of Residential Leases; Leave from Employment; Good Cause for Unemployment Insurance.	26.50 26.44.063, .067, .150 26.09.191 59.18.570,.575,.580, .585 49.76 50.20.050(1)(b)(iv)
Sexual Attacks	Forced, coerced or pressured sex, attacks against genitals, forcing sex with or in front of third parties including children,, forced use of pornography or unwanted sexual practices, etc.	Sexual Assault Protection Order; DCFS Child Protective Order,, Restrictions in Parenting Plans; Leave from Employment	7.90 26.44.063, .067, .150 26.09.191 59.18.570,.575,.580, .585 49.76

Type of Domestic Violence	Behaviors	Civil, Family Law, Dependency Court Descriptors	Relevant RCWs
Psychological Attacks	Threats of violence against victim or others, suicidal threats or acts, false reports to third parties (CPS, INS, employers), child snatching, reckless driving to intimidate victim, isolating, stalking/surveillance, interrogating, controlling, reproductive coercion or degrading victim, abusive litigation, distribution of intimate images[37], etc.	Threats of Physical Harm in Domestic Violence Protection Orders; Anti-Harassment Orders; Stalking Protection Orders; Cyber-stalking; Abusive Use of Conflict as Restriction in Parenting Plans; Basis for Declining Mediation; Civil liability for distribution of intimate images; Time needed to acquire skills for employment in consideration of maintenance.	26.50.010 10.14 7.92 26.09.191 26.09.016 26.09.120
Attacks against Property/Pets	Attacks against property/pets to control victim, hitting walls, throwing objects, damaging property, giving away property, setting fire to property, tormenting pets, etc.	Threats of Physical Harm in Domestic Violence Protection Orders; Anti-Harassment Orders; Abusive Use of Conflict as Restriction in Parenting Plans; Just and equitable property distribution	26.50.010 10.14 26.09.191 26.09.080
Use of Children to Control Victim	Attacks against child to control adult victim, injury to child during assault on victim, physical or sexual abuse of child, threats of violence, kidnapping, child concealment, using children for surveillance, children witnessing violence, threatening to call CPS, etc.	DCFS Child Protective Order, Child Maltreatment (physical or sexual abuse), Neglect of Child; Abusive Use of Conflict, or Withholding Parental Access as Restriction in Parenting Plan; Stalking; Cyber-stalking	26.44.063, .067, .150 26.09.191 7.92
Economic Coercion	Control of family resources: money, transportation, health care, telephone, withholding child support, retirement/investment funds, lengthy court battles to impoverish victims, etc.	Abusive Use of Conflict or Child Neglect as Restriction in Parenting Plans, Just and Equitable division of property; Time needed to acquire skills for employment in consideration of maintenance	26.09.191 26.09.080 26.09.120

[37] Chapter 8, Laws of 2015, ESB 2160 took effect on September 26, 2015 but has not been codified as of the date of printing. http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/House/2160-S.SL.pdf

V. Assessing Lethality/Dangerousness: Domestic Violence May Be Lethal or Health Shattering:

One of the more challenging aspects[38] of responding to domestic violence is assessing how dangerous the domestic violence may be in a specific individual case. It is usually the first concern when domestic violence is identified and remains the primary concern throughout the life of a case.

Domestic violence may result in death or severe injury

- to the adult victim, the children, others (family, friend, or innocent bystanders), or to the DV perpetrator
- due to the behaviors of the perpetrator, or of the adult victim, or of the children.

What domestic violence fatality reviews in various states[39] have shown is that much of the salient information related to the homicides or severe injuries was known prior to the homicides by various community systems, but too often decision-makers did not understand the connection between the domestic violence tactics and individual factors or knew only part of the information.

A. Assessing lethality effectively:

- **Danger assessments that use direct input from the adult survivor** continue to be the most accurate for the assessment of dangerousness. DV survivors have the most direct knowledge of the DV abuser. While at times DV survivors may under-report the danger, whenever DV survivors do express fear of being killed (or the children/others being killed), that should be given priority and never minimized.

- **Consider multiple factors:** factors (the specific tactics have been used previously, presence of co-occurring issues substance abuse, suicide, children fighting back, etc.) all interact and effect an assessment of danger. The lethality of domestic violence often increases when the perpetrator believes that the abused party is leaving or has left the relationship.[40] Other risk factors for dangerousness are: threats to kill or maim, stalking, use of weapons,

---

[38] Andrew R. Klein, *Lethality Assessments and the Law Enforcement Response to Domestic Violence*, (Journal of Police Crisis Negotiations), 12(2), 87-102, 2012.

[39] J Fawcett, "Up to Us," *Washington State Domestic Violence Fatality Review 2010;* K. Starr, M. Hobart and J. Fawcett, "If I had One More Day," *Washington State Domestic Violence Fatality Review 2006;* K. Starr, M. Hobart and J. Fawcett, "Every Life Lost is a Call for Change," *Washington State Domestic Violence Fatality Review 2004*; M. Hobart, "Tell the World What Happened to " *Findings and Recommendations from the Washington State Domestic Violence Fatality Review 2002*; M. Hobart, "Honoring Their Lives, Learning from Their Deaths," *Findings and Recommendations from the Washington State Domestic Violence Fatality Review 2000* (Seattle, WA: Washington State Coalition Against Domestic Violence, 2006, 2004, 2002, 2000), http://dvfatalityreview.org/, www.wscadv.org.

[40] J. Campbell, "If I Can't Have You No One Can: Power and Control in Homicide of Female Partners," *Femicide: The Politics of Women Killing*, ed. J. Radford and D. Russell (1992).

suicidality of the perpetrator, use of alcohol or drugs, co-occurrence of child abuse, and failure of past systems to respond appropriately. Page 23 provides a list of factors to consider when attempting to assess the danger to any party, either through significant injury or death in a particular domestic violence case.

- **Consider all tactics of abuse:** When the courts and the community are weighing the safety needs of the victims, their children, and the community, they must consider all the factors, including information about the coercive controlling tactics. Focusing exclusively on the assaults will result in misreading danger to the adult victims, their children, and the community.

- **Consider multiple sources of input:** the information must be gathered from multiple sources: the adult victim, children, other family members, perpetrators, and others (probation, counselors, and anyone having contact with family).

- **Repeat lethality assessments:** danger level is not static. It ebbs and flows.

  The lethality of domestic violence is tragically clear when the perpetrators kill their partners, as well as the children or other family members, and then kill themselves, or when the abused persons desperate to protect themselves and their children kill their perpetrators.

  For this reason, it is critical that the courts use all available legal remedies, such as protective orders, courtroom security, jail, court review, etc., to provide the victim with protection throughout the duration of the court proceedings and after.[41] Effective intervention in domestic violence cases may stop the violence before it becomes a homicide case.[42]

[41] Research on battered women who kill has found no distinguishing characteristics between battered women who kill and those who do not. The only differences found in comparing these two groups of battered women were found in their batterers (the men who were killed had been more violent against the victim, as well as the children, than those who were not killed). A. Browne, *When Battered Women Kill* (1987).
[42] For a more complete discussion on the legal issues involved in cases where an alleged battered woman kills the alleged perpetrator, see C. Gillespie, *Justifiable Homicide* (1989).

LETHALITY ASSESSMENT: FACTORS TO CONSIDER[43]

- ☐ **Perpetrator's access to the victim**

- ☐ **Pattern of the perpetrator's abuse**
  - ☐ Frequency/severity/escalation of the abuse and control tactics in current, concurrent, and past relationships.
  - ☐ Use of weapons and use of dangerous acts (strangulation, repeated blows, throwing victim down flight of stairs, killing pets, etc.).
  - ☐ Threats to kill adult victim, children, self.
  - ☐ Stalking, imprisonment, hostage taking.

- ☐ **Perpetrator's state of mind**
  - ☐ Obsession with victim, jealousy.
  - ☐ Ignoring negative consequences of their abusive behavior
    - ☐ to abuser (arrests, court orders, jail time, etc.)
    - ☐ or to the victim (severe injuries, employment, etc.)
  - ☐ Depression/desperation.

- ☐ **Co-occurring issues: Individual factors that reduce behavioral controls of either adult victims to protect themselves or perpetrators to self-regulate**
  - ☐ Substance abuse
  - ☐ Certain medications
  - ☐ Psychosis
  - ☐ Brain damage

- ☐ **Suicidality of perpetrator, victim, or children**

- ☐ **Adult victims' use of physical force; fighting back**

- ☐ **Children's use of physical force or inserting themselves in the fights**

- ☐ **Situational factors**
  - ☐ Separation violence/perceived loss of control over victim /victim autonomy
  - ☐ Presence of other stresses

- ☐ **Past failures of systems to respond appropriately; this emboldens batterers**

---

[43] A. Ganley, Ph.D., *Domestic Violence: National Curriculum for Children's Protection Services* (Family Violence Prevention Fund, 1996).

B. Impact of Domestic Violence on Health: Not All Danger Results in Death.

1. **Statistics regarding the prevalence and severity** of intimate partner violence vary greatly, depending on survey type, date, and subjects screened. The groundbreaking 1996 National Violence Against Women Survey revealed that approximately 2 million women were physically assaulted, stalked, or raped by an intimate partner annually in the United States, with an estimated 5.3 million victimizations occurring among U.S. women annually.[44] The most recent data collected by the CDC in 2010 reveals that one in three women in the United States will experience intimate partner violence, sexual assault, or stalking within their lifetime. An estimated 5.9% of women in the United States, almost 7 million women, reported an experience of rape, physical violence, or sexual violence by an intimate partner *within the past year*. Additionally, an estimated 5.7 million men reported experiencing these forms of violence by an intimate partner.[45]

2. **Homicides: On average, every day more than three women are murdered by their intimate partners in the US.[46] According to the *Washington State Uniform Crime Report* there were 45,944 domestic violence offenses reported to law enforcement agencies in** 2012, making up 49.6% of all crimes against persons in Washington State.[47] Female victims made up 75% of the 1,496 murder cases that were attributed to intimate partners in 2010.[48]

3. **Injuries 14.8% of women and 4% of men have been injured as a result of IPV. The United States Department of Justice reported that 37% of all women who sought care in hospital emergency rooms for violence-related injuries were injured by a current or former spouse, boyfriend, or girlfriend.** [49,50]

4. **Domestic violence has a major long-term health impact on victims and their children**, not only through direct injury or death but also in terms of

---

[44] National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States*, Centers for Disease Control and Prevention, 2003.
[45] Michele C. Black, et. al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010* Summary Report, Centers for Disease Control and Prevention, 2011.

[47] Kellie Lapczynski, et. al., *Crime in Washington 2012 Annual report*, Washington Association of Sheriffs and Police Chiefs, 2012.
[48] Mathew R. Durose, et. al., *Family Violence Statistics Including Statistics on Strangers and Acquaintances*, Bureau of Justice Statistics, 2005.
[49] Michel R. Rand, *Violence-Related Injuries Treated in Hospital Departments*, (Bureau of Justice Statistics, 1997).
[50] M. Durose, C. Wolf Harlow, P. Lanagan, M. Motivans, R. Rantala, E. Smith and E. Constantin, *Family Violence Statistics Including Statistics on Strangers and Acquaintances* (Bureau of Justice Statistics, United States Department of Justice, June 2005).

impact on illnesses. Women who have experienced domestic violence are 80% more likely to have a stroke, 70% more likely to have heart disease, 60% more likely to have asthma, and 70% more likely to drink heavily than women who have not experienced intimate partner violence.[51] For a complete review of the health impact of domestic violence, see the introduction by P. Salber, M.D., to *Improving the Health Care Response to Domestic Violence*.[52] There is a large body of research documenting the health impact on adult victims.[53]

5. **Without intervention, the perpetrator's pattern of abusive behaviors will most likely escalate in both frequency and severity.** The pattern may change with more emphasis on the psychological abuse, or the physical assaults, over time. Regardless of these variations, damage to the abused party and the children may become more severe.

C. Cautions regarding the assessments of lethality

1. There are a variety of written risk assessment instruments that have become available in last ten years. [54] While they all purport to evaluate the risk of domestic violence, often they evaluate different aspects of domestic violence and rely on different sources of the data (professional vs. victim reports, etc.) [55]
   a) **Re-offending or recidivism in legal system** (DV Mosaic deBecker), DVSI (Williams & Houghton), K-SID (Gelles & Lyon), O.D.A.R.A. (Z. Hilton), SARA (Kropp et al).
   b) **A systems safety audit** (PSI -Duluth)
   c) **Predicting homicides or attempted homicides** (Danger Assessment)[56]
   d) **Measures based on offender intervention programs** (PAS- D. Dutton)

---

[51] Centers for Disease Control and Prevention, Adv*erse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence,* Morbidity and Mortality Weekly Report, 57, 113-140, 2008.
[52] C. Warshaw and A. Ganley, *Improving Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* (San Francisco, CA: Family Violence Prevention Fund, 1995).
[53] A. Coker, P. Smith, L. Bethea, M. King and R. McKeown, "Physical Health Consequences of Physical and Psychological Intimate Partner Violence," *Archives of Family Medicine* 9 (2000). Bonomi, A.E., Anderson, ML., Rivara FP, Thompson RS, 2009, Health Care Utilization and Costs Associated with Physical and Non-physical-Only Intimate Partner Violence. Health Services Research, 44 (3): 1052-67.
[54] Andrew R. Klein, *Lethality Assessments and the Law Enforcement Response to Domestic Violence*, JOURNAL OF POLICE CRISIS NEGOTIATIONS, 12(2), 87-102, 2012.
[55] Evan Stark, *The Dangers of Dangerousness Assessment*, FAMILY & INTIMATE PARTNER VIOLENCE QUARTERLY, 6(2), 13-22, 2013.
[56]Jacquelyn C. Campbell & Nancy Glass, *Danger Assessment*, John Hopkins School of Nursing, 2014, Jacquelyn C. Campbell, et. al., *the Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, Journal of Interpersonal Violence, 24, 4653-674, 2009.

2. **Most dangerousness assessments are based on homicide studies and** focus exclusively on how dangerous the DV perpetrator is. This research on predicting domestic violence homicides (or attempted homicides) reveals crucial but only partial elements of predicting dangerousness.
    a) Adult victims have to die (or almost die) to make their way into homicide statistics and studies. In many domestic violence cases, the abused parties are left with their health shattered: paralyzed, deaf, blind, brain damaged, etc., but not necessarily dead. Such cases would rarely appear in homicide studies.
    b) Also, domestic violence homicide statistics often do not capture the perpetrators' violence toward children, others, or themselves.
    c) Nor does the homicide research capture the damage done when DV victims or children fight back to escape or protect themselves.
    d) Nor do homicide studies capture those victims who are entrapped and their lives forever damaged by the abuser's excessive, continuous control.[57] .

3. Inadequacy of Psychological Testing for Assessing DV Dangerousness
Psychological tests (e.g., MMPIs or other personality measures or cognitive testing) are not useful for either (1) identifying whether or not there is DV in a case, or for (2) assessing dangerousness. (See Appendix A on domestic violence evaluations and assessments). Psychological testing is typically personality testing. DV is a conduct problem and not a personality problem (see Section V on perpetrators) and therefore psychological testing has limited relevance to judicial decision making in DV cases. Psychological testing *in conjunction* with behavioral assessments may have limited usefulness for treatment planning once there is a finding of DV and dangerousness has been assessed.

4. **Instruments to predict child abuse are not useful in predicting** either intimate partner abuse or the risk to children posed by intimate partner perpetrators.

VI. The Why: Causes of Domestic Violence

A. Domestic Violence is "Caused" by Learning, Not Biology or Genetics

1. **Domestic violence conduct**, as well as the rules and regulations of when, where, against whom, and by whom domestic violence is to be used, are learned through both observation and reinforcement throughout the DV

[57] Evan Stark, *Coercive Control, How Men Entrap Women in Personal Life*, New York, Oxford University Press(2007)

perpetrator's life. [58] While there are co-occurring issues that interact with the DV perpetrator's experience that affect a specific individual's pattern of conduct, this learning about the use of assaultive and coercive conduct from observation and reinforcement of experience at individual, family, community, and societal levels is the root or primary "cause."

a) **Learning through observation:** seeing the conduct carried out successfully or at least without negative reinforcement; e.g., the male child witnessing the abuse of his mother by his father, or in the proliferation of images of abuse/control against women in the media.
b) **Reinforcement of behavior**: engaging in the conduct and then being reinforced for it (e.g., a judge colluding with the perpetrator in blaming the victim and not holding the perpetrator accountable for his own conduct).

2. **Domestic violence is learned throughout a person's lifetime, through observing family and friends as well as having experiences in community.**
DV is learned (and reinforced) by interactions with all of society's major institutions: the familial, social, legal, religious, educational, mental health, medical, child welfare, entertainment, media, etc. In all of these social institutions, there are various customs that perpetuate the use of domestic violence as legitimate means of controlling family members at certain times (religious institutions that state that a woman should submit to the will of her husband; laws that do not consider violence against intimates a crime, practices where courts ignore impact of IPV on children if they have not been directly hit, etc.). These practices inadvertently reinforce the use of violence to control intimates by failing to hold the perpetrator accountable for the violence and by failing to protect the abused party.

3. **Domestic violence is learned through reinforcement** by the DV perpetrator engaging in the behavior and repeating it when it works (at least some of the time). It is overtly, covertly, and inadvertently reinforced by all of society's institutions at some point.[59] An individual batterer may be arrested only to have the case dropped as he successfully minimizes or denies responsibility for his conduct or blames the victim for his own conduct. This ongoing pattern of assaultive and coercive control allows the perpetrator to gain control of the victim some of the time through fear and intimidation. Abusive conduct only has to be reinforced intermittently to keep the abusive conduct going.

---

[58] A. Bandura, A. **Aggression: A Social Learning Analysis**, 1973, New Jersey, Prentice Hall, Inc., A. Ganley, "Integrating A Feminist and Social Learning Analysis of Aggression: Creating Multiple Models For Intervention With Men Who Batter," in *Treating Men Who Batter: Theory, Practice, and Programs*, ed. P.L. Caesar and L.K. Hamberger (1989).
[59] G. Dutton, *The Domestic Assault of Women* (1988).

4. **The fact that most domestic violence** is learned means that the DV perpetrator's behavior can be changed. Learning is not destiny. There are individuals who are exposed to domestic violence in their family and yet do not go on to be abusers. The histories of these individuals reveal where they had alternative role models for respectful interactions or were challenged to take another path. Most individuals can learn not to batter when they take responsibility for their behaviors and when there is sufficient motivation for changing that behavior. The court plays a strong role in providing perpetrators with sufficient motivation to change and to participate in the rehabilitation process by holding perpetrators, not the victims, accountable for both the violence and for making the necessary changes to stop their patterns of coercive control. Most importantly, the court plays an essential role in protecting the abused party during the perpetrator's rehabilitation process, and by monitoring that process to ensure the perpetrator's compliance with the court orders. (See Appendix B on court-ordered treatment).

B. Illness-Based Violence vs. Learning-Based Violence of Domestic Violence

1. **Illness-based violence** (e.g., Alzheimer's disease, Huntington's, chorea, psychosis) is uncommon, but it does happen, and such cases may end up in court as domestic violence. A very small percentage of violence against intimates is mislabeled as domestic violence when actually it is caused by organic or psychotic impairments.

   a) It is relatively easy to distinguish this illness-based violence from the learning-based violence typical of domestic violence cases. **With illness-based violence:**
      - Usually no selection of a particular victim (whoever is present when the "short circuit" occurs will get attacked, so it may be a helping professional, family member, stranger, etc.), and there is no pattern of assaultive and coercive control tactics.
      - With learning-based violence the perpetrators direct a pattern of abusive behaviors toward a particular person or persons and adjust their tactics strategically to any constraints in the context (e.g., increasing use of children to monitor DV victim when a no-contact order in place).

   b) With illness-based violence there is usually a constellation of other clear symptoms of the disease.
      - For example, with an organic brain disease there are changes in speech, gait, physical coordination, etc. With psychosis there are multiple symptoms of the psychotic process (e.g., he attacked her "because she is a CIA agent

sent by the Pope to spy on him using the TV monitor").

- With illness-based violence the assaultive acts are strongly associated with the progression of a disease (e.g., the patient showed no prior acts of violence or abuse in a 20-year marriage until other symptoms of the disease had appeared).

2. Poor recall of the event alone is *not* an indicator of illness-based violence (see Section IV, B on perpetrators for discussion of their minimization and denial).

3. Knowing in these rare cases that the violence is caused by a disease will not alter the fact that the violence occurred, but it should influence:

   - the strategies the court chooses to use to increase the safety of the victim, the children, and the public.
   - strategies for rehabilitation of the perpetrator: specialized domestic violence counseling is contraindicated for illness-based violence. In such cases, the violence can be more effectively managed by appropriate external constraints and by appropriate medical or mental health intervention.

C. Domestic Violence Is Not "Out of Control" Behavior

1. **Often there is a claim that domestic violence is the result of "losing control." Some perpetrators will batter only in particular ways, e.g., hit certain parts of the body, but not others; only use violence towards the victim even though they may be angry at others (their boss, other family members, etc.); break only the abused party's possessions, not their own. Domestic violence perpetrators make choices even when they are supposedly "out of control." Such decision** making indicates they are actually in control of their behavior.[60]

2. Domestic violence involves a pattern of conduct that involves choice. Certain tactics require a great deal of planning to execute (e.g., stalking, interrogating family members, controlling and hiding money). Some batterers impose "rules" on the victims, carefully monitoring their compliance and punishing victims for any "infractions" of the imposed

[60] A. Ganley, *Court Mandated Counseling For Men Who Batter* (1981) (available from author); A. Ganley, "Impact of Domestic Violence on the Defendant and Victim in the Courtroom," in Janet Carter, et al., *Domestic Violence: The Crucial role of the Judge in Criminal Court Cases: A National Model for Judicial Education* (Family Violence Prevention Fund, 1991); A. Ganley, "Feminist-Based Interventions for Battering Men," in *Treating Men Who Batter: Theory, Practice, and Programs*, ed. P. Caesar and L. Hamberger (1989).

rules.[61] Such attention to detail contradicts the notion that perpetrators "lost" control or that their abusive behavior is the result of poor impulse control.

3. Battering episodes are done intentionally to gain victim compliance. Some tactics are carried out occur when the perpetrator is not even emotionally charged.[62] The perpetrators choose to use assaultive and coercive tactics to get what they want or to get that to which they feel entitled or to punish victims for an infraction. Interviews with perpetrators reveal that when using both overt and subtle forms of abuse, perpetrators know what they want from the victims.[63] Perpetrators use varying combinations of physical force and threats of harm and intimidation to instill fear in their victims. At other times, they use other manipulations through gifts, promises, and indulgences. Regardless of the tactic chosen, the perpetrator's intent is to get something from the victims, to establish domination over them, or to punish them. Perpetrators selectively choose tactics that work to control their victims.[64]

D. Domestic Violence Is Not Caused By.

There are various misconceptions about the causes of domestic violence which can often mislead courts in their response to domestic violence cases.

1. **Domestic Violence Is Not Caused By Stress**
   - There are different sources of stress in our lives (e.g., stress from the job, stress from not having a job, marital and relationship conflicts, losses, discrimination, poverty). People respond to stress in a wide variety of ways (problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.).[65] People choose ways to reduce stress according to what has worked for them in the past.
   - People can be in distressed relationships and experience negative feelings about the behavior of the other without choosing to respond with violence or other criminal activities.
   - It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence or other illegal behaviors. Just as we would not excuse a robbery or a mugging of a stranger, simply because the perpetrator was "stressed," we should not excuse the perpetrator of domestic violence because he or she was "stressed."

---

[61] K. Fischer, N. Vidmar and R. Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2174 (1993).
[62] N. Jacobson and J. Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (Simon and Schuster, 1998).
[63] A. Ganley, *Review of Intake Interviews With Batterers Seeking Treatment Program* (unpublished data, 1995; 1988-94).
[64] E. Pence and M. Paymar, *Educational Groups for Men Who Batter: The Duluth Model* (1993).
[65] A. Bandura, *Aggression: A Social Leaning Analysis* (1973).

- Moreover, as already noted, many episodes of domestic violence occur when the perpetrator is not emotionally charged or stressed. When we remember that domestic violence is a pattern of behavior consisting of a variety of behaviors repeated over time, then citing specific stresses (divorce, loss of job, etc.) becomes less meaningful in explaining the entire pattern.

2. **Domestic Violence Is Not Caused by Anger**
    - The role of anger in domestic violence is complex and cannot be simplistically reduced to cause and effect. Some battering episodes occur when the perpetrator is upset. Some abusive conduct is carried out calmly to gain the victim's compliance. Some displays of anger or rage by the perpetrator are merely tactics used to intimidate the victim and can be quickly altered when the abuser thinks it is necessary (e.g., upon arrival of police).
    - Current research indicates that there is a wide variety of arousal or anger patterns among identified domestic violence perpetrators, as well as among those identified as not abusive.[66] These studies suggest that there may be different types of batterers. Abusers in one group actually reduced their heart rates during observed marital verbal conflicts, suggesting a calming preparation for fighting rather than an out of control or angry response. Such research challenges the notion that domestic violence is merely an anger problem and raises major questions about the safety and efficacy of anger management programs for batterers.
    - Remembering that domestic violence is a pattern of behaviors rather than isolated, individual events help to explain the number of abusive episodes that occur when the perpetrator is not angry. Even if experiencing anger at the time, perpetrators still choose to respond to that anger by acting abusively. Ultimately, individuals are responsible for how they express anger or any other emotions, and for how they try to control adult victims through intimidation or force.

3. **Domestic Violence Is Not Caused by Relationship Dynamics or by the Abused Party's Behavior**
    - Batterers develop their pattern of control in early dating relationships and maintain them across relationships. They tend to repeat those patterns in all their intimate partnerships, regardless of the significant differences in the personalities or conduct of their intimate partners or in the characteristics of those particular

[66] J. Gottman, N. Jacobson, R. Rushe, J. Wu Short, J. Babcock, J. La Taillade and J. Waltz, "The Relationship Between Heart Rate Reactivity, Emotionally Aggressive Behavior and General Violence in Batterers," *Journal of Family Psychology* 9, no. 2 (1995); N. Jacobson, J. Gottman, J. Waltz, R. Rushe, J. Babcock and A. Holtzworth-Munroe, "Affect, Verbal Content, and Psychophysiology in the Arguments of Couples With a Violent Husband," *Journal of Consulting and Clinical Psychology* 62 (1994): 982-88.

relationships themselves. These variables in partners and relationships support the position that, while domestic violence takes place within a relationship, it is not caused by the relationship.

- **Not victim's personality or behavior:** Research indicates that there are no personality profiles for battered women.[67] Battered women are no different from non-battered women in terms of psychological profiles or demographics. Once again this challenges the myth that something about the woman causes the perpetrator's violence. Furthermore, one research study indicates that no victim behavior could alter the perpetrator's behavior.[68] IPV victims report being assaulted when they agreed or disagreed, when asleep, passed out or awake, when they fought back or complied. This also suggests that the victim's behavior is not the determining factor in whether or not the perpetrator uses violence and abuse in the relationships.
- **Adolescent DV abusers:** Domestic violence in adolescent relationships further challenges the belief that the abuse is the result of the victim's behavior. Oftentimes, the adolescent abusers only superficially know their victims, having dated them only a few days or weeks before beginning to abuse the victim. Such an abuser is often acting out an image of how to conduct an intimate relationship based on recommendations from peers, media, or models set by family members, etc.
- Both adult and adolescent batterers bring into their intimate relationships certain expectations of who is to be in charge and what mechanisms are acceptable for enforcing that dominance. It is those attitudes and beliefs, rather than the victims' behavior, which determine whether or not persons are violent.
- Domestic violence does not end when the relationship ends—it may continue or escalate, and children can become the conduit for control and abuse. That is because batterers continue to use a pattern of assaultive and coercive conduct even if victims leave.
- Looking at the relationship or the abused party's behavior as a causal explanation for domestic violence takes the focus off the perpetrator's responsibility for the pattern of assaultive and coercive conduct, and unintentionally colludes with the perpetrator's minimization, denial, externalization, and rationalization of the violent behavior.
- Blaming the abused party or locating the problem in the relationship provides the perpetrator with excuses and

---

[67] G.T. Hotaling and D.B. Sugarman, "An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge," *Violence and Victims* 1, no. 2, (1986): 101-124.

[68] N. Jacobson, J. Gottman, J. Waltz, R. Rushe, J. Babcock and A. Holtzworth-Munroe, "Affect, Verbal Content, and Psychophysiology in the Arguments of Couples With a Violent Husband," *Journal of Consulting and Clinical Psychology* 62 (1994): 982-88.

justifications for the conduct. This inadvertently reinforces the perpetrator's use of abuse to control family members and thus contributes to the escalation of the pattern. The abused parties are placed at greater risk, and the court's duties to protect the public, to assess damages, to act in the best interests of children, and to hold perpetrators accountable are greatly compromised.

4. **Domestic Violence Is Not Caused by Alcohol or Most Drugs: Substance Abuse as Co-Occurring Issue**

- **Alcohol and drugs such as marijuana, depressants, anti-depressants, or anti-anxiety drugs do not cause non-violent persons to become violent**. Many people use or abuse those drugs without ever battering their partners. Alcohol and drugs are often used as the excuse for the battering, although research indicates that the pattern of assaultive behaviors which comprise domestic violence is not being caused by those particular chemicals.[69]
- There is mixed evidence that other particular drugs (e.g., speed, cocaine, crack, meth) may chemically react within the brain to cause violent behavior in individuals who show no violent behavior, except under the influence of those drugs. Further, research is needed to explore the exact cause and effect relationship between these drugs and violence. The use of those substances are not associated with a pattern of assaultive behavior directed specifically at intimate partner.
- While research studies cited above have found high correlation between aggression and the consumption of various substances, there is no data clearly proving a cause and effect relationship. There are a wide variety of explanations for this high correlation.[70] Some say that the alcohol and/or drugs provide a disinhibiting effect, which gives the individual permission to do things they ordinarily would not do. Others point to the increased irritability or hostility which some individuals experience when using drugs and which may lead to violence. Others state that the high correlation may merely reflect the overlap of two widespread social problems: domestic violence and substance abuse.

- Regardless of the exact role of alcohol and drugs, it is important to maintain a focus on the domestic violence and not allow substance use or abuse to become the justification for the violence.

---

[69] B. Critchlow, "The Powers of John Barleycorn: Beliefs About the Effects of Alcohol on Social Behavior," *American Psychologist* 41 (1986): 751, 764.
[70] A. Ito, N. Miller and V. Pollock, "Alcohol and Aggression: A Meta-Analysis of the Modulating Effects of Inhibitory Cues, Triggering Events and Self Focused Attention," *Psychological Bulletin* 129 (1996): 60-82.

- **Substance Abuse as a Co-occurring Issue:** While substance abuse is not the cause of DV and the presence of alcohol or drugs does not alter the finding that domestic violence took place, it is relevant to certain court considerations and in dispositions of cases. The use and/or abuse of substances may increase the lethality of domestic violence and needs to be carefully considered when weighing safety issues concerning the abused party, the children, and the community.
    - **Court decisions in cases where the DV perpetrator also abuses alcohol and/or drugs must be directed at both the DV and the substance abuse**. For individuals who abuse alcohol and drugs, changing domestic violence behavior is impossible without also stopping the substance abuse.
    - It is not sufficient for the court to order the substance-abusing perpetrator of domestic violence into treatment either just for substance abuse or domestic violence. Intervention must be directed at both co-occurring problems, either through (a) concurrent treatments for domestic violence and substance abuse, or (b) residential substance abuse treatment with a mandatory follow-up program for domestic violence, or (c) an involuntary mental health commitment with rehabilitation directed at both the substance abuse and the domestic violence.

VII. The Who: The Domestic Violence Perpetrator

The following information about perpetrators cannot be used as a predictive profile to determine whether or not a party is a perpetrator of domestic violence.

Domestic violence perpetrators are a very heterogeneous population whose primary commonality is their conduct in that they use a pattern of assaultive and coercive behaviors against their intimate partners. Individuals may have some of the characteristics listed below and yet not act in abusive ways. Obviously, only by evaluating the facts of the case and hearing evidence of the behavioral pattern associated with domestic violence can the court determine if domestic violence is present and if so, who the perpetrator is. However, knowing some of the following issues related to domestic violence perpetrators can assist in fact-finding, decision-making, and determining how the court can intervene most effectively.

The diversity of the batterers is limited only by the diversity represented in the community. Sometimes the court system as a whole, or a particular court, deals with one group more than another (e.g., a particular socioeconomic class or a particular ethnic group). This may lead to some inaccurate generalizations about perpetrators (or victims) as courts think about perpetrators (or victims) only in terms of those cases that happen to be in that court. When the court process

is accessible to all, and domestic violence issues are identified, then the diversity of perpetrators becomes apparent.

A. DV Perpetrators from All Groups

DV perpetrators are a very heterogeneous population whose primary commonality is their use of a pattern of assaultive and coercive behaviors to control intimate partners.

1. **All personality types and physical/cognitive abilities:**
   There is no specific personality diagnosis for domestic violence perpetrators. There is a great deal of discussion in the literature about the psychological profile of batterers, especially as it relates to assessing their dangerousness or choosing most appropriate treatment and /or predicting outcome in their relationships.[71] There appear to be clusters of personality characteristics for different abusers just as there are clusters of personality characteristics for non-abusers.[72] The literature suggests that there may be different types of batterers who use different controlling tactics to different degrees.[73,74] Part of this variance may be explained by different types of batterers or by the fact that those studied are at different stages in their own histories as abusers.

2. **All ages, educational levels, occupations, socioeconomic classes:**
   - Adolescent to elderly populations: DV perpetrators range from eleven years old to those in their eighties.
   - No formal education, GEDs, high school diploma, college/university degrees, advanced degrees
   - Unemployed, entrepreneurs, trade workers, professionals
   - Low, middle, and high income. While certain courts may have a higher percentage of one income group of batterers over another

---

[71] D. Saunders, "Men Who Batter: Multiple Profiles Requiring Multiple Responses," in *Legal Responses to Wife Assault*, ed. N.Z. Hilton (1993).

[72] R. Tolman and L. Bennet, "A Review of Quantitative Research on Men Who Batter," *Journal of Interpersonal Violence* 5 (1990): 87-118; L.K. Hamberger and J. Hastings, "Recidivism Following Spouse Abuse Abatement Counseling: Treatment Program Implications," *Violence and Victims* 5, no. 3, (1990): 157-170; D. Saunders, "Men Who Batter: Multiple Profiles Requiring Multiple Responses," in *Legal Responses to Wife Assault*, ed. N.Z. Hilton (1993).

[73] E. Gondolf, "Who are Those Guys? Toward a Behavioral Typology of Batterers," *Violence and Victims* 3, no. 3 (1988): 187-203; N. Issac, D. Cockran, M. Brown and S. Adams, "Men Who Batter: Profile From a Restraining Order Database," *Archives of Family Medicine* 3 (1994): 50-54, , Danuta Rode, *Typology of Perpetrators of Domestic Violence,* Polish Psychological Bulletin, 41(1), 36-45, 2012. Sheila H. Chiffriller, et. al., *Understanding a New Typology of Batterers: Implications for Treatment,* Victims and Offenders, 1(1), 79-97, 2006., Elizabeth Gilchrist, *Implicit Thinking About Implicit Theories in Intimate Partner Violence, Psychology, Crime, and Law* 15(2/3), 131-145, 2009.
Jana Jasinski, et. al., *Testing Johnson's Typology: Is There Gender Symmetry in Intimate Terrorism?* Violence and Victims, 29(1), 73-88, 2014.

[74] Albert R. Roberts, *Classification Typology and Assessment of Five Levels of Woman Battering*, Journal of Family Violence, 21, 521-527, 2006. Sarah Weldon & Elizabeth Gilchrist, *Implicit Theories in Intimate Partner Violence Offenders*, Journal of Family Violence, 27(8), 761-772, 2012.

income group, domestic violence perpetrators are found in all economic classes.

3. **All cultural groups: race, ethnicity, religious affiliation:** Prevalence studies of domestic violence among certain populations show some variance but usually these variances are ascribed to factors other than the DV (e.g., differential of systems response to people of color).
    - Most often the question of whether there are cultural differences in the frequency or severity of domestic violence is raised regarding cases that involve persons of color or third-world immigrants. Certain racial, ethnic, and religious groups are sometimes viewed as being more violent than others are in the United States. Many cultures, including the white culture in the United States, give very mixed messages about domestic violence.
    - Sometimes there is a tendency to view other cultures as being more violent than one's own by focusing only on that other culture's more obvious cultural supports for domestic violence, without also being aware of that culture's prohibitions against it. Cultural illiteracy results in the failure to see that most cultures have a mixture of conflicting messages about domestic violence (e.g., "you never hit a woman" versus "sometimes women have to be disciplined,"). And there is tendency to avoid acknowledging just how violent one's own culture is and how one's own culture tolerates domestic violence.
    - Culture may influence the specific tactics available to an abuser to control the victim. For example, a Christian batterer may quote scripture out of context to justify the abusive conduct and to blame the victim. Or, a gay batterer may threaten to "out" the victim in order to gain further control by intimidation. Or, a batterer may threaten a victim about immigration status or deny a victim contact with ethnic traditions.
    - Culture may also influence the resources accessible (language and cultural sensitivity) to victims and their children. Within certain cultures there is high regard for community authorities, and in others there is fear of government authorities. These cultural differences will affect whether or not victims will access resources of community systems or agencies (courts, police, shelters, etc.).
    - Culture may influence the intervention strategies (e.g., treatment programs) used with DV perpetrators. There is a growing body of literature on culture-specific intervention approaches for

batterers.[75,76 77,78,79]

- Just as the court would not find the values of a culture to be a mitigating circumstance in crimes such as robbery, speeding, or violence against a stranger, it should not treat domestic violence any less seriously based on assumptions regarding a particular culture's acceptability of domestic violence.

B. Gender: Majority of DV Perpetrators in Heterosexual Relationships Are Male, while the Abused Parties Are Female

1. National crime statistics show that approximately eighty-five percent (85%) of spouse abuse victims are women.[80]
2. While women sometimes do use physical force against intimate partners, it is often self-defensive violence.[81]
3. Furthermore, studies indicate that while both men and women sometimes use some of the same behaviors, the effects of male violence are far more serious than female aggression as measured by the frequency and severity of injuries.[82]
4. In gay, lesbian, bisexual and transgender relationships, the gender issues are different. (See Appendix D for discussion of DV for LGBTQ relationships.)
5. Regardless of the gender pattern, the courts must take domestic violence seriously and determine the primary aggressor, taking into consideration who is doing what to whom.

---

[75] E. Aldarondo and F. Mederos, *Men Who Batter: Intervention and Prevention Strategies in a Diverse Society* (Kingston, NJ: Civic Research Institute, 2002).
[76] R. V. Almedia and K. Dolan-Delvecchio, "Addressing Culture in Batterers Intervention: The Asian Indian Community as an Illustrative Example," *Violence Against Women* 5, no. 6 (1999), 654-681.
[77] R. Carrillo and J. Tello, eds., *Family Violence and Men of Color: Healing the Wounded Male Spirit* (New York: Springer, 1998).
[78] S. S. Doe, "Cultural Factors in Child Maltreatment and Domestic Violence in Korea," *Children and Youth Service Review* 22, no. 3/4 (2000): 231-236.
[79] O. J. Williams, "Treatment for African American Men Who Batter," *CURA Reporter* 25, no. 3 (1995): 6-10; O. J. Williams and L. R. Becker, "Partner Abuse Programs and Cultural Competence: The Results of a National Study," *Violence and Victims* 9, no. 3 (1994): 287-296; O. J. Williams, "Ethnically Sensitive Practice to Enhance Treatment Participation of African American Men Who Batter," *Families in Society*, 73 (1992): 588-95; O. J. Williams, "Group Work With African American Men Who Batter: Toward More Ethnically Sensitive Practice," *Journal of Comparative Family Studies* 25 (1994): 91-103.
[80] M. Durose, C. Wolf Harlow, P. Langan, M. Motivans, R. Rantala and E. Smith, *Family Violence Statistics, Including Statistics on Strangers and Acquaintances,* Bureau of Justice Statistics (U.S. Department of Justice, Office of Justice Programs, June 2005), http://www.ojp.usdoj.gov/ (NCJ 207846).
[81] D. Saunders, *supra* note 11, at 47-60.
[82] R. A. Berk, S. F. Berk, D. R. Loseke and D. Rauma, "Mutual Combat and Other Family Violence Myths," in *The Dark Side of Families: Current Family Violence Research*, ed. D. Finkelhor, R. J. Gelles, G. T. Hotaling and M. A. Straus (1983); D. C. Berios and D. Grady, "Domestic Violence; Risk Factors and Outcome," *The Western Journal of Medicine* 155, no. 2 (August 1991).

C. Some Domestic Violence Perpetrators Minimize, Deny, or Lie about Their Domestic Violence Conduct.

1. **Minimization and denial as a self-con:** For some, minimization and denial are defense mechanisms against the psychological pain of recognizing they are abusing those they supposedly love, or those who are family to them. This kind of minimization and denial is a self-con rather than an attempt to lie to someone else or to even avoid the consequences. Because of the intimate nature of the relationship there is a great deal more of this self-conning in intimate partner violence than found in perpetrators of stranger violence. Examples of DV minimization or denial may include: "I only hit once," "I never hit them," "I just put them to the floor," "The children never saw the abuse," "We got into a little fight," "I sort of lost it," etc., even when there is clear data that the victim had been hospitalized for severe injuries due to his assault against her.

2. **Minimization, denial, lying as a tactic of control:** Other perpetrators do lie, even in court, to avoid the consequences of their behavior and to maintain control of their partner. Unlike the "self-conners" who are deluding themselves, those who are lying know they are not telling the truth and are conning others. Many times batterers are looking for others to collude with them in order to establish further control over the victim (e.g., "See, even the judge agrees with me that it was not a big deal or that you deserved what you got.").

3. **Damaging to victim:** The DV perpetrators' use of minimization and denial is particularly damaging to victims when they are able to enlist others (family, friends) and institutions (courts, child welfare, family law proceedings) in colluding with them.

4. **Court's Role:** These DV perpetrator characteristics of minimization, denial, and lying go to the core of the court's role of holding DV perpetrators responsible for both their abusive conduct and for changing to be a safe adult, partner, parent, and community member. People do not change when they do not think there is anything that needs to change. The judicial officer can cut through the DV perpetrator's minimization, denial, or lying in the legal proceedings by addressing them as they come up and then by establishing clear, measurable goals for change with a review process for monitoring changes during the rehabilitation phase. This often has to be done in collaboration with the other community partners involved with the family.

D. Perpetrators of Domestic Violence Externalize Responsibility (Blame) for Their Behavior to Others, Particularly to Their Victim or to Factors Supposedly Outside of Their Control

1. **Perpetrators blame others for their abusive behavior** as in the following collection of offenders' statements about their abusive conduct while in court-ordered treatment: "She wouldn't listen to me," "She's an alcoholic," "I have PTSD (post-traumatic stress disorder)," "The cop didn't like me," "The Child Protective Services worker believes anything my kids say," and "I got a women's libber judge." These perpetrators failed to mention their own abusive conduct even though there was clear evidence that they had committed serious assaults against their partners.

2. **DV perpetrators justify their abusive conduct:** They go into great detail to "explain" or justify their abusive behavior even if they do acknowledge their conduct. They focus on the abused party's behavior that supposedly "caused" their violence. Batterers attempt to keep the court's focus off their abusive conduct by moving the focus to the victim.

3. **Court's role to cut through a perpetrator's minimization, denial, and externalization.** Focus on descriptions of the perpetrator's behavior (as well as considering the DV survivor's descriptions) during an incident and over several incidents, and not on the circumstances surrounding the behavior. Descriptions of how and when the perpetrators acted provide more relevant information for the court than why they acted, and allows for more productive fact-finding.

E. Domestic Violence Perpetrators Seek To Be in Control of Others, Especially the Abused Party

Those who batter are very controlling of situations and other people. Perpetrators often direct their behaviors in court primarily for the purpose of controlling the abused party, and secondarily to control the court process. They will use whichever tactics will work in a particular situation. (See behavioral definition of domestic violence for list of controlling behavior, Section I.)

F. The DV Perpetrators as Parents: Coercive Control also Extends to the Children [83],[84]

- **Batterers tend to be highly controlling of children** (see Section VI on children). The abusers think of their children as merely an extension of themselves and are often unable to consider the needs of the children as separate from their needs or issues as adults. They ignore what is in best interests of the children in the development of parenting plans and visitation schedules, and often simply focus on maintaining their control over the children as "their parental right." For example, they will be make extraordinary demands on very young children to maintain their contact during periods of court-ordered supervised visits (demanding that young preschool child call every night to say good night to them).
- **DV perpetrators use the children to control the adult victim**; requiring the children to participate in the physical or verbal abuse of the other parent or requiring developmentally inappropriate behavior from children in order to undermine the parenting of the DV victim or to control the court process. For example, a parent who insists that young children in state care be given daily notes from the parent (which they are too young to read), then interrogates the children during supervised visits about their reading of the notes. Such a perpetrator is more focused on controlling the state care process that on meeting needs to children during this period.
- **DV perpetrators are often self-absorbed and view children solely in terms of meeting their own needs.** Some perpetrators ignore their children and focus solely on the adult intimate, while others also focus on the children but only as a means to control the victim or the court process. Domestic violence perpetrators are often unwilling or unable to consider the best interests of the children.[85]

G. Domestic Violence Perpetrators: Excessive Jealousy and Possessiveness

- Some perpetrators are very possessive of the abused party's time and attention. They often accuse the abused party of sexual infidelity, and of other supposed infidelities, such as spending too much time with the children, with the extended family, with work, with friends, etc. With or without social networks, perpetrators experience themselves as being very

---

[83] A. Ganley & S. Schechter, *Domestic Violence: A National Curriculum for Child Protective Services* (1996) (San Francisco, CA: all published by Futures Without Violence, A. Ganley & M Hobart, *Social Worker's Practice Guide to Domestic Violence* (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services; A, Ganley, *Domestic Violence, Parenting Evaluations and Parenting Plans*, 2009./ King County Coalition Against Domestic Violence

[84] Marissa L. Beeble, Deborah Bybee, and Cris Sullivan., *Abusive Men's use of Children to Control their Partners and Ex-partners*, EUROPEAN PSYCHOLOGIST, 12(1), 54-61, 2007.

[85] J. L. Edleson, L. F. Mbilinyi and S. Shetty, *Parenting in the Context of Domestic Violence* (Center for Families, Children, and the Courts Staff, 2003).

isolated and only able to talk to the abused party. Their jealousy is not based on the victims' behavior or intent, but instead is one more part of the perpetrators' pattern of coercive control. Abusers may even be jealous of the victim's attention and nurturing towards children, such as interfering with breastfeeding or disallowing comforting and holding of children.

- The excessive obsession and possessive of adult victim is an indicator of lethality (see section on Assessment of Lethality/Dangerousness, *infra,* pg. 23).

H. DV Perpetrators May Have Good Qualities

Some domestic violence perpetrators may be good providers, hard workers, good conversationalists, witty, charming, or intelligent. Sometimes the court, evaluators, and the abused party are misled by the appearance of positive qualities and assume then that the violence did not really happen since only individuals who are "monsters" could commit such acts, or that the violence can be ignored because this "good" person will soon stop. The reality is that even seemingly normal and nice people may batter and may be very dangerous. Battering stops only when perpetrators are held accountable for both their abuse and for making the changes necessary to stop the violence. Battering stops when perpetrators choose to stop.

VIII. The Who: The Abused Party

A. Victims of Domestic Violence in All Groups: Age, Racial[86], Socioeconomic, Educational, Occupational, Religious, and Personality Groups

Victims of domestic violence are a very heterogeneous population whose primary commonality is that they are being abused by someone with whom they are or have been intimate. They do not fit into any specific "personality profiles." Being the abused party is the result of behaviors done by another rather than the result of personal characteristics. Consequently, just as with victims of other trauma (car accidents, earthquakes, etc.), there is no particular type of person who is battered.

[86] For current summary research (2014) see The Facts on Violence Against American Indian/Alaskan Native Women, The Facts on Immigrant Women and Domestic Violence, available from www.futureswithoutviolence.org/

B. Abused Parties May or May Not Have Been Abused as Children, or in Previous Relationships

There is **no** evidence that previous victimization, either as adults or as children, results in women seeking out or causing current victimization.[87]
While some DV survivors may end up in another abusive relationship, the majority do not. Courts often do not see those DV survivors who move on and eventually partner with non-abusers or are not partnered at all. The courts may see a higher percentage of those DV survivors who have been in more than one abusive relationship. For those who experience another abusive relationship, the explanations vary. Domestic violence is a widespread problem and if a DV survivor gets into a new relationship there are high odds that it will be with another abuser. DV perpetrators are not always visible at the start of a relationship. Often DV perpetrators will seek out victimized partners and use that information to gain and maintain a controlling relationship (e.g., "I will protect you from your abuser"). Even for those survivors who know about the abuser's past abusive relationships, they may have been conned by the abuser that "I am different now," "You are not like the last one," and/or "I would never harm you." Even if the survivor is in another abusive relationship, that current abuser is responsible for the abusive conduct, not the DV victim.

C. Abused Parties' Isolation Due to Perpetrator's Control Over DV Victim's Activities and Contacts with Friends, Children, Family, etc.

1. Some of the abused party's behaviors within the court process can be understood in light of the degree of control the perpetrator has managed to enforce by isolating the victim, either physically or psychologically.

2. **Incremental isolation of the abused party:** Some perpetrators increase their psychological control of the abused party to the point that they literally determine reality for the abused party. At first perpetrators may cut the abused parties off from other supportive relationships by claims of "loving them so much and wanting to be with them all the time." In response to this "love," the abused party initially spends ever-increasing amounts of time with the perpetrator. These tactics are replaced with more overt controls, such as verbal and physical assaults to separate the abused party from family or friends. Without outside contact, it becomes more and more difficult for the abused party to avoid the psychological control of the perpetrator. Even when victims maintain contact with family, friends, or coworkers, the batterer continues to undermine the support or influence of such relationships by continually undercutting and criticizing those relations (e.g., "Your friend is a dyke," "Your family just wants to

[87] L. Walker, *The Battered Women's Syndrome* (1984); M.A. Dutton, *Empowering and Healing the Battered Woman* (New York: Springer Publishing Company, 1992).

interfere," "Those people are trying to break up this family,"). Some abused parties come to believe the perpetrator when they are told that if they left the perpetrator, they would not be able to survive alone. Others resist such distortions, but only at great emotional and sometimes physical cost.

3. **Batterers isolate and control** by controlling the victim's access to accurate information and by providing disinformation. Batterers continually give misinformation to the victims (e.g., "You need my signature to file for citizenship") and intervene to keep victims from getting accurate information (e.g., child welfare, domestic violence advocates, health care providers, legal advocates).

4. **DV perpetrators control tactics** (intermittent threats of physical harm, isolation from support, and periodic indulgences) are similar to brainwashing tactics used with prisoners of war and hostages. Their impact on DV victims are sometimes even more insidious because they are being carried out by an intimate partner rather than by an identified "enemy." The more successful a perpetrator has been in isolating the abused party, the more the DV perpetrator controls what the abused party believes. Breaking the isolation of the abused party requires intervening in the control that the perpetrator has imposed on the abused party.

D. Sometimes Abused Parties Minimize and Deny the Abuse to Protect their Children and Themselves

1. **The majority of victims do not minimize or deny the abuse.** Battered victims talk directly about the domestic violence, but the community too often does not want to listen to or acknowledge what the victims are saying. Rather than confront its own barriers to accepting the truth from victims, the community ignores what they are hearing and focuses in a pejorative way on the minority of battered women who minimize the abuse in order to survive.

2. **Protective strategies: some battered women deny or even lie about the abuse.** Understanding this can assist the community in designing appropriate supports for DV victims regardless of whether they self-disclose.
    - **Victims fear the perpetrators' escalating abuse and control**. Abused parties minimize, deny, or lie about the abuse against themselves or their children because of the escalating retaliation and control by the perpetrator. Whenever domestic violence goes public (in criminal, family law, or child welfare proceedings), batterers dramatically increase their coercive control over victims by any means necessary. The perpetrator may increase the violence or threats of violence, threats to take the children, or they may

bargain with the abused party to change the story with promises that if they do, the abuse will stop.

- **Victims minimize and deny the abuse due to community barriers**. Sometimes the abused party minimizes or does not reveal the abuse because they have been told by law enforcement, lawyers, counselors, their ministers, child welfare, etc., that nothing can be done, and that only the abused party can stop the violence by changing their behavior that makes the perpetrator angry or by leaving. Or systems advise adult victims to avoid raising issues regarding domestic violence because it will be used against them (e.g., family law attorneys who advise clients not to raise domestic violence concerns or allegations of child abuse in dissolution proceedings) or because raising DV issues will be seen as by child welfare or opposing counsel in family law only as a manipulation to "get a leg up" in their case. In such cases, the abused party has learned that the systems with the power to intervene will not act. Thus, they are forced to try to work out their own deals with or around the abuser in hopes of stopping the abuse.
- **Sometimes, the abused party's minimization and denial is actually a survival mechanism.** For example, the abused party may block out the physical pain of assault in order to be more able to protect the children from the violence. When asked by others if they were injured or if their spouse hurt them, an abused party may honestly say "no" because they have been so successful in blocking out even the physical pain. Other abused parties may tell only parts of the violent episode in court because openly acknowledging what happened is too overwhelming. Or, they may not think their abuse is really domestic violence because it did not result in hospitalization or life-threatening injuries. This minimization or denial about parts of the abuse becomes part of surviving domestic violence and of being able to keep moving.
- Oftentimes, the community focuses on the victim as still "loving" the perpetrator without considering the very real community barriers that prompt minimizing by the abused parties.

3. **Victims' minimization and denial can be reduced by increasing safety and support.** In court proceedings, the abused parties' minimization and denial of domestic violence may be decreased when they are encouraged to behaviorally describe what happened at specific dates and times, rather than asking them to evaluate whether or not the perpetrators' behavior was abusive. Use questions such as "When the perpetrator got angry, what did he do?" or "What did she do next?" etc., rather than "did he hurt or beat you?" This will often provide the court with the information (e.g., what, how, when, who) necessary to ascertain the facts. Having safe options for DV victims and their children also decreases minimization.

E. What May Appear at First To Be "Crazy" Behavior May in Fact Be a Normal Reaction to a "Crazy" Situation

1. **The primary reason given by victims of domestic violence for staying with the perpetrator is the realistic fear of the escalating violence.** Some want to return to the perpetrator in spite of severe violence, or ask for divorce only after years of abuse. Victims may know from past experience that the pattern of assaultive and coercive behavior gets worse whenever they attempt to get help. Research shows that domestic violence tends to escalate when the victim leaves the relationship. National crime statistics show that in almost seventy-five percent (75%) of reported spousal assaults, the partners were divorced or separated.[88] Separated women are 3 times more likely than divorced women and 25 times more likely than married women still living with their husbands to be victimized by a batterer.[89] More recent research confirms that the most dangerous time for the battered woman is at separation.[90] Perpetrators may repeatedly tell the abused parties that they will never be free of them. The abused party believes this due to past experience. When they did attempt to leave, the perpetrator may have tracked them down or abducted the children in the attempt to get the victim back. Experience of survivors in family court proceedings illustrates how separation from the DV perpetrator often results in severe consequences to the DV victim and their children, both financially and in terms of parenting.

2. **DV vs Homelessness:** Many DV victims are forced to choose between DV in the home and homelessness[91] because of economic circumstances, the abuser's financial control, or exploitation. Most nurturing parents will go to great lengths to avoid making their children homeless, even if it means coping with abuse.

3. **Perpetrators do not let abused parties leave their control. It is a myth that abused parties could easily leave the relationship if they wanted to, and that the perpetrators would let the abused party leave without using pattern of assaultive and coercive behavior against them**. It is a myth that abused parties stay with perpetrators because they like to be abused. Even in cases where the abused party was abused as a child, she/he does not seek out violence and does not want to be battered.

---

[88] United States Department of Justice (1983).
[89] Ronet Bachamn and Linda E. Saltzman, *Violence Against Women: Estimates from the Redesigned Survey, Bureau of Justice Statistics*, 1995.
[90] *Violence Against Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* (United States Department of Justice, March 1997).
[91] *When There is Nowhere to Go: Domestic Violence and the Need for Better housing Options for Survivors and their Children,* Tampa, FL: ChildNet/SafeNet Collaborative. Equal Rights Center, 2008 *No-vacancy: Housing Discrimination Against Survivors of Domestic Violence in the District of Columbia*.

F. Domestic Violence Victims in Court Proceedings Have the Same Goal as the Court: To Stop the Violence

1. Victims use various formal and informal strategies to resist or stop the abuse

Contrary to the myth that all victims are passive and submissive, they use many different formal and informal strategies to cope with, and to resist, the abuse and to protect their children.

2. Majority of Domestic Violence Victims Follow Through with Court Proceedings

Contrary to the myth of the reluctant witness or petitioner, the majority of domestic violence victims follow through with the court proceedings when appropriate supports and resources are made available. When courts have high percentages of domestic violence victims not following through, the courts can remedy this by identifying and correcting the court barriers to follow through, rather than blaming the victims.

Reasons some abused parties may fail to show up at later hearings:

- Police have failed to enforce the temporary order; the abused party feels that a permanent order will be useless in stopping the violence.
- It is the 10th or 15th continuance the DV abuser has been granted and they fear losing their employment if they take any more time off.
- Perpetrator or others tell them that the orders will be dropped if they do not show up for the hearing. Thinking that the violence has stopped and that the order is no longer necessary, the abused party may not appear at the next hearing.
- The perpetrators have intercepted the notification of hearings intended for the abused party, or threatened the victim by an escalation of violence.
- Violence has temporarily stopped. Abused parties may be unaware that the perpetrator has merely switched tactics of control. Rather than use violence, or the threat of violence, the perpetrators are temporarily using good behavior in order to manipulate their way out of the court proceedings.

3. **Victims looking for immediate stop to abuse**

While the court may be able stop some DV using the legal remedies available over a period of time (e.g., no-contact orders, bail, hearings, convictions, sentence, probation, family law proceedings), the abused party may be attempting to stop the violence immediately. Using a variety of strategies, such as agreeing with the perpetrator's denial and minimization of the violence in public or with child welfare, accepting promises that it will never happen again, requesting that the court terminate the protective order, not showing up for court hearings, not requesting a DV finding in a family law case, saying that she "still loves" him, etc., the victim may be able to stop the immediate violence temporarily.

4. **Legal systems' lack of follow-through on stopping the pattern of assaultive and coercive behaviors:**

Sometimes the victims will turn to the court system for help, and will follow through on the court process, only to see that the court does not stop the violence. Examples:

- Abused party may obtain a protective order, and then see that the existence of that order does not deter the perpetrator. This is particularly true in jurisdictions where perpetrators are rarely arrested for violations of court orders. The abused party may seek a continuation of a restraining order, or extension of the protection to children or other family members, only to be told there has not been a recent assault to justify extension of the order for a longer period of time.
- Or, because the perpetrator is police or military, the court is unwilling to grant the new protection order which may have consequences to employment.
- Or the family law proceedings force survivors into parenting plans that not only do not protect them but also endanger the children.
- In such cases, the abused party sometimes re-engages in prior survival strategies of complying with the perpetrator during the court process because it often appears that the perpetrator is more in control of the process than the court is.

5. **Trauma-induced ambivalence**

Sometimes victim behavior, such as being a reluctant witness or an ambivalent petitioner, is consistent with both being traumatized by violence and being a person traumatized by an intimate. People who have experienced trauma, especially multiple times, may appear inconsistent and being overwhelmed Sometimes the way that the abused party is

acting is in direct response to what the perpetrator did immediately preceding the court hearing, or has been doing throughout the relationship. The victim's safety plan and protective strategies are merely different than the ones the court may have.

6. **Victim behaviors as survival behaviors**

Rather than viewing the domestic violence victim's behavior as either masochistic, or crazy, or "in denial," or as indicating that there really was no violence, it should be viewed as a normal response to the DV abuser's pattern of assaultive and coercive behaviors and as contributing to the adult victim's survival and the survival of the children.

G. DV Survivors/Victims as Parents

The research[92,93,94,95] on DV survivors as parents indicates that DV survivors parent competently, often under extreme circumstances. On measures of parenting practices: nurturing, support, and setting appropriate limits for children, DV survivors do well. The research on the negative impact of domestic violence on children indicates that negative consequences come from the DV perpetrator's parenting practices and or the stress on the children from living with the domestic violence abusive tactics. All the resiliency research indicates that children's resiliency is fostered by maintaining a relationship with the non-offending parent. As more court systems look to change how the systems support DV victims as parents and hold DV perpetrator (and not the victim) accountable for changing to become a safe and responsible parent[96], the systems expect to reach better outcomes for children exposed to domestic violence. [97,98,99]

---

[92] Simon Lapierre, *More Responsibilities, Less Control: Understanding the Challenges and Difficulties Involved in Mothering in the Context of Domestic Violence*, British Journal of Social Work, 40(5), 1434-1451, 2010.
[93] Kantahyanee W. Murray, et. al., *The Impact of Intimate Partner Violence on Mothers' Parenting Practices for Urban, Low-Income Adolescents*, J. FAM. VIOL., 27, 573–583, 2012.
[94] Lynette M. Renner & Shamra Boel-Studt, *The relation between intimate partner violence, parenting stress, and child behavior problems,* Journal of Family Violence, 28, 201-212, 2013.
[95] Cris M. Sullivan, et. al., *Beyond Searching for Deficits: Evidence That Physically and Emotionally Abused Women are Nurturing Parents,* Journal of Emotional Abuse, 2(1), 51-71, 2000, accessible at http://vaw.msu.edu/wp-content/uploads/2013/10/Beyond-search-for-deficits.pdf
[96] A. Ganley & M Hobart, *Social Worker's Practice Guide to Domestic Violence* (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services
[97] Echo A. Rivera, et. al., *Secondary Victimization of Abused Mothers by Family Court Mediators*, Feminist Criminology, 7(3), 234-252, 2012. Echo A. Rivera, et. al., *Abused Mothers' Safety Concerns and Court Mediators' Custody Recommendations,* Journal of Family Violence, 27 (4): 321-32, 2012.
[98] April Zeoli, et. al., *Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers*, Journal of Family Violence, 28 (6): 547-60, 2013.
[99] Susan P. Johnson & Cris M. Sullivan, *How Child Protection Workers Support or Further Victimize Battered Mothers,* Affilia, Journal of Women and Social Work, 23(3), 242-258, 2008.

H. In Summary: Barriers to Victims Protecting Themselves and Their Children

Sometimes uninformed helpers or courts assume that DV victims could just leave, get a protection order, file for a parenting plan, or do something to stop the violence safely if they just wanted to act. The reality is that there are multiple external barriers that victims have to overcome or work around in order to carry out a protective strategy. Understanding these barriers allows communities to join with victims to solve problems, overcome the barriers, and plan for safety, rather than continue to blame the victim.

The barriers to victims taking steps to protect themselves and their children (leaving the relationship, getting a protection order, testifying in court, following a parenting plan, being safe with their children, etc.) are multiple and vary for each abused person. The barriers include:

1. **Perpetrator's escalating violence and control**
   Perpetrators escalate their physical and sexual assaults against victim, children, or others, as well as escalate their intimidation by stalking, attacks against property, threats to take children, false reports to Child Protective Services (CPS) or Immigration and Customs Enforcement, etc.

2. **Economic and resource barriers**
   Economic barriers include lack of safe housing, income, child care, health insurance, transportation, education, and funds for lawyers, etc. The batterers often control the victims' access to resources either because they provide them (e.g., the health insurance) or because they consume the resources (e.g., gasoline for transportation) needed to support the victim and the children.

3. **Community barriers**
   Community barriers include: lack of victim services, childcare, a coordinated legal response, etc.; low-cost or pro bono family attorneys; pressures to maintain relationship from family/religious/cultural values; and victim blaming attitudes (e.g., being told by perpetrator, counselors, courts, child welfare, ministers, police, family, friends, etc. that the abuse is the victim's fault and that victims are responsible for making all the changes needed to stop the abuse).

4. **Individual barriers**
   Individual barriers include ambivalence about relationship; being immobilized by psychological and physical trauma (some victims of trauma may not be able to organize everything required to separate and to establish a new life for themselves and their children, particularly during the period immediately following the trauma and while the perpetrator

continues to escalate the abusive tactics).

Too often helpers focus solely on wanting victims to overcome the individual barriers and ignore the reality of multiple barriers posed by the batterer and the community.

IX. The Who: The Children as Victims of Domestic Violence[100]

Children do not merely witness domestic violence, but also are at risk of being victims of physical or sexual abuse by domestic violence perpetrators, or of being victimized by the perpetrator's use of children to control the adult victim.[101] The early literature in the field noted that male children of battered spouses may be more at risk to grow up to be abusers, but little attention was initially given to the immediate effects on children of the perpetrator's abusive conduct. In the 1990s, there was more focus given to these more immediate effects. Studies show that we can no longer presume that children free of physical injuries are not (nor will be) damaged psychologically, developmentally, and emotionally by the domestic violence perpetrator's conduct.

However, studies also show that we cannot presume that all children in homes where there is intimate partner violence experience statute-defined child maltreatment or neglect and should be removed from those homes.[102] [103] That overreaction by child welfare puts children in danger of losing the one parent (the adult victim) who is supportive of them, and it puts them at risk of being traumatized by being separated from their home and community.[104] Current research

---

[100] There is an ever-growing body of research on relationships between intimate partner violence and children. This literature focuses on the need for programs to respond to the safety of the abused adult as the most effective strategy to improve the safety of the children. The following resources have been designed specifically for the courts working collaboratively with community agencies: *Effective Interventions in Domestic Violence and Child Maltreatment Cases: Guidelines For Policy and Practice* (recommendations from the National Council of Juvenile and Family Court Judges Family Violence Department, 1999); *Family Violence: Emerging Programs For Battered Mothers and Their Children* (State Justice Institute, The David and Lucile Packard Foundation, 1998); N. Lemon and P. Jaffee, *Domestic Violence and Children: Resolving Custody and Visitation Disputes, A National Judicial Curriculum* (San Francisco, CA: The Family Violence Prevention Fund, 1995), www.endabuse.org- not a valid URL, possibly https://www.ncjrs.gov/pdffiles1/Digitization/169016NCJRS.pdf; L. Goodmark, JD, "Domestic Violence and Child Maltreatment in Immigrant Communities," *ABA Child Law Practice: Helping Lawyers Help Kids* 22, no. 4 (2003); R. Fitzgerald, C. Bailey and L. J. Litton, *Using Reasonable Efforts Determinations to Improve Systems and Case Practice in Cases Involving Family Violence and Child Maltreatment,* 54 Juvenile and Family Court Journal 97 (2003).

[101] A. Ganley & M Hobart, **Social Worker's Practice Guide to Domestic Violence** (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services, , A. L. Ganley and S. Schechter, *Domestic Violence: A National Curriculum for Child Protective Services* (San Francisco, CA: The Family Violence Prevention Fund, 1996).

[102] Jeffrey L. Edleson, "Should Childhood Exposure to Adult Domestic Violence Be Defined as Child Maltreatment Under The Law?" in *Protecting Children from Domestic Violence: Strategies for Community Intervention*, ed. P. G. Jaffe, L. L. Baker and A. J. Cunningham (New York, NY: Guilford Press, 2004): 8-29.

[103] Lois A. Weithorn, J.D., Ph.D., *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment,* HASTINGS L.J. 53 1 (November 2001): 53-60.

[104] Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response,* 23 WOMEN'S RTS. L. REP. 2 (Rutgers Law School, 2002): 107-133.

indicates that domestic violence impacts children in a wide variety of ways.[105] The nature and extent of the damage and risk of danger to children will vary depending primarily on six factors:

1. The specific abusive control tactics used by the perpetrator.
2. The impact of the intimate partner abuse on the adult victim.
3. The impact of the intimate partner abuse on the child.
4. A lethality assessment of the domestic violence.
5. Presence of co-occurring issues (substance abuse, mental health issues, poverty).
6. The specific protective factors in the case: the adult victim's, the child's, the perpetrators, and the community's.

The effects of the perpetrator's conduct may be mitigated by the social supports to the child provided by the adult victim, family, other significant adults, social groups, and communities.

Given the widespread prevalence of domestic violence, all court cases involving children (e.g., family law, juvenile, dependency courts, as well as criminal courts) should be routinely screened for domestic violence (see section below on routine screening). If domestic violence is identified, then the routine screening should also identify the adult victim and domestic violence perpetrator. Given that there is so much variance in domestic violence impact on children, any time domestic violence is identified in cases involving children, a comprehensive assessment of the specific risk posed to children by the intimate partner violence should be conducted and made available to the court. As of 2009, this is now the policy of Washington Children's Administration for its cases. (See section below for overview of children's domestic violence risk assessment.)

In responding to either criminal or civil domestic violence cases where children are involved, the court should consider the following information in its deliberations. (For further discussion regarding how these findings can assist the court in fact-finding and decision-making, see Chapter 11.)

A. Overlap between Domestic Violence and Child Maltreatment

Researchers estimate that the extent of overlap between domestic violence and child physical or sexual abuse ranges from 30 to 50 percent.[106] Girls are five to six times more likely to be sexually abused by battering fathers than non-battering

[105] J. L. Edleson, L. F. Mbilinyi and Sudha Shetty, *supra* note 45.

[106] Hamby, S, Finkelhor, D., Turner, H. & Ormrod, R. (2011), *Children's Exposure to Intimate Partner Violence and Other Family Violence.* Juvenile Justice Bulletin- NCJ 232272, Washington DC., Hamby, S, Finkelhor, D., Turner, H. & Ormrod, R (2010) *The overlap of witnessing partner violence with child maltreatment and other victimizations in a nationally representative sample of youth*, **Child Abuse and Neglect,** 34, 734-741. P. Jaffe, D. Wolfe and S. Wilson, *Children of Battered Women* (1990). See also M. A. Straus and R. J. Gelles, *Physical Violence in American Families* (1990) (surveying over 6,000 American families, researchers found that 50 percent of men who frequently assaulted their wives also frequently abused their children); M. Roy, ed., *Battered Women: A Psychological Study of Domestic Violence* (1977) (Pescott and Letko report 43 percent of women in a shelter had children who also were victims of abuse by the domestic violence perpetrator. Roy reports 45 percent of the children of battered women are physically abused).

fathers.[107] Some shelters report that the first reason many battered women give for fleeing the home is that the DV perpetrator was also attacking the children.[108] Adult victims report multiple concerns about the impact of spousal abuse directly on the children.[109] Furthermore, the more severe and fatal cases of child abuse overlap with domestic violence.[110]

B. Perpetrators May Physically or Psychologically Traumatize Children in the Process of Battering Their Adult Intimates

While the children may not be the specific target of the domestic violence perpetrator, domestic violence perpetrators may traumatize children in the process of battering their adult intimate partners in the following ways:

1. **DV perpetrator intentionally injures** (or threatens violence against) the children, pets, or the children's loved objects, as a way of threatening and controlling the abused parent.

    - For example, the child is used as a physical weapon against the victim, is thrown at the victim, or is abused as a way to coerce the victim to do certain things; or
    - The children's pets or loved objects are damaged, or are threatened with damage (e.g., attacks against pets or loved objects are particularly traumatic for young children who often do not make a distinction between their own bodies and the pet or loved object). An attack against the pet is experienced by the child as an attack against the child.

---

[107] L. Bowker, M. Arbetel and J. McFerron, "On the Relationship Between Wife Beating and Child Abuse," in *Feminist Perspectives on Wife Abuse*, ed. K. Yllo and M. Bograd (1988).
[108] *Resident Survey* (Seattle, WA: New Beginnings Shelter, 1990).
[109] N. Z. Hilton, "Battered Women's Concerns About Their Children Witnessing Wife Assault," *Journal of Interpersonal Violence* 7 (1992): 77-86.
[110] In a 1993 study, the Oregon Department of Human Resources (*Task Force Report on Child Fatalities and Critical Injuries Due to Abuse and Neglect*, 1993) reported that domestic violence was present in 41 percent of the families experiencing critical injuries or deaths due to child abuse and neglect. Of the 67 child fatalities in Massachusetts in 1992, twenty-nine (43 percent) were in families where the mother was identified as a victim of domestic violence. (Felix and McCarthy). The Massachusetts Department of Social Services notes that, "in 20 of the cases, the report of the domestic violence was noted in the case record with no further explanation or intervention." Source of reports: S. Schechter and J. Edleson, *In The Best Interests of Women and Children: A Call For Collaboration Between Child Welfare and Domestic Violence Constituencies* (briefing paper prepared for the Conference Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, 1994, available through the National Council of Family and Juvenile Court Judges, Reno, NV).

2. **DV perpetrator unintentionally physically injures the children during the perpetrator's attack on the adult victim.**

    - When the child gets caught in the fray (e.g., an infant injured when mother is thrown while holding the infant); or
    - When the child attempts to intervene (e.g., a small child is injured when trying to stop the perpetrator's attack against the victim).[43]

3. **The perpetrator uses the children to coercively control the adult victim:**

    - Isolating the child along with the abused parent (e.g., not allowing the child to enter peer activities or friendships);
    - Engaging the children in the abuse of the other parent (e.g., making the child participate in the physical or emotional assaults against the adult);
    - Forcing children to watch the abuse against the victim;
    - Interrogating the children about mother's activities;
    - Forcing the victim to always be accompanied by a child or children in order to set up surveillance of the mother's activities;
    - Taking the child away after each violent episode to ensure that the abused party will not flee the abuser, etc.; and
    - Asserting that the children's "bad" behavior is the reason for the assault on the intimate partner.

4. **Assaulting the abused parent in front of the children.**

    - In spite of what parents say, children have often either directly witnessed the acts of physical and psychological assaults, or have indirectly witnessed them by overhearing the episodes or by seeing the aftermath of the injuries and property damage.
    - Research reveals that children who "merely" witness domestic violence may be affected in the same way as children who are physically and sexually abused.[111]
    - Men who witness their father's abuse their mothers were three times more likely to abuse their wives than men who had not.[112]

---

[111] G. Goodman and M. Rosenberg, "The Child Witness to Family Violence: Clinical and Legal Considerations," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. Sonkin (1986), Russell, D., Springer, K., & Greenfield, E. (2010) *Witnessing domestic violence in childhood as an independent risk factor for depressive symptoms in young adulthood,* **Child Abuse and Neglect** 34(6), 448-453.
[112] Howard Davidson, *The Impact of Domestic Violence on Children,* AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, 1994, available at

5. **Even after separation, batterers use the children as pawns to control the abused party.**

When the abused party and perpetrator are separated, the perpetrator's main vehicle for continued contact and control of the adult victim is through the children (whether they are the legal parents of the children or not). Consequently batterers often seek out legal control of the children in order to maintain control over the adult victims. And courts are often reluctant to set limits on parental access to children by the domestic violence perpetrator. When adult victims have separated from batterers without the batterers being held accountable for their abusive tactics, the batterers focus their control of the adult victims through the children. In these cases, the intent is to continue the abuse of the adult victim, with little regard for the damage to the children resulting from this controlling behavior.[113] Consequently, separation may increase, rather than decrease, the children's exposure to abusive tactics. Examples include:

- **Using lengthy custody battles as a way to continue control over the other parent** (repeated challenges to parenting plans, visitation schedules, court-ordered parenting evaluations, domestic violence evaluations, etc.).
- **Making or threatening false reports against the adult victim to Child Protective Services**, ordering children not to tell the adult victim what is happening during visitation, etc.
- **Holding children hostage or abducting** the children in an effort to punish the abused party or to gain the abused party's compliance.
- Some **visitation periods become nightmares** for the children because of physical abuse by the perpetrator, or because of the psychological abuse that results when the abuser interrogates the children about the activities of the victim, repeatedly disparages the victim, etc. During visitation, some perpetrators will go into tirades about the abused party's behaviors, or will repeatedly break into sobbing because the abused party is "causing" the separation or exposing children to their abusive conduct toward new partners.
- **Insisting that the children take care of all perpetrator's emotional needs,** or expecting unlimited visitation or access by telephone/email/school visits/etc. in order to avoid being alone (e.g., one perpetrator persuaded the court to order each of his two adolescent sons to stay alternate nights with him after the separation, ignoring the children's needs for time with each other or with their friends).

[113] E. A. Walker and G. Edwall, "Domestic Violence and Determination of Visitation and Custody in Divorce," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. Sonkin (1986); J. L. Edleson, "The Overlap Between Child Maltreatment and Woman Battering," *Violence Against Women* 5 (February 1999): 134-54.

- **Actively undermining the parenting of the adult victim by setting up expectations of the child to directly contradict the parenting of the adult victim** (e.g., bedtimes, school work schedules, social activities, excessive indulgences). Sometimes this takes the form of intervening in their relationships with step-siblings or other family members.

C. Effects of Domestic Violence on Children

1. **Consequences of the perpetrator's abuse vary according to the age and developmental stage of the child.**[114]

   a) **Infants**
   During this stage, one crucial developmental task for the very young child is the development of emotional attachments to others. Being able to make attachments to others provides a foundation for the healthy development of the individual. This attachment and appropriate stimulation increases infant brain development. Domestic violence not only interrupts the infant's attachment to the abuser, but also can interrupt the child's attachment to the abused party. The perpetrator often interferes with the abused party's care of the young child. The violence may not permit the bonding between parent and the child. This results in the child having difficulty forming future relationships and can block the development of other cognitive, emotional, and relational skills and abilities.

   b) Toddlers 2 to 4 years old
   At these ages, toddlers are developing a separate sense of self and agency ("No" and "Me do."). The perpetrator's abuse of the adult victim may interfere with the toddler's separation and contribute to anxious attachment to either parent or interrupt learning to do tasks for oneself.

   c) Children 5 to 10 years old
   The primary tasks of children at this age are problem-solving development and cognitive development. The perpetrator's violence and pattern of control can impede or derail both of these tasks. For example, a child may have difficulty learning basic concepts in school because of her anxieties about what is happening at home.

   d) **Teenagers**
   The central developmental task of teenagers is becoming autonomous and developing relationships. These partly occur as teens separate from their relationships with parents and establish

[114] P. Jaffe, D. Wolfe and S. Wilson, *Children of Battered Women* (1990); J. L. Edleson, "Children's Witnessing of Adult Domestic Violence," *Journal of Interpersonal Violence* 14 (August 1999): 839-70.

peer relationships. Often, the learning from family relationships is duplicated in peer relationships. For teens who are coping with the domestic violence perpetrator's abuse against the other parent, there are no positive models within the family for learning the relationship skills necessary for establishing mutuality in healthy adult relationships (listening, support, non-violent problem-solving, compromise, respect for the other, acceptance of differences, etc.).

2. **The negative effects of the perpetrator's abuse in interrupting childhood development may be seen immediately in cognitive, psychological, and physical symptoms, such as:**[115]
   - Eating/sleeping disorders;
   - Mood-related disorders, such as depression or emotional neediness;
   - Over-compliance, clinging, withdrawal;
   - Aggressive acting out, destructive behavior;
   - Detachment, avoidance, a fantasy family life;
   - Somatic complaints, finger biting, restlessness, shaking, stuttering;
   - School problems; and
   - Suicidal ideation.

3. **The children's experience of domestic violence also may result in changes in perceptions and problem-solving skills, such as:**
   - Young children incorrectly see themselves as the cause of the perpetrator's violence against the intimate partner.
   - Children using either passive behaviors (withdrawal, compliance, etc.) or aggressive behaviors (verbal and/or physical striking out, etc.) rather than assertive problem-solving skills.

4. **There also may be long-term effects as these children become adults.**
   - Since important developmental tasks are interrupted, these children may carry these deficits into adulthood. They may never recover from getting behind in certain academic tasks or in interpersonal skills. These deficits impact their abilities to maintain jobs and relationships.
   - Recent research indicates there are long-term health effects from experiences of family violence during childhood.[116]
   - Male children in particular are affected and have a high likelihood

[115] *Id.*
[116] A. L. Coker, P. H. Smith, L. Bethea, M. King, R. E. McKeiwn, "Physical Health Consequences of Physical and Psychological Intimate Partner Violence," *Archives of Family Medicine* 9, no. 5 (2000): 451-57.

of battering intimates in their adult relationships.[117]

5. **Sometimes, the children do not wait to become adults before using violence themselves (against the victim, the abuser, their peers, other adults, etc.). The following cases illustrate the influence of domestic violence on children's violence.**
    - Two sons witness long-term violence of father against mother. One son attacks mother; second son kills his brother, defending mother from brother's attack.
    - Child attacks mother while they are residing in shelter for battered women.
    - Child kills father as he attacks mother.

D. Routine Screening for Domestic Violence in Court Cases Involving Children[118] [119]

1. Given the prevalence of domestic violence and its potential impact on both children and the legal issues before the court, all legal cases involving children should be screened for domestic violence.

2. If domestic violence is identified, then screening should also identify the domestic violence perpetrator and the adult victim in the case.

3. Given that domestic violence is potentially lethal and is an issue of power and control, unidentified domestic violence in court cases involving children often results in the court having inadequate information to decide the issues before it that are vital to the children (e.g., protective orders, parenting plans, and dependency issues). Consequently, routine screening for domestic violence increases the likelihood that domestic violence will be identified in a timely manner, and the issues before the court can be considered in light of the domestic violence (as well as other co-occurring issues).

---

[117] C. T. Hotaling and D.B. Sugarman, "An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge," *Violence and Victims* 1, no. 2 (1986): 101-24.

[118] H. L. Bragg, *Child Protection in Families Experiencing Domestic Violence* (US Department of Health and Human Services, Administration for Children and Families, Children's Bureau, Office on Child Abuse and Neglect, 2003).

[119] In the State of Washington, Domestic Violence is one of the issues that must be taken into consideration when determining parenting plans. Child Welfare includes questions regarding history of domestic violence in its risk assessments. Routine screening for domestic violence is becoming standard practice in health care. As of 2009, WA CA has policies regarding protocols for routine screening for DV or all cases and Specialized DV Assessments for those cases with identified DV. A. Ganley & M Hobart, *Social Worker's Practice Guide to Domestic Violence* (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services; A, Ganley**,** ***Domestic Violence, Parenting Evaluations and Parenting Plans*****,** 2009./ King County Coalition Against Domestic Violence

4. **All personnel involved in these cases (Attorneys General, Prosecutors, Family Court Personnel, Family Law Attorneys, Guardians ad Litem (GALS), Court Appointed Special Advocates (CASA), Custody Evaluators, Child Welfare workers) should have specialized training in** screening protocols in order to carry out screening in a way that promotes safety for the children and for the adult victim.[120]

E. Assessment of the Specific Risks to Children Posed by the Domestic Violence Perpetrator (See Appendix A, Assessment Protocol)

Once domestic violence is identified in court cases involving children, a specific assessment should be conducted to assess the risks posed to children by the domestic violence. There is too much variance in impact of domestic violence on children to attempt to render findings without knowing the specifics of the domestic violence pattern, its impact on the children, its impact on the adult victim, the lethality assessment, the co-occurring issues (substance abuse, mental health, and poverty) and the protective factors in the individual case. This assessment should include information about, and a consideration of, the following:

1. **Detailed description of the pattern of abusive conduct.**

   Risk to children cannot be determined without gathering information about the entire pattern:
   - Physical assaults,
   - Sexual assaults,
   - Psychological assaults,
   - Economic coercion, and
   - Use of children to control the adult victim.

2. **Detailed description of the impact on the adult victim:**
   - Medical and mental health,
   - Resources: funds, health insurance, transportation,
   - Employment,
   - Housing, and
   - Family/social relationships.

[120] Models for routine screening can be found on the American Bar Association's website at http://www.abanet.org/domviol/screening%20tool%20final%20version%20sept.%202005.pdf, and for health care and child welfare workers in the *National Consensus Guidelines on Identifying and Responding to Domestic Violence Victimization in Health Care Settings* (Family Violence Prevention Fund, 2001), and *Identifying and Responding to Domestic Violence: Consensus Recommendations for Child and Adolescent Health* (Family Violence Prevention Fund, 2002), also available at www.endabuse.org. and A. Ganley & M Hobart, **Social Worker's Practice Guide to Domestic Violence** (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services.

3. **Detailed description of the impact on the child:**
    - Medical and mental health,
    - Child care
    - Health insurance
    - Housing,
    - Schooling,
    - Access to resources (nutrition, etc.),
    - Social/family relationships,
    - Parenting by adult victim, and
    - Parenting by the perpetrator.

4. **Lethality assessment (See previous section on lethality factors to consider)**
   A lethality assessment should also be conducted as part of the comprehensive assessment of risks posed to children by the domestic violence. When there is a history of domestic violence, some children are at risk of injury, death, or psychological harm. Some even become at greater risk during legal proceedings or post-separation of the perpetrator and the adult victim.

5. **Co-occurring Issues:**
    - Substance Abuse
    - Mental health Issues
    - Poverty

6. Description of protective factors[121] found in
    - **The adult victim**
      Battered parents go to great lengths to protect children, only to have their efforts labeled as "failure to protect" (e.g., when complying with batterers in order to protect their children, or when heeding the divorce attorney's advice not to report their concerns to CPS), or as "making false accusations to get a better deal in divorce proceedings" when calling the police after being attacked by their abuser following separation. Battered parents demonstrated a wide range of protective strategies: teaching children to hide during the violence, sending children to stay with friends, fleeing communities, getting protection orders, etc. These often go unrecognized as protective factors by evaluators, or they are misidentified as poor parenting or as "failure to protect." Too often, evaluators use the batterer's continued abuse of the adult victim as evidence of failure to protect the children, when in fact the continued contact may indicate the failure of the community to

[121] See Appendix B for detailed description of protective factors from A. Ganley and S. Schechter, *National Curriculum for Children's Protective Services* (San Francisco, CA: The Family Violence Prevention Fund, 1996) (currently out of print).

protect the adult victim and the children. Evaluators need to carefully assess adult victims for help-seeking behaviors and for protective factors, both formal and informal, and give appropriate weight to the multiple ways battered parents nurture and protect children in the midst of domestic violence.[122]

- **The children themselves**
  The children, because of age and skill may be able to engage in self-protection, and they may have relationships with the adult victim or others that promotes their resiliency.

- **The DV perpetrator**
  When batterers accept full responsibility for their conduct and for changing it, and can understand the damage to the children, they have the basis for rebuilding healthy relationships with the children. They may have employment, willingly respect court orders, support the parenting of the adult victim, and participate in programs for batterers. All of these would be considered protective factors.

- **The community**
  Does the community have adequate child care services, support programs for abused parties, intervention programs for batterers, prompt law enforcement response to violations of court orders, etc.? All of these community services are protective factors for children in homes where there is domestic violence.

F. Need for Specialized Training on Domestic Violence and Children: Identification and Assessment

1. The issues related to children and domestic violence are complex, and the expertise and research about these issues are emerging. The courts often rely on the input of professionals to make decisions in these complex cases. Unfortunately, few Family Court Services staff, Guardians ad Litem (GALS), Court Appointed Special Advocates (CASA), Child Protective Services (CPS) Social Workers, or even professional custody evaluators have the specialized training necessary for identifying domestic violence and evaluating its impact on parenting and on children. Too often, these professionals are relying on concepts and research based on families without identified domestic violence.

   Domestic violence has some unique effects on families and requires specialized assessment and interventions to be effective in maintaining the

[122] J. L. Edleson, L. F. Mbilinyi and S. Shetty, *Parenting in the Context of Domestic Violence, supra* note 45.

safety and well-being of the children and the adult victim.[123] Consequently, applying "high conflict" family research, concepts of "parental alienation syndrome," or "failure to protect" to families with domestic violence endangers the children, as well as the battered parent.

2. Specialized training should be required not only for judges and for commissioners, but also for lawyers and any professional providing evaluations to the courts in these cases. All personnel involved in these cases (Attorneys General, Prosecutors, Family Court Personnel, Family Law Attorneys, Guardians ad Litem (GALS), Court Appointed Special Advocates (CASA), Custody Evaluators, Child Welfare workers, Evaluators for child welfare) should have specialized training in what an appropriate domestic violence assessment of risks posed to children should contain. Those responsible for conducting the assessments should have additional training on domestic violence assessment protocols, in order to conduct assessments that promote safety for the children and for the adult victim.[124]

3. The courts should work collaboratively with other community agencies to review policies and procedures, and ensure that they are keeping up with the current expertise in this field.

G. This Specialized Assessment of Identified DV Should Be the Basis for Recommendations for Court Orders Involving Domestic Violence Cases with Children, Parenting Plans, and Dependency Decisions[125]

The safety and well-being of the children exposed to domestic violence are increased as the courts direct their efforts to:

1. **Increasing the safety of the adult victim and the children**
   If the information indicates either the children or adult victim are in danger of physical harm, then the court should seek to increase the safety of both. It should not assume that the children are not in physical danger simply because there was no evidence of physical harm in the past. There have been a number of cases where children were killed or harmed for the first time during or immediately following legal proceedings. The violence had been directed at the adult victim in the past, but when it appears that the adult victim is no longer under their control, some batterers will direct

[123] J. L. Edleson, L. F. Mbilinyi and Sudha Shetty, *supra* note 45.
[124] See *supra* note 72.
[125] See *Promising Judicial Practices in Domestic Violence and Child Dependency Cases* (recommendations from the Rural Domestic Violence and Child Victimization dependency court team training in Washington State, 2005). A. Ganley & M Hobart, *Social Worker's Practice Guide to Domestic Violence* (2010, R 2012), Children's Administration, Washington State Department of Social and Health Services.

their violence against the children.

2. **Respecting the autonomy of the adult victim**
   Batterers want to maintain power and control over the victim even if separating or divorcing. They will often seek arrangements through the children, as a means of maintaining that power and control, by requesting certain parenting or custody arrangements. These arrangements are very detrimental to children because the perpetrator's focus remains on the control of the adult victim and not on the best interests of the children. Consequently, when there is a history of domestic violence, parenting plans should limit the batterer's ability to control the adult victim through the children (e.g., granting sole decision making to the adult victim, having clear visitation schedules where contact between the two parties is limited, clear child support expectations with payments going to support enforcement, etc.).

3. **Holding the domestic violence perpetrator, not the victim, responsible for both the abuse and for stopping it**
   Domestic violence perpetrators harm children, either directly or indirectly, when battering the other parent. It is important for the children's safety and well-being that the perpetrator's responsibility for being abusive, and for changing the behavior, is made clear. Both parenting plans and child welfare service plans that require batterers to successfully complete a batterer's intervention or to follow other restrictions are useful in clarifying the batterer's accountability, not only for the batterer as a parent, but also for the children. It is a very confusing message to children to be placed in parenting plans which force contact with domestic violence perpetrators who take no responsibility for what they did to the other parent and for its impact on the children. It further complicates the matter for children when the parenting plans or service plans subtly, or not so subtly, place blame for the abuse on the non-offending parent.

X. The Who: The Community as Victim

A. Domestic Violence Ripples Out into the Community

Examples of the tragic consequences of domestic violence to the community can be seen on a daily basis in newspapers across the country as the reports recount the latest homicide of an ex-spouse, current partner, their children, innocent bystanders, as well as those who attempt to intervene in the violence. Although often not identified by the media as "domestic violence" homicides, these cases often have a history of abusive and controlling behavior by one party against the other. For example:

- In California, a DV perpetrator kills the victim, his daughters, and several of the victim's co-workers, as well as a police officer.

- In New York, a nightclub is burned down by the boyfriend of an employee, resulting in the deaths of numerous patrons inside.
- In Colorado, a lawyer is shot in court by a domestic violence defendant.
- In Washington, a child welfare worker attacked with ax by a DV perpetrator during home visit.
- In Washington, a lawyer is killed by the husband of a client he was defending in a custody case where domestic violence was alleged.
- In Washington, a domestically violent perpetrator kills his wife and her two female friends as they wait in the courthouse for the judge's decision in an annulment hearing.
- In Washington, a police chief kills his wife and himself in front of their two children.

B. Financial Cost of Domestic Violence to the Community

Studies continue to document the mounting financial costs to the community in health care, the workplace, and in the courts.[126] [127]

Costs to the community in lost lives and resources are constant reminders that domestic violence is not a family affair and it is not a private affair. It is a community affair demanding a community response

XI. Impact of Domestic Violence on Criminal and Civil Courts Proceedings

A. Domestic Violence in Criminal Court Proceedings

Domestic Violence appears in criminal courts in a wide variety of ways.

1. The DV perpetrator is the defendant, and the victim is a witness. As cited previously in Section III, the perpetrator of domestic violence may commit a wide variety of crimes in the process of abusing and controlling the victim. These may be either felonies or misdemeanors. However, in understanding the DV perpetrator's and victim's behaviors, it is helpful to the court to consider the specific charges in light of what is known about the dynamics of domestic violence. For example, how a DV victim responds to the DV perpetrator's arson is both the same and different than how a victim of arson responds to a stranger doing the same criminal act.

---

[126] H. Meyer, "The Billion Dollar Epidemic," *American Medical News* (January 6, 1992). *Victims Costs and Consequences: A New Look* (Washington, DC: National Institute of Justice, 1996).Max, W, Rice, DP, Finkelstein, E, Bardwell, R, Leadbetter, S. 2004, *The economic toll of Intimate Partner Violence Against Women in the United States*, *Violence and Victims***,** 19 (3) 259-272, Reeves, C.A & O'Leary-Kelly, A. (2009). *A Study of the Effects of Intimate Partner Violence on the Workplace*. University of Arkansas, Fayetteville, AS., Bonomi AE, Anderson, M Rivara, FP, Thompson RS, 2009 *Healthcare Utilization and Costs Associate with Physical and Nonphysical- Only Intimate Partner Violence*, Health Research, $$(3):1052-67.

[127] Bonomi AE, Anderson ML, Rivara FP, Thompson RS. 2009. *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence***.** Health Services Research, 44(3): 1052-67.

The DV perpetrator's coercive conduct is ongoing even through legal proceedings and has an ongoing impact on the DV victim/witness.

2. The DV victim may be the defendant in a criminal case.
   - Victims may be charged with crimes when they used physical force either (1) to defend themselves and the children or (2) in response to years of abuse by the DV perpetrator. Such self-defense or retaliatory use of physical force is not accompanied by a pattern of assaultive and coercive behaviors and does not fit the behavioral definition of domestic violence.
   - DV victims may be the defendants if they have been coerced into illegal behavior by the domestic violence perpetrator.[128]
   - An understanding of domestic violence dynamics can assist the court in its decision-making regarding charges against a DV victim.

3. The children experiencing domestic violence may be victims, witnesses, or defendants in criminal cases. Children may have witnessed the domestic violence, may have been victimized by the violence, or may have used physical force to protect a family member from DV, or children may be DV perpetrators or victims in their own adolescent relationships. Once again, an understanding of the dynamics of domestic violence can assist the court in its proceedings.

B. Domestic Violence appears in a wide variety of civil court proceedings (family law, dependency, etc.) *with or without* concurrent criminal proceedings:

1. Abused party seeks dissolution of marriage and rehabilitative compensation.

2. Abused party seeks temporary protection order, protection order, or modification of a protection order, anti-harassment order, and or stalking protection order.

3. Abused party seeks restraining order during divorce proceedings due to continued harassment by the abuser at place of employment, at children's school, or at homes of family members or through manipulation of joint funds.

[128] B. E. Richie, *Compelled To Crime: The Gender Entrapment of Battered Black Women* (New York: Routledge Press, 1996).

4. Abused party seeks compensation for physical and psychological damage caused by abuser in lengthy marriage.

5. Abused party seeks supervised and limited visitation until abuser successfully completes specialized treatment programs for batterers.

6. Abused party seeks change in marital property settlement entered under coercion of the perpetrator.

7. Abused party seeks sole decision-making and primary residential custody of children in order to reduce control of the batterer, and as way to improve batterer's responsible parenting.

8. DV abuser seeks changes in parenting plan as way to maintain access to and control over the abused party.

9. DV abuser seeks visitation in dependency court proceedings as means to maintain access to the DV victim.

10. Termination of the DV abuser's parental rights is sought as a result of physical abuse of the children.

11. Termination of the abused party's parental rights is sought as a result of failure to protect the children from the perpetrator's abuse.

Once again, an understanding of the dynamics of domestic violence can assist the court in its proceedings.

C. DV Perpetrator's Controlling Behavior during Criminal and Civil Court Proceedings

DV perpetrators often attempt to control the court process as a means of showing the abused party that the perpetrator, not the judicial officer, is in control of the legal process. DV perpetrators become very adept at using the legal system as one more tactic of coercive control against the victim.

1. Physical assaults or threats of violence against the abused party and others inside or outside the courtroom, threats of suicide, threats to take the children, etc., in order to coerce the abused party to change the petition or to recant previously given testimony.

2. Following the abused party in or out of court.

3. Sending the abused party notes or "looks" during proceedings.

4. Bringing family or friends to the courtroom to intimidate the abused party.

5. Long speeches about all the abused party's behaviors that "made" the perpetrator do it.

6. Statements of profound devotion or remorse to the abused party and to the court.

7. Requesting repeated delays in proceedings; e.g., dragging out parenting plan proceedings over two to three years.

8. Requesting changes of counsel, or not following through with appointments with counsel.

9. Intervening in the delivery of information from the courts to the abused party, so that the abused party will be unaware of when to appear in court.

10. Requesting mutual orders of protection as a way to continue control over the abused party and to manipulate the court.

11. Continually testing limits of visitation/support agreements (e.g., arriving late or not showing up at appointed times and then, if the abused party refuses to allow a following visit, threatening court action).

12. Threatening or implementing custody fights to gain leverage in negotiations over financial issues.

13. Enlisting the aid of parent rights groups to verbally harass abused party (and sometimes courts or other professionals involved with case) into compliance. Reporting professionals to state licensing board or to professional organizations to maintain control over the victim.

14. Using any evidence of damage resulting from the abuse as evidence that the abused party is an unfit parent (abused party's counseling records, etc.).

D. Courts Can Intercede in the Perpetrator's Controlling Behaviors in the Courthouse and in Proceedings

Below are examples of procedures that courts have instituted to address the ongoing security issues for DV victims and the court as well as to address the DV perpetrators ongoing abusive conduct during proceedings. The list is not exhaustive. Judicial officers have found it helpful to periodically review court procedures in light of domestic violence cases.

1. Ensuring that a safe place is available in the courthouse for abused parties to wait until their case is called; having courthouse security procedures,

such as metal detectors, etc.

2. Calling domestic violence cases as early as possible on the court calendar or having a calendar that is solely for domestic violence cases.

3. Ensuring that any statements made from the bench indicate that the court takes evidence of domestic violence seriously in the cases before it.

4. Using court policy to assure the safety of the abused party by ordering the alleged abuser to remain in the courtroom until the abused party has left the building.

5. Ordering the court security person, if requested, to accompany the abused party to transportation.

6. Intervening where appropriate on the economic coercion of the batterers.

7. Intervening where appropriate when batterers use the children to control and abuse the adult victim.

8. Holding the batterer, not the victim, responsible for following the court orders.

XII. Conclusion

Domestic violence cases present unique challenges for the courts. These cases can be handled more effectively and efficiently if fact-finding and decision-making are based on:

- an understanding of both the behavioral and legal definitions of domestic violence, as well as
- an understanding of both the societal and familial context in which domestic violence occurs and is too often reinforced.

The criminal and civil court systems' response to domestic violence must be part of a coordinated community effort to end the devastating consequences of violence within the family. Criminal and civil court judges can play a powerful role in a coordinated response by:

- Considering both the short-term and long-term damaging effects of the perpetrator's abuse in their decision-making.
- Holding DV perpetrators, not victims, of accountable for stopping their abusive conduct;
- Ensuring that DV victims have access to the justice and protection of the courts; and
- Developing court practices that increase safety for all.

CHAPTER 3
THE LEGISLATIVE RESPONSE TO DOMESTIC VIOLENCE

As mentioned in Chapter 1, **domestic violence** is defined for the purposes of this domestic violence manual as assaultive or abusive conduct between adults who have been, or still are, in an intimate relationship. Washington law provides many remedies for domestic violence, and the appropriate remedy depends on the facts and circumstances of each case.

This chapter offers a brief overview of the available legal options as responses to domestic violence. Some of these options are covered in detail in later portions of this domestic violence manual, while others are mentioned only briefly in order to distinguish them from the subjects covered in more detail.

I. WASHINGTON'S STATUTORY FRAMEWORK

Washington's domestic violence statutes are interspersed throughout the Revised Code of Washington (RCW), with the primary purposes of protecting the domestic violence victim and treating domestic violence as a serious crime. In addition to criminalizing domestic violence and providing for domestic violence shelters, the Washington Legislature has recognized the economic barriers to escaping domestic violence by adopting the Family Violence Option as part of Washington's Workfirst (welfare-to-work) program[1] and passing legislation providing that domestic violence victims could continue to be eligible for unemployment compensation if they left their jobs to protect themselves from abuse.[2] The Washington Legislature has also recognized the crucial need for victims to access safe housing by enacting protections for victims against eviction for the actions of their abusers and adverse rental decisions in Washington's Residential Landlord-Tenant Act.[3]

Washington State has evinced "a clear public policy to prevent domestic violence—a policy the legislature has sought to further by taking clear, concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable." *Danny v. Laidlaw Transit Services*, 165 Wn. 2d 200, 198 P.3d 128 (2008).

II. DOMESTIC VIOLENCE AS A CRIME

The Washington statutes do not define a separate crime of domestic violence, as is done in some states. With limited exceptions, the Washington approach is to rely on the

---

[1] Laws of 1997, ch. 58 § 103; WAC 388-61-001.
[2] Laws of 2002, ch. 8 § 1
[3] Laws of 2004, ch. 17 § 1

existing criminal statutes, but to supplement them with special procedures in cases involving domestic violence. As a result of statutory changes in 2010 that allow prior domestic violence–related misdemeanor offenses to be scored in felony sentencing, the status of the relationship should be alleged in the information and found by the jury or the court.[4] For other purposes, the status of the relationship need not be alleged in the information or found by the jury. *State v. Felix,* 125 Wn. App. 575, 105 P.3d 427 (2005) (Constitutional analysis); *State v. Goodman,* 108 Wn. App. 355, 30 P.3d 516 (2001) (Statutory analysis).

Key statutory provisions are set forth below.

A. Legislative goals

RCW 10.99.010 states:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only in the past twenty years has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

B. General guidelines

RCW 10.99.040(1) provides:

(1) Because of the serious nature of domestic violence, the court in domestic violence actions:

(a) Shall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings;

(b) Shall not require proof that either party is seeking a dissolution of marriage prior to instigation of criminal proceedings;

---

[4] Laws of 2010, ch. 274, §§ 401-407

(c) Shall waive any requirement that the victim's location be disclosed to any person, other than the attorney of a criminal defendant, upon a showing that there is a possibility of further violence: PROVIDED, That the court may order a criminal defense attorney not to disclose to his or her client the victim's location; and

(d) Shall identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence.

C. Statutory Definitions

1. RCW 10.99.020 establishes the following definitions for domestic violence proceedings:

(1) "Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

NOTE: Although prison cell mates technically may come within this definition, the Court of Appeals has suggested they would not favor their inclusion: "We question the wisdom of considering inmates in a penal institution—at least those who are not 'involved in a relationship'—as cohabiting adults for the purposes of this act." *State v. Barragan*, 9 P.3d 942, 948 n.1, 102 Wn. App. 754, 763 n.1 (2000).

NOTE: A domestic relationship does not exist between an adult and his minor sister-in-law who does not reside with the family. *State v. Garnica*, 20 P.3d 1069, 1075, 105 Wn. App. 762, 773 (2001).

(2) "Dating relationship" has the same meaning as in RCW 26.50.010.

NOTE: A dating relationship is defined in RCW 26.50.010(3) as: "[A] social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the

parties."

(3) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

(a) Assault in the first degree (RCW 9A.36.011)
(b) Assault in the second degree (RCW 9A.36.021)
(c) Assault in the third degree (RCW 9A.36.031)
(d) Assault in the fourth degree (RCW 9A.36.041)
(e) Drive-by shooting (RCW 9A.36.045)
(f) Reckless endangerment (RCW 9A.36.050)
(g) Coercion (RCW 9A.36.070)
(h) Burglary in the first degree (RCW 9A.52.020)
(i) Burglary in the second degree (RCW 9A.52.030)
(j) Criminal trespass in the first degree (RCW 9A.52.070)
(k) Criminal trespass in the second degree (RCW 9A.52.080)
(l) Malicious mischief in the first degree (RCW 9A.48.070)
(m) Malicious mischief in the second degree (RCW 9A.48.080)
(n) Malicious mischief in the third degree (RCW 9A.48.090)
(o) Kidnapping in the first degree (RCW 9A.40.020)
(p) Kidnapping in the second degree (RCW 9A.40.030)
(q) Unlawful imprisonment (RCW 9A.40.040)
(r) Violation of the provisions of a restraining order, no contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location. (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, 74.34.145)
(s) Rape in the first degree (RCW 9A.44.040)
(t) Rape in the second degree (RCW 9A.44.050)
(u) Residential burglary (RCW 9A.52.025)
(v) Stalking (RCW 9A.46.110)
(w) Interference with the reporting of domestic violence (RCW 9A.36.150)

(4) "Victim" means a family or household member who has been

subjected to domestic violence.

NOTE: Special issues concerning prosecutions for property offenses where the parties are married are discussed in Chapter 5, VIII

2. A more general definition is provided in RCW 26.50.010, which defines domestic violence as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;

(b) [S]exual assault of one family or household member by another; or

(c) [S]talking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

D. Interference with the Reporting of a Domestic Violence Offense

In 1996, the legislature adopted RCW 9A.36.150, Interfering with the Reporting of Domestic Violence. That section provides:

1. A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

In *State v. Nonog*, 169 Wn.2d 220, 230-31, 237 P.3d 250 (2010), the Supreme Court held that although the specific domestic violence crime was not specifically set out in the interference count, the defendant was on notice of what offense was listed by reading all the counts as a whole. Commission of a crime of domestic violence under subsection (1) of this section is a necessary element of the crime of interfering with the reporting of domestic violence.

In *State v. Clowes*, 104 Wn. App. 935, 945-47, 18 P. 3d 596 (2001) the defendant appealed from his conviction for two offenses: violation of a no-contact order and interfering with the reporting of a domestic violence offense. In *Clowes*, the interference charge was dismissed because the

charging document was found to be insufficient. The no-contact order conviction was reversed for an instructional error. The court rejected the defense argument that reversal of the no-contact order count provided an independent basis for reversing the interfering with reporting a domestic violence offense count. The court concluded that RCW 9A.36.150 (interfering with reporting a domestic violence offense) does not require a conviction of a separate domestic violence offense and that so long as sufficient evidence of the commission of such an offense is contained in the record, the conviction for interfering with reporting a domestic violence offense can stand.

2. Interference with the reporting of domestic violence is a gross misdemeanor.

This statute marks a significant break from the legislature's traditional treatment of domestic violence offenses. In essence, it makes proof of the existence of a family or household relationship an element of the offense.

E. Mandatory Arrest Without Warrant

A police officer with probable cause to believe that one of a variety of domestic violence orders has been violated or that an assault between family or household members has occurred within the previous four hours is required to arrest the perpetrator. RCW 10.31.100(2). Even when arrest is not required, the officer has discretion to effect a warrantless arrest in virtually any domestic violence situation. RCW 10.31.100(1) authorizes arrests without warrants for all felonies and for misdemeanors that involve violence or threats of violence to persons or property, the wrongful taking of property, and acts of criminal trespass.

This is discussed in greater detail in Chapter 4, Section I.

III. PROVISIONS CONCERNING THE POSSESSION OF FIREARMS

A. Disqualification of Right to Possess a Firearm by Certain Domestic Violence Offenders

1. Possession of a firearm as a felony

RCW 9.41.040(2)(a)(i) and (ii) defines the crime of Unlawful Possession of a Firearm in the Second Degree. It provides that it shall be unlawful to possess a firearm:

> After having previously been convicted in this state or elsewhere of . . . the following crimes when committed by one family or household member against another, committed after July 1, 1993: Assault in the fourth degree,

coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, 10.99.040); [or]

During any period of time that the person is subject to a court order issued under chapter 7.90, 7.92, 9A.46, 10.14, 10.99, 26.09, 26.10, 26.26, or 26.50 RCW that:

(a) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

(b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(c) (i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner[5] or child; and

(ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

Possession of a firearm in the second degree is a class C felony. RCW 9.41.040(2)(b). Possession of a firearm by a defendant who has been previously convicted of a "serious offense" is a class B felony of unlawful possession of a firearm in the first degree. No proof of a domestic relationship is required for possession of a firearm in the first degree. A serious offense includes, inter alia, any crime of violence, reckless endangerment in the first degree, child molestation in the second degree, and any crime in which a deadly weapon verdict was returned. RCW 9.41.010(18)(a)-(o).

[5]"Intimate partner" includes: A spouse, a domestic partner, a former spouse, a former domestic partner, a person with whom the restrained person has a child in common, or a person with whom the restrained person has cohabitated or is cohabitating as part of a dating relationship.

The court has no discretion to waive or limit the firearm restriction imposed under RCW 9.41.040 for an adult felony offender. *State v. Damiani*, 162 Wn. App 1, 251 P. 3d 927 (2011) (comparing lack of discretion in the restoration context with the lack of discretion in the removal context).

2. Court's duty to inform defendant of loss of right to possess a firearm

Both CrR 4.2 and CrRLJ 4.2 require that a defendant be advised, in writing, of the effect of a guilty plea on the right to possess a firearm. In addition, at the time of conviction for an offense which makes a defendant ineligible to possess a firearm, the court must inform the person both in writing and orally of the loss of right to possess a firearm and the need to surrender any concealed pistol license. RCW 9.41.047(1). A conviction includes a guilty finding, whether by plea or trial, even if sentence is pending. RCW 9.41.040(3).

The court is required to provide identification and conviction information to the Department of Licensing to effectuate the provisions of RCW 9.41.047(b). RCW 9.41.047(1).

3. Restoration of the right to possess a firearm

A defendant may petition a court of record for restoration of the right to possess a firearm five years after conviction of a felony (assuming that the defendant has had no subsequent convictions of any kind and so long as possession of a firearm is not barred by RCW 9.94A.525) or three years after conviction of a non-felony offense (assuming that the defendant has had no subsequent convictions of any kind, is not barred from possession a firearm by RCW 9.94A.525, and the individual has completed all the terms of his or her sentence). RCW 9.41.040(4)(a)(ii)(A)-(B).

The Court of Appeals held that the trial court's power to restore the right to possess firearms is ministerial, rather than discretionary. *State v. Swanson*, 116 Wn. App. 67, 78; 65 P.3d 343, 349 (2003) (The trial court's function is ministerial; thus, the court did not have discretion to deny restoration to convict who met all statutory requirements for restoration).

B. Authority of Court to Prohibit a Perpetrator from Possessing a Firearm or Other Dangerous Weapon while Issuing Orders for Protection of the Victim

RCW 9.41.800 contains broad authority for a court to prohibit the possession of a firearm or other dangerous weapon in conjunction with issuing an order for the protection of a domestic violence victim. Almost all conceivable orders come

within the scope of this statute (R.C.W. 7.92, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.26.130, 26.26.590, 26.50.060, 26.50.070). a court finds by ***clear and convincing evidence*** that the person to be restrained used, displayed, or threatened to use a firearm or other dangerous weapon in a serious felony offense, or previously committed an offense which makes a person ineligible to possess a firearm, the court ***must***:

(a) Require the party to surrender any firearm or other dangerous weapon;

(b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from obtaining or possessing a firearm or dangerous weapon; and

(d) Prohibit the party from obtaining or possessing a concealed pistol license. RCW 9.41.800(1)(a)-(d).

If the court makes the same findings by a ***preponderance*** (but does not find that clear and convincing evidence has been adduced) the court ***may*** issue any or all of the above orders. RCW 9.41.800(2)(a)-(d).

Furthermore, the court has the authority to order ***temporary*** surrender of a firearm without notice to the other party if it finds that irreparable injury could result if an order is not issued until the time for response has elapsed. RCW 9.41.800(4).

In addition, if the court finds that the possession of a firearm or other dangerous weapon presesnts a serious and imminent threat to public health or safety, or the health or safety of individual, the court may also order the surrender of a concealed pistol license, prohibit the party from obtaining or possessing a firearm or other dangerous weapon, or prohibit the party from possessing a concealed pistol license. RCW 9.41.800(5).

In 2014, the legislature enacted prohibitions for any individual subject to certain restraint provisions in a protective order from possessing a firearm, where the court finds that the individual poses a credible threat to his or her intimate partner or the intimate partner's child. RCW 9.41.800(3). These provisions closely align (though they are not identical) with provisions in federal law prohibiting domestic violence abusers restrained by protection orders from possessing firearms. See Subsection C, *infra*.

RCW 9.41.800(3) provides that the court shall require the party to surrender any firearm or concealed pistol license, and prohibit the party from obtaining such:

> During any period of time that the person is subject to a court order issued under chapter 7.90, 7.92, 9A.46, 10.14, 10.99, 26.09, 26.10, 26.26, or 26.50 RCW that:
>
> (a) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;
>
> (b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (c)(i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and
>
> (ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury, ….

The firearms are to be surrendered to the sheriff, the chief of police of municipality having jurisdiction, or the attorney for the person seeking the order, or to any other person designated by the court. RCW 9.41.800(6).

Violation of RCW 9.41.800 is generally a misdemeanor. RCW 9.41.810. However, violation of RCW 9.41.800(3) (firearm possession where a protection order with restraints against domestic violence is issued following notice and hearing and a finding of credible threat) constitutes a class C felony.

C. Federal Legislation

Although a detailed discussion of federal legislation is beyond the scope of this manual, two significant enactments merit discussion. Under 18 U.S.C. 922(g)(8), a person who is subject to a court order issued for the protection of an intimate partner cannot possess a firearm or ammunition if the order:

> (a) Was issued after a hearing at which the respondent had actual notice and an opportunity to participate;
> (b) Restrains the person from harassing, stalking, or threatening an intimate partner or otherwise placing the intimate partner in reasonable fear of bodily injury or bodily injury to a child; and
> (c) (i) Includes a finding that the person restrained represents a credible threat to an intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child. . .

In addition, pursuant to 18 U.S.C. 922(g)(9), a person who has been convicted of a misdemeanor crime of domestic violence in any state court is prohibited from possessing a firearm.

Possession of a firearm by someone previously convicted of an offense with a penalty of greater than one year is barred by 18 U.S.C. 922 (g)(1). Subsection (g)(1) does not require proof that the prior conviction involved an intimate partner. Subsection (g)(1) is a long-standing statute and is not part of the recent changes to 18 U.S.C. 922.

Violation of any of the provisions of subsection (g) of 18 U.S.C. 922 is punishable by ten years in prison. 18 U.S.C. 924 (a)(2).

NOTE: A violation of 18 U.S.C. 922(g) requires proof of one of several jurisdictional requirements. However, since federal jurisdiction is established by proof that the "firearm or ammunition . . . ha[d] been shipped or transported in interstate or foreign commerce," in most situations, federal prosecution would be possible.

Appendix C contains further discussion of the federal provisions.

IV. Orders for the Protection of the Victim

The legislature has also provided for the imposition of several types of orders for the protection of victims of domestic violence, as well as victims of other violent or harassing behavior. These include:

- No-Contact Orders (RCW 10.99.040, 10.99.050)
- Domestic Violence Protection Orders (RCW 26.50)
- Restraining Orders (RCW 26.09.060, 26.09.300)
- Anti-Harassment Orders (RCW 10.14.080, 9A.46.050)
- Vulnerable Adult Protection Orders (RCW 74.34.110, 74.34.130)
- Sexual Assault Protection Orders (RCW 7.90)
- Stalking Protection Orders (RCW 7.92)

Requests for protection from another party may also arise in proceedings under RCW 26.10.200 (non-parental action for child custody); RCW 26.26.138 (restraining order-parentage proceeding); RCW 26.44.063 and RCW 26.44.150 (temporary restraining order or preliminary injunction; child abuse and adult dependent abuse proceedings, and penalties for violation).

The legislature has also enacted specific provisions ensuring that foreign protection orders are enforceable in Washington. Chapter 26.52, RCW.

The following section briefly describes the various types of orders that may confront a court in a domestic violence case. No-contact orders as part of criminal proceedings are

discussed in greater detail in Chapter 4 and Chapter 5. Chapter 8 contains a detailed discussion of the procedure to be followed in issuing a domestic violence protection order, which is civil in nature. Anti-harassment orders are not typically issued where domestic violence is being committed. Sexual assault and stalking protection orders are generally only available for individuals who are ineligible for a domestic violence protection order. However, because there are limited circumstances when these other orders may be the only relief available, they will be discussed briefly below.

Violation of many of these orders is a separate offense. This is discussed where appropriate below. The Washington Legislature has generally tried to make uniform the penalties for violations of the various types of orders entered for the protection of domestic violence victims. RCW 26.50.110 establishes penalties for violating any order granted under Chapters 7.90, 7.92, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.52.020, 74.34 RCW. A few exceptions remain. Violation of a temporary restraining order issued pursuant to RCW 26.44.063 and 26.44.150 remain misdemeanors and are not governed by 26.50.110. Civil anti-harassment orders are also not covered by RCW 26.50.110.

A victim's consent to the violation of a protection or no-contact order is not a defense to a criminal prosecution for violating the court order. *State v. Dejarlais*, 136 Wn.2d 939, 969 P.2d 90, 92(1998) (violation of a 26.50 protection order); *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974, 979 (2000) (violation of a 10.99 no-contact order). In fact, RCW 10.99.040(4)(b) and RCW 26.50.035(1)(c) require that the order prohibiting contact indicate on its face that the person restrained is subject to arrest even if the victim consents to the contact. *State v. Wofford*, 148 Wn. App 875, 201 P.3d 389 (2009)(any willful violation of a protection order is criminal). Continued reliance on *Reed v. Reed*, 149 Wn. 352, 356 270 P. 1028, 1029(1928), which held that a victim who consented to a violation of a restraining order could not enforce that order, appears to be unwarranted. *Dejarlais*, 136 Wn.2d at 943-44 (rationale of *Reed* severely criticized, but case not specifically overruled).

NOTE: As indicated above, both RCW 10.99.040(4)(b) and RCW 26.50.035(1)(c) require that the order, on its face, indicate that consent to violation is not a defense. This is a mandatory requirement. An order that does not include this language cannot serve as the basis for a criminal charge. *State v. Marking*, 100 Wn. App. 506, 512, 997 P.2d 461, 464, *review denied*, 141 Wn.2d 1026 (2000) (conviction based on order without mandatory language reversed for insufficiency of evidence).

In addition, violation of any of these orders is punishable as contempt. For a brief discussion of whether the double jeopardy clause bars both criminal prosecution and entry of a contempt finding, see Chapter 4, Section III, G, 5.

The chart at the end of this chapter summarizes the important attributes of the various available orders.

A bench guide summarizing the various orders available for the protection of victims is available in Appendix J and at http://www.courts.wa.gov/dv/?fa=dv.guide.

A. No-Contact Orders Under RCW 10.99.040 and 10.99.050

No-contact orders, including jury instructional issues, are discussed in greater detail in Chapter 4, Section III and Chapter 5, Section X.

1. A domestic violence no-contact order may be imposed whenever a criminal domestic violence prosecution is pending.

A criminal no-contact order may be imposed as a condition of release or a condition of sentence. It is entered by the court having jurisdiction over the criminal matter. The moving party is generally the prosecuting attorney. A court may issue a criminal no-contact order at arraignment in cases where the defendant does not appear, where that court has found probable cause. RCW 10.99.040(3)

2. The scope of a no-contact order is limited.

A no-contact order bars the defendant from having contact with the victim. It may include a provision prohibiting the defendant from knowingly coming within or remaining at a specified distance of a location.

This type of order properly does not make provisions for the custody of children or for division of property, but may be issued to protect individuals who are not direct victims of the crime, if the relevant restraints are "directly related to the circumstances of the crime." RCW 9.94A.505(8); *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). In *State v. Warren*, 165 Wn. 2d 17, 195 P.3d 940 (2008), the court held that protecting the victim's mother was directly related to the crimes in the case, where the defendant attempted to induce her not to cooperate in the prosecution of the crime, and she had testified against the defendant, resulting in his conviction of the crime.

Restrictions on the defendant's right to parent can only be imposed with a finding by the trial court that the restriction is "reasonably necessary to prevent harm to the children." *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246, 1249 (2001). In *Ancira*, the court concluded that, under the facts presented, a provision in a criminal no-contact order that barred the defendant from having any contact with his non-victim children violated his fundamental right to parent. 107 Wn. App at 656-7. Accord *State v. Stanford*, 128 Wn. App. 280, 115 P.3d 368 (2005) (Provision of criminal sentence restricting defendant to only supervised contact with non-victim children not warranted).

3. Violation of a no-contact order is a crime.

Any violation of a domestic violence no-contact order is a separate crime. It is punished pursuant to the provisions of RCW 26.50.110. Generally, violation is a gross misdemeanor. However, under the following circumstances, violation is a class C felony:[6]

(a) The act that violates the order issued under RCW 7.90, 7.92, 9A.46, 9.94A, 10.99, 26.09, 26.10, 22.26, 74.34, or a valid foreign protection order as defined in RCW 26.52.020, that is an assault (not amounting to an assault in the first or second degree) or is an act "that is reckless and creates a substantial risk of death or serious physical injury to another person." RCW 26.50.110(4). In some counties, these incidents are referred to as assaults in violation of a protection/no-contact order and not as felony violations of a no-contact order. *See State v. Sanchez*, 122 Wn. App. 579, 94 P.3d 384 (2004).

(b) The defendant has had two prior convictions for violating orders issued under any of the following provisions: under RCW 7.90, 7.92, 9A.46, 9.94A, 10.99, 26.09, 26.10, 22.26, 74.34, or a valid foreign protection order as defined in RCW 26.52.020. The previous conviction need not involve the same person as the victim in the current offense. RCW 26.50.110(5).

NOTE: Felony violations of a no-contact order have been classified as seriousness level five offenses.[7] RCW 9.94A.515. A felony violation of a no-contact order is included within the definition of "crime against person" and subject to the filing standards of RCW 9.94A.411. In addition, when sentencing an offender for a "crime against person," the court is required to impose a community custody range. RCW 9.94A.505(2)(ii). These penalties apply to offenses which occur on or after July 1, 2000, regardless of when the original order was issued.

(c) The defendant has violated the order by possessing a firearm or concealed pistol license. RCW 9.41.800(3).

---

[6] Somewhat confusingly, both RCW 10.99.040 and 10.99.050 require that the face of the order indicate that any violation of the order which is an assault, an act of reckless endangerment, or a *drive-by shooting* is a felony and then refer to RCW 26.50.110 for the penalty provisions. RCW 26.50.110 does not include the drive-by shooting provision, presumably since any drive-by shooting is, by itself, a felony. RCW 9A.36.045.

[7] Before this date, these offenses were "unranked" and thus subject to a 0 to 365-day penalty, regardless of the defendant's prior record.

(d) RCW 10.99.050(7) requires all courts to have policies and procedures to grant victims a process to modify or rescind a no-contact order issued under RCW 10.99. The administrative office of the courts has developed a model policy, available at http://www.courts.wa.gov/programs_orgs/pos_genderandjustice/ModelPolicyForVictims.pdf.

B. Domestic Violence Protection Orders Under Chapter 26.50 RCW

Chapter 8 contains a detailed discussion of domestic violence protection orders and contains specific information concerning the procedure for issuing and serving such orders. Jury instructional issues are discussed in Chapter 5, IX.

1. Protection orders may be obtained by a victim even if criminal charges are not pending.

A court may issue a protection order when there are specific allegations of domestic violence regardless of "whether or not there is a pending lawsuit, complaint, petition, or other action between the parties." RCW 26.50.030(2). There is no requirement of a recent act of domestic violence, so long as there are past acts of domestic violence and the victim is currently fearful. *Spence v. Kaminski*, 12 P.3d 1030, 1035, 103 Wn. App. 325, 333-4 (2000); *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P. 3d 592 (2002); *Barber v. Barber*, 136 Wn. App 512, 516, 150 P.3d 124 (2007). The victim's current fear of recurrence must be reasonable. *Freeman v. Freeman*, 169 Wn.2d 664, 674-75, 239 P.3d 557 (2010).

Pursuant to RCW 26.50.021, the Department of Social and Health Services may seek a domestic violence protection order on behalf of and with the consent of a vulnerable adult. See RCW 74.34.020(17) (definition of vulnerable adult).

2. Scope of a protection order.

Unlike a criminal no-contact order, the scope of a protection order can be quite broad. Of course, protection orders can prohibit the abuser from contacting the victim. In addition, protection orders can include provisions requiring the abuser to vacate a residence or to obtain treatment, for temporary custody of children, requiring the payment of attorney fees, or "other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer." RCW 26.50.060(1)(f).

3. Penalty for violation of protection orders.

(a) Violation of a protection order, when the restrained person knows of the order and violates a provision prohibiting acts or threats of violence against, or stalking of, a protected party, or a restraint provision prohibiting contact with a protected party, is a crime. RCW 26.50.060(1)(a),(h)(i); *State v. Wofford*, 148 Wn. App 870, 201 P.3d 389 (2009). *See also, Jacques v. Sharp*, 83 Wn. App. 532, 542-3 922 P.2d. 145, 150 (1996) (interpreting "restraint provision" in prior version of the statute)

However, a violation of any provision of a domestic violence protection order that follows two prior convictions for violating a no-contact or domestic violence protection order subjects a defendant to felony criminal prosecution even if the violation, itself, could not have been prosecuted pursuant to RCW 26.50.110(1). *State v. Chapman*, 140 Wn.2d 436, 998 P.2d 282 (2000).

(b) A criminal violation of a protection order is generally a gross misdemeanor. RCW 26.50.110(1). The violation is a class C felony, however, if:

(i) The act that violates the order issued under RCW 7.90, 7.92, 9A.46, 9.94A,10.99, 26.09, 26.10, 26.26, 74.34 or a valid foreign protection order as defined in RCW 26.52.020, is an assault (not amounting to an assault in the first or second degree) or is an act "that is reckless and creates a substantial risk of death or serious physical injury to another person." RCW 26.50.110(4).

(ii) The defendant has had two prior convictions for violating orders issued under any of the following provisions: RCW 7.90, 7.92, 9A.46, 9.94A,10.99, 26.09, 26.10, 26.26, 74.34, or a valid foreign protection order as defined in RCW 26.52.020. The previous conviction need not involve the same person as is the victim in the current offense. RCW 26.50.110(5).

NOTE: Felony violations of a protection order have been classified as seriousness level five offenses. RCW 9.94A.515. A felony violation of a protection order is included within the definition of "crime against person" and subject to the filing standards of RCW 9.94A.411. In addition, when sentencing an offender for a "crime against person," the court is required to impose a community custody range. RCW 9.94A.505(2)(11).

(c) Upon conviction, the court, in addition to any other penalties provided by law, may order the defendant to submit to electronic home detention. For further discussion see, Chapter 4, III, G, 6.

(d) Violation of any provision of a protection order constitutes contempt of court, which provides an additional remedy for victims to enforce such an order. RCW 26.50.110(3). *State v. Wofford*, 148 Wn.App. 870, 201 P.3d 389 (2009). The existence of two different remedies in punishing a defendant who violates the restraint provisions of a protection order does not violate an accused's right to equal protection. *State v. Horton*, 54 Wn. App. 837, 840-1 776 P.2d 703, 704-5, (1989).

(e) RCW 26.50.060(2) provides that where a court makes a finding that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may issue a permanent protection order. However, the validity of a permanent order that does not explicitly find that the respondent is likely to resume acts of violence is not an element of the crime of violation of such an order. *City of Seattle v. May*, 171 Wn.2d 847, 256 P. 3d 1161 (2011). Accord, *State v. Miller*, 156 Wash.2d 23, 123 P.3d 827 (2005).

C. Protection and Restraining Orders in Other Domestic or Civil Proceedings

1. Domestic violence protection orders may be entered in a dissolution or parentage action.

RCW 26.50.025 provides that domestic violence protection orders may be issued within actions under RCW 26.09, 26.10, or 26.26. Where a separate protection order has been issued, the court may consolidate the domestic violence protection order cause numbers within the dissolution or parentage case.

2. Restraining orders may be entered in a dissolution or parentage action.

The statutes governing marriage dissolutions and parentage actions authorize the court to enter restraining orders, temporary or otherwise, in the context of those proceedings. RCW 26.09, 26.26.138.

The relief available with a restraining order is broad, and the order may be tailored to the facts and circumstances of each individual case. Provision can be made for child support, maintenance, and attorney fees. A

restraining order can last longer than one year.

Obtaining a restraining order can be complex and expensive. The victim may be unable to obtain a restraining order without retaining counsel. Also, a restraining order is not available in the context of another proceeding if the parties are neither married nor have a child in common. In such cases, the victim's remedy is normally limited to a protection order.

3. Penalty for violation.

Violation of domestic violence protection orders within dissolution or parentage cases are fully enforceable under RCW 26.50.

Knowing violation of a provision in a restraining order "restricting the person from acts or threats of violence, or of a provision restraining the person from going onto the grounds of or entering the residence, workplace, school, or day care of another, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location" is a crime. RCW 26.09.300(1). Penalties (including felony penalties under some circumstances) are governed by RCW 26.50.110.

D. Foreign Protection Orders

In recognition of what the Washington State Legislature termed an "epidemic" of women fleeing abusers by crossing state lines and in fulfillment of the policies of the Violence Against Women Act (VAWA) as Title IV of the violent crime control and law enforcement act (P.L. 103-322), the legislature adopted the Foreign Protection Order Full Faith and Credit Act in 1999. This act has been codified in Chapter 26.52, RCW.

The legislature, in adopting this act, intended "that the barriers faced by persons entitled to protection under a foreign protection order will be removed and that violations of foreign protection orders be criminally prosecuted in this state." RCW 26.52.005.

For more detail about foreign protection orders, see Chapter 8, Section XXII.

E. Anti-Harassment Orders

1. Civil anti-harassment orders under Chapter 10.14 RCW

(a) Washington's anti-harassment statutes, Chapter 10.14 RCW, authorize protection orders somewhat comparable to protection orders entered under the Domestic Violence Prevention Act (DVPA) (RCW

26.50). The anti-harassment statutes apply in situations not governed by Chapter 10.99 RCW (no-contact orders, criminal), Chapter 26.50 RCW (protection orders), or Chapter 7.90 RCW (sexual assault orders). See RCW 10.14.130.

(b) Anti-harassment orders in the context of domestic violence cases may often be sought by other family members of the victims of domestic violence who themselves fear violence or harassment from the perpetrator, and generally, not by the victims themselves. For example, anti-harassment orders may come into play in domestic violence cases when an ex-partner is harassing a current partner, the parents, or children of a former family or household member.

(c) The district court has original jurisdiction over any anti-harassment petition, except in cases where the respondent to the petition is under eighteen years of age, the case involves title or possession of real property, a superior court has exercised or is exercising jurisdiction over a proceeding involving the parties, or the action would have the effect of interfering with a respondent's care, control, or custody of the respondent's minor child. In those situations the court shall transfer the case to superior court. RCW 10.14.150(1)–(2). Municipal court may have jurisdiction over anti-harassment petitions if the court has passed a local court rule authorizing such jurisdiction.

Superior courts have concurrent jurisdiction to receive transfer of anti-harassment petitions in cases where a district or municipal court judge makes findings of fact and conclusions of law showing that meritorious reasons exist for the transfer. RCW 10.14.150(3).

The municipal and district courts shall have jurisdiction and cognizance of any criminal actions brought under RCW 10.14.120 and 10.14.170. *Id.)*.

NOTE: In 1993, Const. art. 4, § 6 (amend. 65) was amended to grant district and superior courts concurrent jurisdiction over cases in equity. Thus, case law in which it was held that an anti-harassment order issued by a district court was void as being in excess of the court's jurisdiction is no longer controlling. See *State v. Brennan*, 884 P.2d 1343, 1340 n.8, 76 Wash. App. 347, 356 n.8 (1994).

(d) "Unlawful harassment" under the anti-harassment statute RCW 10.14 does not require that the intent of the respondent be proven but only that the respondent engaged in a "knowing and willful course of conduct." The petitioner need not fear personal injury or property damage, but must "reasonably and actually" suffer from substantial emotional distress.

(e) Violation of an anti-harassment order issued pursuant to Chapter 10.14 RCW is a gross misdemeanor. RCW 10.14.170.

2. Criminal anti-harassment orders under RCW 9A.46.040

(a) A defendant who is charged with a crime of harassment under RCW 9A.46.020 may be ordered, as a condition of release, to:

Stay away from the home, school, business, or place of employment of the victim;

Refrain from "contacting, intimidating or threatening, or otherwise interfering" with the victim or others, including but not limited to members of the victim's family or household. RCW 9A.46.040(1)(a)(b).

(b) Similarly, RCW 9A.46.080 permits imposition of a criminal anti-harassment order following conviction. Violation of such an order is a gross misdemeanor.

F. Other protective orders

1. Stalking Protection Orders under Chapter 7.92 RCW

(a) In 2013, in response to the murder of a stalking victim, the legislature enacted the Jennifer Paulson Stalking Protection Order Act. RCW 7.92. (ESSB 1383, Laws of 2013, ch. 84, Sec. 10.)

(b) A stalking protection order petition may be filed by someone who is a victim of "stalking conduct," who is ineligible for a domestic violence protection order under RCW 26.50. RCW 7.92.040. This may include family members or new partners of a domestic violence victim or minors in dating relationships who do not meet the definition of "family or household member" under RCW 26.50.010(2) due to their ages.

(c) "Stalking conduct" is defined as:

(I) Any act of stalking as defined under RCW 9A.46.110;
(II) Any act of cyberstalking as defined under RCW 9.61.260;
(III) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that:
(i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling;

(ii) Serves no lawful purpose; and

(iii) The stalker knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person. RCW 7.92.030(3).

(d) Violation of stalking protection orders triggers enhanced criminal penalties as compared with anti-harassment orders. Unlike in cases involving violations of anti-harassment orders, law enforcement must arrest a respondent when there is probable cause to believe that a stalking protection order has been violated. RCW 10.31.100(2).

(e) The district court has original jurisdiction over a stalking protection order petition, except in cases where the respondent to the petition is under eighteen years of age, the case involves title or possession of real property, a superior court has exercised or is exercising jurisdiction over a proceeding involving the parties, or the action would have the effect of interfering with a respondent's care, control, or custody of the respondent's minor child. In those situations the court shall transfer the case to superior court. RCW 7.92.050(3)–(5). Municipal court may have jurisdiction over anti-harassment petitions if the court has passed a local court rule authorizing such jurisdiction.

(f) Under RCW 7.92.020(3)(a), (refers to the criminal law definition of stalking in RCW 9A.46.110), the respondent must intentionally harass or follow another person and in doing so either must intend to frighten, intimidate, or harass that person or know or should reasonably know that the person is intimidated, harassed or afraid. The petitioner both objectively and subjectively must be placed in fear of personal injury or property damage to either themselves or another person.

(g) Under RCW 7.92.020(3)(c), intent need not be proven, provided that the stalker knows or should reasonably know that the course of conduct frightens, intimidates, or threatens the petitioner. Although the petitioner's objective and subjective state of mind must be shown, the petitioner need only feel "intimidated, threatened, or frightened;" this definition does not explicitly state that they must fear personal injury or property damage. This definition of stalking has not been legally tested.

2. Criminal Stalking No-Contact Orders

A defendant who is charged with a crime of stalking under RCW 9A.46.110 or RCW 9A.46.060 may be prohibited, as a condition of release, from having any contact with the victim or be required to stay a specified distance away from a location. RCW 7.92.160; RCW

9A.46.040(3).

RCW 7.92.160(6) also permits imposition of a criminal anti-stalking order following conviction. Violation of such an order is a gross misdemeanor.

3. Sexual Assault Protection Orders under RCW 7.90

In 2006, the Washington State Legislature passed Chapter 7.90, RCW, the Sexual Assault Protection Order Act. This law filled a gap that had existed for many sexual assault victims by providing them with an avenue to obtain "stay away" protection from the offender. RCW 7.90.005.

Sexual assault protection orders are discussed in detail in Chapter 4, 8, and 9 of Washington's Sexual Offense Bench Guide.[8]

(a) In criminal cases, RCW 7.90.150 allows a court to prohibit contact between the accused and alleged victims when the accused has been charged with or arrested for a sex offense defined in RCW 9.94A.030.

When a person has been convicted of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096 or RCW 9.68A.090, or any gross misdemeanor that is, under RCW 9A.28, a criminal attempt, solicitation, or conspiracy to commit a sex offense, a no-contact order issued at sentencing is recorded as a sexual assault protection order RCW 7.90.150(6)(a).

(b) Civil sexual assault protection orders are available to victims under the sexual assault protection order statute, RCW 7.90. However, sexual assault protection orders (SAPOs), are not available for a victim who qualifies for domestic violence protection under RCW 26.50. RCW 7.90.030. However, some domestic violence victims—in particular, minors who do not fit the "family or household member" definition—are eligible to petition for a SAPO.

(c) Any person may seek relief by filing a petition that alleges that he or she has been the victim of nonconsensual sexual conduct or nonconsensual sexual penetration committed by the respondent. RCW 7.90.040(1)(h).

(d) A victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident, who does not qualify for a

---

[8] The manual is available at: http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/SexualOffense/indexhttp://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/SexualOffense/index

domestic violence protection order under RCW 26.50, and who is at least sixteen years of age, may petition the court for a sexual assault protection order. RCW 7.90.030(a), .040(2)

(e) A parent or guardian may file for a SAPO on behalf of a minor child, a vulnerable adult, or any other adult who, because of age, disability, health, or inaccessibility, cannot file the petition. RCW 7.90.030(b)

(f) The court may appoint a guardian ad litem for the petitioner as it deems necessary. RCW 7.90.040(4). No guardian or guardian ad litem need be appointed on behalf of a respondent who is 16 or 17 years of age; however, the court may appoint a guardian ad litem for the respondent as it deems necessary. RCW 7.90.040(3),(4) The appointment of a guardian ad litem shall be at no cost to either party. RCW 7.90.040(3),(4)

V. DOMESTIC VIOLENCE DATABASE AND COMPUTER-BASED INTELLIGENCE INFORMATION SYSTEM

A. Domestic Violence Database

All no-contact, protection, and similar orders must be entered into the Domestic Violence Database. The Domestic Violence Database is discussed more fully in Chapter 9.

B. Computer-Based Intelligence Information System

Virtually all of the orders that are required to be entered into the Domestic Violence Database are also to be entered into the computer-based intelligence information system. RCW 26.50.160; RCW 26.52.030(2) provides for the entry of foreign protection orders. The system currently in use is the Washington Crime Information Center (WACIC), managed by the Washington State Patrol.

The clerk of the court is to forward a copy of the order on or before the next judicial day to the law enforcement agency specified in the order. That agency is to enter the order into a computer-based criminal intelligence system. If the order is modified or terminated, the clerk is to forward a copy of the superseding document to the appropriate law enforcement agency.

If the order specifies no particular date, it is unclear how long the order will remain in law enforcement's computer-based criminal intelligence information system. Some law enforcement agencies will set an expiration for one year, while others will set an expiration for decades away. If the order specifies a particular date, the order remains in the law enforcement computer-based criminal intelligence information system until the expiration date specified on the order. RCW 10.99.040(5)–(6), RCW 10.99.050(3).

Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement of the existence of the order.

NOTE: The court should be aware that not every protection order may actually be entered into the law enforcement database. Washington State agencies began entering protection orders into the National Crime Information Center (NCIC) using the NCIC protection order format in September 1999. When there are gaps in the mandatory information fields required for entry into NCIC, the order may not be recorded. Neither the courts nor the victim may be aware that the order was not entered. Also note, foreign protection orders are not entered unless they have been filed with a state court. The court should make every effort to ensure the required information is included on every order, including providing a clear expiration date for the order.

VI. Confidential Name Changes and Confidential Addresses

A. Name Changes for Domestic Violence Victims

RCW 4.24.130(5) provides:

> Name change petitions may be filed and shall be heard in superior court when the person desiring a change of his or her name or that of his or her child or ward is a victim of domestic violence as defined in RCW 26.50.010(1) and the person seeks to have the name change file sealed due to reasonable fear for his or her safety or that of his or her child or ward. Upon granting the name change, the superior court shall seal the file if the court finds that the safety of the person seeking the name change or his or her child or ward warrants sealing the file. In all cases filed under this subsection, whether or not the name change petition is granted, there shall be no public access to any court record of the name change filing, proceeding, or order, unless the name change is granted but the file is not sealed.

B. Confidential Addresses

A victim of domestic violence may request that the secretary of state designate an address for receipt of mail and service of process.[9] The address designated by the secretary can be used by the victim for virtually all legitimate purposes. The secretary will forward all first-class mail to the actual address of the victim. RCW

[9] For further information, contact the Address Confidentiality Program, Office of the Secretary of State, PO Box 257, Olympia, WA 98507-0257, 1-800-822-1065 (in Washington) or 360-753-2972, TTY 1-800-664-9677 (in Washington) or 360-664-0515 or http://www.secstate.wa.gov/acp/.

40.24.010 et seq. The victim's actual address may be disclosed only to a law enforcement agency or pursuant to court order. RCW 40.24.070.

The secretary of state has adopted administrative regulations to carry out the dictates of RCW 40.24. These are found at WAC 434-840.

A parent or guardian may make a request for a confidential address on behalf of a child. RCW 40.24.030(1). A person intending to relocate a child who is a participant in the confidential address program of RCW 40.24 may have confidential information notice requirements delayed or waived. RCW 26.09.460.

VII. Domestic Violence Shelters and Advocacy Programs

A. Background

In 1979 the Washington Legislature passed a law providing for funding and standards for domestic violence shelters and services. RCW 70.123. In 2015, the legislature updated the statute and declared, in part:

> The legislature finds that there are a wide range of consequences to domestic violence, including deaths, injuries, hospitalizations, homelessness, employment problems, property damage, and lifelong physical and psychological impacts on victims and their children. These impacts also affect victims' friends and families, neighbors, employers, landlords, law enforcement, the courts, the health care system, and Washington state and society as a whole. Advocacy and shelters for victims of domestic violence are essential to provide support to victims in preventing further abuse and to help victims assess and plan for their immediate and longer term safety, including finding long-range alternative living situations, if requested. SSB 5631, Laws of 2015, Chapter 275; RCW 70.123.010.

Washington State-funded domestic violence shelter and service standards are found at WAC 388-61A, which covers facility standards, as well as standards relating to administrative and supportive service delivery standards.

B. Confidentiality of Victim Information

Domestic violence program staff and volunteers are prohibited from disclosing information about a recipient of shelter, advocacy, or counseling services without the informed authorization of the recipient. RCW 26.50.076. Furthermore, communications between a victim and a domestic violence advocate are privileged. RCW 5.60.060(8).

Discovery of domestic violence program records is governed by RCW 70.123.075, requiring a written motion and supporting affidavits by the party seeking discovery, and requiring the court to conduct an in-camera review of the records. The court shall

determine whether the domestic violence program's records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records. RCW 70.123.075(c). The court shall enter an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings. RCW 70.123.075(d).

In 2012, the legislature amended RCW 26.50.250 to prohibit disclosure of the confidential addresses of domestic violence programs in court proceedings unless the court finds, following a hearing where the domestic violence program has been notified and provided an opportunity to be heard, that such disclosure is necessary for the implementation of justice. The court's finding, by clear and convincing evidence, must consider safety and confidentiality concerns of the parties and other residents of the domestic violence program, and other alternatives to disclosure that would protect the interests of the parties in making such a finding. RCW 26.50.250(1).

Where a court orders that the confidential location or address be disclosed, the court shall order that further dissemination be prohibited, and that the court records relating to such information be sealed. RCW 26.50.250(2). Intentional and malicious disclosure of this confidential information is a gross misdemeanor. RCW 26.50.250(3).

VIII. Domestic Violence Fatality Review Panels

Pursuant to RCW 43.235, the Department of Social and Health Services was directed to coordinate the review of domestic violence fatalities across Washington State. Review panels are to include medical personnel, forensic pathologists, prosecuting attorneys, domestic violence advocates, and other persons with appropriate expertise. Biennial statewide reports were generated through 2010, summarizing the findings of the various panels and identifying issues and performance deficits identified by the various panels. The Fatality Review Project continues to track domestic violence homicide statistics and issue findings on population-specific domestic violence homicides. The reports can be found at http://dvfatalityreview.org/fatality-review-reports/ or by contacting the Washington State Coalition Against Domestic Violence.[10]

[10] For further information, contact the Washington State Coalition Against Domestic Violence, Olympia Office: 711 Capitol Way, Suite 702, Olympia, WA 98501, 360-586-1022, TTY 360-586-1029, or Seattle Office: 500 Union St, Suite 200, Seattle WA 98101, 206-389-2515, TTY 206-389-2900, or go to http://www.wscadv.org/.

ATTACHMENT 1

Comparison of Protective Court Orders for Washington State

Type of Order	SEXUAL ASSAULT PROTECTION ORDER	DOMESTIC VIOLENCE PROTECTION ORDER	NO-CONTACT ORDER	RESTRAINING ORDER
Nature of Proceeding	Civil or criminal, in context of pending criminal action or as a condition of sentence, under RCW 7.90.	Civil, under RCW 26.50.	Criminal, in context of pending criminal action, under RCW 10.99.	Civil, normally in context of pending dissolution or other family law action, under RCW 26.09, 26.10, 26.26.
Who may obtain order?	A person who does not qualify for a domestic violence protection order, and is a victim of nonconsensual sexual conduct or non-consensual sexual penetration, including a single incident, may petition for a civil order. Minors under the age of 16 with parent or guardian. Court may appoint a guardian ad litem for either petitioner or respondent at no cost to either party. Order on behalf of victims of sex offenses may be issued when criminal charges filed.	A person who fears violence from a "family or household member" (RCW 10.99.020), or who has been the victim of physical harm or fears imminent physical harm or stalking from a "family or household member," (includes dating relationships). Petitioners 13 or older in a dating relationship with a respondent, 16 or older; minors aged 13–15 with a parent, guardian, guardian ad litem, or next friend.	Incident must have been reported to the police. Criminal charges must be pending. Judge must consider issuance pending release of defendant from jail, at time of arraignment, and at sentencing.	Petitioner who is married to respondent or has child in common.
Jurisdiction	District, municipal, or superior court. See RCW 26.50.020(5).	Telephonic hearings available in limited circumstances. • TPO: district, municipal, or	District, municipal, or superior court.	Superior court only.

Type of Order	SEXUAL ASSAULT PROTECTION ORDER	DOMESTIC VIOLENCE PROTECTION ORDER	NO-CONTACT ORDER	RESTRAINING ORDER
	Telephonic hearings available pursuant to court rule and in limited circumstances.	superior court. • PO: limited to superior court if superior court has family law action pending, or if case involves children or order to vacate home.		
Cost to Petitioner	No filing or service fees.	No filing or service fees.	None.	Same as dissolution. Filing fee waived if indigent.
How does the respondent receive notice?	Notice of civil order served on the respondent. Notice by certified mail or publication authorized in some cases. Notice of criminal order given to defendant verbally and in writing when order is entered.	Notice served on the respondent. Notice by certified mail or publication authorized in limited circumstances.	Verbal and written notice given at bail hearing, arraignment, or sentencing. As part of sentencing, the court may issue a no-contact order.	Notice served on respondent or respondent's attorney.
Consequences if order is knowingly violated	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise gross misdemeanor.	Mandatory arrest. Release pending trial may be revoked. Additional criminal or contempt charges may be filed. Felony if any assault, reckless endangerment or drive-by shooting, otherwise gross misdemeanor.	Mandatory arrest. Gross misdemeanor. Possible criminal charges or contempt.
Maximum duration of order	• Temporary civil SAPO: 14 days with service. • Full civil SAPO: Designated by court up to two years. • Criminal orders: Designated	• TPO: 14 days with service. • TPO: 24 days certified mail or with service by publication. • PO: Designated by court, one year, or permanent.	Until trial and sentencing are concluded. Post-sentencing provision lasts for possible maximum of sentence in superior court.	• TRO:14 days. • Preliminary injunction: dependency of action. • RO in final decree: permanent unless

Type of Order	SEXUAL ASSAULT PROTECTION ORDER	DOMESTIC VIOLENCE PROTECTION ORDER	NO-CONTACT ORDER	RESTRAINING ORDER
	by court. Post-sentencing provision may last up to two years following imprisonment, or community supervision, conditional release, probation, or parole.		In district or municipal court, for a fixed period not to exceed 5 years.	modified.

Attachment 2
Other Court Orders

Kind of Order	ANTI-HARASSMENT ORDER	VULNERABLE ADULT PROTECTION ORDER
Nature of Proceeding	Civil, under RCW 10.14.	Civil, under RCW 74.34.110 and RCW 26.50.
Who may obtain order?	A person who does not qualify for a domestic violence protection order, and who has been seriously alarmed, annoyed, or harassed by a conduct which serves no legitimate or lawful purpose. Petitioners 18 or older with respondent 18 or older. If respondent is under 18, unless emancipated or guardian ad litem appointed. Or, petitioner under age 18 with parent or guardian with a respondent under 18 in cases where adjudication of offense has happened or is under investigation against petitioner. Parties generally are not married, have not lived together, and have no children in common.	A vulnerable adult, or an interested person on behalf of a vulnerable adult, who has been abandoned, abused, subject to financial exploitation, or neglect or threat thereof. The Department of Social and Health Services may also obtain an order on behalf of a vulnerable adult.
Jurisdiction	Must file in district or municipal court. Transfer to superior court when there is an action pending between the parties, order to vacate home, the respondent is under 18, or the action would interfere with a respondent's care, control, or custody of the respondent's minor child.	Superior court.

Kind of Order	ANTI-HARASSMENT ORDER	VULNERABLE ADULT PROTECTION ORDER
Cost to Petitioner	No filing or service fees for stalking, sexual assault, or domestic violence victims.	No service or filing fees.
How does the respondent receive notice?	Notice served on respondent. The court may permit service by publication if the petitioner pays or if the petitioner's costs have been waived.	Notice served on the respondent. Notice by certified mail or publication authorized in limited circumstances.
Consequences if order is knowingly violated	Gross misdemeanor. Discretionary arrest with possible criminal charges or contempt.	Mandatory arrest for violating restraint and exclusion provisions. Possible criminal charges or contempt. Class C felony if assault or reckless endangerment, otherwise Gross misdemeanor.
Maximum duration of order	TAHO: 14 days. TAHO: 24 days certified mail or with service by publication. AHO: 1 year or permanent.	TVAPO: 14 days with personal service. TVAPO: 24 days certified mail or with service by publication. VAPO: Designated by court, for a fixed period not to exceed 5 years

Kind of Order	STALKING PROTECTION ORDER	STALKING NO-CONTACT ORDER
Nature of Proceeding	Civil under RCW 7 (RCW chapter number is pending the code reviser's decision after July 28, 2013, when statute takes effect).	Criminal, in context of pending criminal action at arraignment or as a condition of sentence, under RCW 9A.46.110 or 060 and RCW 7 (RCW chapter number is pending the code reviser's decision after July 28, 2013, when statute takes effect).
Who may obtain order?	A person who does not qualify for a domestic violence protection order and is a victim of any	Incident must have been reported to the police. Stalking-related criminal charges must be pending.

Kind of Order	STALKING PROTECTION ORDER	STALKING NO-CONTACT ORDER
	stalking conduct. Stalking conduct includes stalking as defined by RCW 9A.46.110, cyberstalking as defined by RCW 9.61.260, or repeated contacts, attempts to contact, monitoring, tracking, keeping under observation, or following another person and causing a person to feel intimidated, frightened, or threatened. Petitioners over 16 may file (not required to have a guardian or next friend). Parent or guardian may petition on behalf of any minor, including minors 16 or 17. Interested person may petition on behalf of vulnerable adult. Court may appoint a guardian ad litem for either petitioner or respondent. If respondent is 15 or younger and not emancipated, a guardian ad litem must be appointed. Petitioner shall not be required to pay fees.	The court may issue the order by telephone before arraignment or trial on bail or personal recognizance if no other restraining or protective order exists and victim does not qualify for a domestic violence protection order. Court must also consider issuance at time of arraignment and at sentencing, regardless of any existing protective orders. If criminal charges are dismissed or defendant is acquitted, the victim can file for a separate civil stalking protection order. The criminal stalking no-contact order may be continued until a full hearing. As a part of sentencing, if the victim does not qualify for a domestic violence protection order, the court may issue stalking no-contact order. Post-sentencing provision lasts for possible maximum of five years.

GLOSSARY FOR COURT ORDERS CHART	
AHO Anti-Harassment Order	**TPO** Temporary Protection Order
PO Order for Protection	**TRO** Temporary Restraining Order
RO Restraining Order	**TSAPO** Temporary Sexual Assault Protection Order
SAPO Sexual Assault Protection Order	**TSPO** Temporary Stalking Protection Order
STPO Stalking Protection Order	**TVAPO** Temporary Vulnerable Adult Order
TAHO Temporary Anti-Harassment Order	**VAPO** Vulnerable Adult Order

CHAPTER 4
CRIMINAL PRE-TRIAL ISSUES

This chapter covers those pre-trial issues that frequently arise in cases in which the defendant is charged with a crime related to domestic violence. Pre-trial dispositions and diversions are covered in Chapter 8. Matters of general criminal procedure that are covered in the criminal benchbooks are not repeated here. This chapter supplements the criminal benchbooks by including more detailed coverage of the issues that tend to arise in domestic violence cases.

I. Arrest: Warrantless

A. Permissive Warrantless Arrests

A police officer having probable cause to believe that a felony has been committed may arrest the perpetrator without a warrant. RCW 10.31.100(1). Likewise, a police officer may arrest a person without a warrant if the police officer observed the commission of any misdemeanor or gross misdemeanor. Finally, an officer may arrest without a warrant if the officer has probable cause to believe that the person has committed certain misdemeanors specified by RCW 10.31.100(1). These include any misdemeanor or gross misdemeanor involving "physical harm or threats of harm to any person or property or the unlawful taking of property" and involving acts of criminal trespass. RCW 10.31.100(1).

B. Mandatory Warrantless Arrests

An officer must arrest a person whom the officer has probable cause to believe violated an order which restrains the person from contact with the victim or whom the officer believes has committed an assault against a family or household member within four hours of the time that police make contact with the alleged perpetrator. RCW 10.31.100(2)(a)-(c).

RCW 10.31.100(2) provides:

> A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:
>
> 1. An order has been issued of which the person has knowledge under, 26.44.063, or Chapter 7.92, 7.90, 9A.46, 10.99, 26.09, 26.10, 26.26, 26.50, 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace,

school, or daycare, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

2. A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

3. The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved, including whether the conduct was part of an ongoing pattern of abuse.

C. Comparison of Mandatory vs. Permissive Arrest Situations

The situations in which a police officer is required to arrest a perpetrator of a domestic violence offense are rather limited. These include situations where the officer has probable cause to believe that one of a variety of domestic violence

orders has been violated or where the officer has probable cause to believe that specified forms of assault between family or household members have occurred.

On the other hand, an officer, in the exercise of his or her discretion, may arrest a defendant without a warrant in virtually any domestic violence situation because under RCW 10.31.100(1) warrantless arrests are authorized for all felonies and for misdemeanors which involve violence or threats of violence to persons or property, the wrongful taking of property, and acts of criminal trespass.

D. Warrantless Entry Into Victim's Home

A person subject to a domestic violence no-contact order has no standing to challenge his warrantless arrest in the victim's home, even where the victim has specifically declined to authorize the entry. *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000). *See also, State v. Johnson*, 104 Wn. App. 409, 420, 16 P.3d 680, 686 (2001) (defendant in custody; warrantless entry into home to search for other victims permitted; recognition that victims of domestic violence may be uncooperative with police because they may fear retribution from their batterer). *But see, State v. Schultz,* 170 Wn. 3d 746, 248 P.3d 484 (2011) (Mere acquiescence to an officer's entry is not consent; raised voices heard from outside the home did not justify warrantless entry based on the emergency aid exception to requirement for a warrant.)

E. Victim's Consent to Search Home

Consent searches are permissible and reasonable under the Fourth Amendment when consent comes from the occupant or occupants of the premises that are present at the time that consent is requested. The police need not obtain consent from an absent occupant. *Fernandez v. California,* 134 S.Ct. 1126 (2014).

II. Pretrial Release

A. Introduction

In Washington, the law governing personal recognizance, bail, conditions of release, and related matters is the same in domestic violence cases as it is in other criminal prosecutions.

Washington's General Rules are covered in other benchbooks, and the discussion need not be repeated here. In superior court, see Washington State Judges Benchbook, Criminal Procedure, Superior Court. In courts of limited jurisdiction, see Washington State Judges Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. These benchbooks cover in detail matters such as:

- Constitutional provisions, statutes, and court rules

- Respective rights of defendant and State
- Personal recognizance
- Bail
- Conditions of release
- Factors to be considered by court
- Delay of release
- Release in capital cases
- Violation of conditions
- Failure to appear

In this domestic violence manual, the discussion focuses on the special considerations that should be taken into account in domestic violence cases. Attention is also given to no-contact orders and other special procedures that are available in such cases. The principal rules of court, CrR 3.2 and CrRLJ 3.2, can be found at http://www.courts.wa.gov/court_rules.

B. Research on Danger to Victim During Pretrial Period

1. The lethal potential of domestic violence is well documented.

Across the United States, intimate partner homicides consisted of 11% of all homicides between 1976 and 2005. Intimate partner homicides made up approximately one third of all female homicides, and 3% of all male homicides.[1]

From 1997 to June 2010,[2] 566 people were killed in Washington State domestic violence–related fatalities. These include the children, friends, co-workers, and family of the abused women, as well as four law enforcement officers who intervened.

2. The risk of reabuse pending trial is high.

The victim is especially vulnerable to retaliation or threats by the defendant during the pretrial period.[3] Multiple prosecution and arrest studies broadly concur that abusers who come to the attention of the criminal justice system who reabuse are likely to do so sooner rather than

---

[1] S. Catalano, *Intimate Partner Violence in the United States,* Washington DC.: U.S. Department of Justice, Bureau of Justice Statistics (2007).

[2] Jake Fawcett, "Up to Us-Lessons Learned and Goals for Change After Thirteen Years of the Washington State Domestic Violence Fatality Review," *Washington State Domestic Violence Fatality Review 2010* (Washington State Coalition against Domestic Violence, 2010), available at : http://dvfatalityreview.org/

[3] E. Buzawa, G. Hotaling, A. Klein, & J. Byrnes. *Response to Domestic Violence in a Pro-Active Court Setting, Final Report,* Washington DC: U.S. Department of Justice, 95-IJ-CX-0027, National Institute of Justice, NCJ 181427 (1999).

later.[4] The Washington State Institute for Public Policy found that compared to other offenders, domestic violence offenders have higher rates of domestic violence recidivism than non-domestic violence offenders. For example, for offenders with a current domestic violence offense, 18% were convicted for a new domestic violence felony or misdemeanor within 36 months compared to 4% of non-domestic violence offenders.[5]

One study in an urban specialized domestic violence court, where it took on average six and a half to seven months for cases to be disposed, 51% of defendants charged with domestic felonies other than violation of protective orders were rearrested pre-disposition, 14% for a crime of violence and 16% for violation of a protection order. Among those charged with order violations, a felony in New York, the rearrest rate was 47%, including 37% for violating the protective order again.[6]

3. **Research also suggests that domestic violence tends to escalate when the victim leaves the relationship.**

   The research demonstrates that a history of domestic violence may be a reliable indicator that further violence will occur. In addition, the victim may be particularly vulnerable to reassault during attempts to leave or to sever the relationship. Data from the U.S. Department of Justice indicates divorced or separated persons were subjected to the highest rates of intimate partner violence.[7] According to one report, separation from an abuser increased the risk of fatality seven times.[8] Factors to consider in determining risk of reabuse, or homicide, to victims or the public.

Various studies have found that women's perception of risk is important in determining risk of reassault by an intimate partner, and in particular, that victims' prediction of reassault was the strongest single predictor of reassault.[9]

---

[4] *Id*; C. Hartley & L. Frohmann, *Cook County Target Abuser Call (TAC): An Evaluation of a Specialized Domestic Violence Court*. Washington D.C.: U.S. Department of Justice (2003), 2000-WT-VX-0003, National Institute of Justice, NCJ 202944.; D. Ford & J. Regoli, *The Indianapolis Domestic Violence Prosecution Experiment, Final Report*. Washington D.C.: U.S. Department of Justice, National Institute of Justice (1993).

[5] E. Drake, L. Harmon, & M. Miller, "*Recidivism Trends of Domestic Violence Offenders in Washington State*, Washington State Institute for Public Policy, Report No. 13-11-1901, November 2013, available at:http://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf.

[6] C. M. Rennison, Ph.D. and Sara Welchans, "Intimate Partner Violence," *Bureau of Justice Statistics Special Report* (United States Department of Justice, May 2000) (NCJ 178247).

[7] S. Catalano, *Intimate Partner Violence in the United States,* supra, at note 1.

[8] J. Campbell et al., "Assessing Risk Factors for Intimate Partner Homicide," *NIJ Journal* 250 (2003).

[9] E.W. Gondolf & D.A. Heckert, *Determinants of women's perceptions of risk in battering relationships*. Violence & Victims 18 (4):371-386, (2003); L. Goodman, M.A. Dutton, & Bennett, L., Predicting repeat abuse among

Prior domestic violence and access to firearms are the strongest and most consistent risk factors for domestic violence homicide, with estrangement, a stepchild living in the home, and unemployment also strongly implicated. Although violence outside of the home and alcohol abuse are also implicated in male-perpetrated domestic violence homicide, they seem to be less strong risk factors than for other types of homicide. Female perpetrators are far less likely to have had a history of perpetrating any kind of violence. Firearms, estrangement, and prior mental health problems in the form of depression or suicidality are particular risk factors for domestic violence murder-suicide.[10] Other aspects of the intimate partner relationship, such as abuse during pregnancy and stalking, have also been implicated as risk factors.

Although there is overlap between the risk factors for reassault by an intimate partner and the risk factors for domestic violence homicide, there seems to be a difference of degree and some differential patterns. For instance, substance abuse is more of a risk factor in domestic violence assault and reassault than in domestic violence homicide, while perpetrator suicidality is more of a risk factor in murder of intimate partners by men (because of the large proportion of murder-suicides) than in murder of intimate partners by women or in domestic violence re-offending. Child abuse victimization and witnessing domestic violence in childhood are well documented as risk factors for domestic violence perpetration and therefore are presumed to be risk factors for reassault[11] However, neither has been implicated in intimate partner lethality, perhaps because this history generally is not part of homicide records.

4. Information to be Provided by the Prosecutor At First Appearance

Several studies have found that basic information typically available provides as accurate of a prediction of abuser risk to the victim as more extensive and time-consuming investigations and assessments.[12] In Washington a great deal of relevant information should be provided to the court by the prosecutor. Some courts have charged pretrial staff with collecting information relating to risk.

RCW 10.99.045 states a defendant arrested for domestic violence shall be required to appear in person before a magistrate within one judicial day after the arrest. RCW 10.99.045(3)(b) requires the prosecutor to provide the following information to the court at first appearance after arrest and arraignment:

---

arrested batterers: Use of the danger assessment scale in the criminal justice system. Journal of Interpersonal Violence 10, 63-74 (2000).

[10] J.C. Campbell et al., *Assessing risk factors for intimate partner homicide.* National Institute of Justice Journal, 250, 14-19 (2003).

[11] N.Z. Hilton, et. al., *A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment*. Psychological Assessment, Vol 16(3), Sep 2004, 267-275

[12] D. Heckert & E. Gondolf, *Assessing Assault Self-reports by Batterer Program Participants and their Partners,* Journal of Family Violence 15, (2), 181-197 (2004); J. Roehl & K. Guertin, *Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders,* The Justice System Journal, 21, (2), 171-198.

- The defendant's criminal history, if any, that occurred in Washington or any other state.
- If available, the defendant's criminal history that occurred in any tribal jurisdiction.
- The defendant's individual (protective) order history, which lists all civil and criminal domestic violence orders the defendant has been subject to.

5. Bail Prior to Court Appearance

In *Westerman v. Cary,* 125 Wn. 2d 277 (1994), the Washington Supreme Court upheld a Spokane District Court Rule which requires all defendants arrested for domestic violence crimes be held without bail "pending their first court appearance." The Court found that the "right" to bail under Washington State Constitution Article 1, §20, does not attach until the time of the preliminary hearing when the court will review probable cause and make individualized determinations as to bail and conditions of release.

C. Applying CrR 3.2(a) in Domestic Violence Cases

1. Legal standard

CrR 3.2(a) states that an accused, "other than a person charged with a capital offense" shall "be ordered released on the accused's personal recognizance" unless the court is satisfied that:

(a) "[R]ecognizance will not reasonably assure the accused's appearance;" CrR 3.2 (a)(1) or

(b) It is shown that there is a "likely danger that the accused will commit a violent crime;" CrR 3.2 (a)(2)(a) or

(c) It is shown that there is a "likely danger . . . that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice." CrR 3.2 (a)(2)(b).

The text of CrR 3.2 is virtually identical to that of CrRLJ 3.2. For ease of reference all cites will be to the Superior Court Rule.

2. Making a finding of future dangerousness

In evaluating the CrR3.2(a) factors, the court should be sensitive to the concerns outlined above. Factors to be considered in making a finding of future dangerousness, pursuant to CrR 3.2(d), (e), include:

(a) The accused's history of response to legal process, particularly court orders to personally appear;

(b) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;

(c) The accused's family ties and relationships;

(d) The accused's reputation, character, and mental condition;

(e) The length of the accused's residence in the community;

(f) The accused's criminal history under CrR 3.2(C)(6); CrR 3.2(e)(1); RCW 10.99.045 (3)(b); and CrRLJ 3.2 as provided by the prosecutor;

(g) The accused's history of domestic violence orders in Washington;

(h) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;

(i) The nature of the current charge if relevant to the risk of nonappearance;

(j) The presence of lethality factors as determined by accepted research; and

(k) Any other factors indicating the accused's ties to the community.

3. No contact with the victim (or others) as a condition of release

a. Authority to condition release upon no contact

In any domestic violence case, the court should consider imposing a requirement of "no contact" with the victim as a condition of release. CrR 3.2(d). A no-contact order imposed pursuant to court rule may also prohibit (where supported by the record) the defendant from contacting or otherwise intimidating the non-victim witnesses to the incident. This is particularly important when children are the witnesses to an incident of domestic violence.

b. Comparison of no-contact orders issued pursuant to RCW 10.99.040(2) with no-contact orders issued pursuant to CrR 3.2(k)

It must be emphasized that an order barring the accused from having contact with the victim and/or other witnesses is different from an order of no contact imposed pursuant to RCW 10.99.040(2). Violation of a no-contact order issued pursuant to CrR 3.2 will result in revocation of release pursuant to CrR 3.2(k)(2) or CrR 3.2(l). In contrast, as discussed at Chapter 3, Section IV, A, 3, violation of a Chapter 10.99 RCW order is a separate crime.

Because of the lower standard of proof required for revoking release upon conditions, additional protection is afforded the victim when both types of no-contact orders are entered. See CrR 3.2(k)(1). In practice, most courts simply issue the written no contact pursuant to RCW 10.99.040(2) and either in an oral or written order setting terms of release requires compliance of the condition of no contact.

c. Notice to the victim

Under the Washington State Constitution, victims of crimes charged as felonies have the right to be informed of all proceedings that the accused has the right to attend. Const. art. I, § 35. Subject to the court's discretion, victims of crimes charged as felonies also have the right to attend all proceedings that the accused has the right to attend.

In addition, to help protect the victim during the pretrial period, some states mandate notice to victims of the defendant's arrest, arraignment, and pretrial release if the victim has requested this information and provided an address.[13] Although such notice is not required under Washington law, this procedure is recommended when possible. Washington has provided an automated notification system for victims that they can access at their request.[14]

4. Other release provisions

Provisions prohibiting the defendant from possessing a firearm or other dangerous weapon

[13] *See, e.g.,* Conn. Gen. Stat. § 51-286c.

[14] The Department of Corrections and Washington Association of Sheriffs and Police Chiefs operate a Statewide Automated Victim Information and Notification system. See http://www.doc.wa.gov/victims/registerautomated.asp

a. Authority under RCW 9.41.800

When issuing a no-contact order pursuant to RCW 10.99, the court may restrict the authority of a defendant to possess a firearm or other dangerous weapon if the court finds either that the defendant previously used or displayed a firearm or other dangerous weapon in a serious offense or that the defendant previously committed an offense (such as assault against a family member) that makes the defendant ineligible to possess a firearm. RCW 9.41.800(2). Under certain circumstances, the court ***must*** bar a defendant from possessing a firearm or other dangerous weapon. RCW 9.41.800(1).

RCW 9.41.800 is discussed more fully in Chapter 3 at Section III.

b. Authority under CrR 3.2

In addition to the authority granted the court pursuant to RCW 9.41.800, a court may issue orders restricting the right of a defendant to possess a firearm in conjunction with an order setting bail or releasing a defendant on personal recognizance. CrR 3.2(d) provides:

Upon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, the court may impose one or more of the following conditions:

- Prohibit the accused from possessing any dangerous weapons or firearms . . .

In addition, CrR 3.2(d)(10) authorizes the court to "[i]mpose any condition other than detention to assure administration of justice and reduce danger to others in the community."

c. Revocation of Release under CrR3.2 (k) and (l)

As defendants may violate conditions of release, the court may hear violations upon motion, or by arrest with warrant upon "the court's own motion or a verified application by the prosecuting attorney alleging with specificity that an accused has willfully violated a condition of the accused's release." A court may order an offender to appear for reconsideration of conditions of release pursuant to CrR

3.2(k) or issue a warrant directing the arrest of the accused for immediate hearing.

III. No-Contact Orders

One of the most significant aspects of a criminal case involving domestic violence is the court's authority to enter a no-contact order. Such an order does just what the name implies—it prohibits contact with the victim. A no-contact order is typically entered as a part of the defendant's pretrial release. In addition, such orders may be entered at other stages of a proceeding, including sentencing and disposition.

A court has the authority to enter a no-contact order whenever a criminal domestic violence prosecution is pending. RCW 10.99.040(2)-(3). Such orders may also be entered as a condition of sentence following conviction. RCW 10.99.050(1).

A. Jurisdiction and Procedure

1. No-contact orders may properly be entered by superior, district, or municipal trial courts

The court with jurisdiction over the criminal case is the proper court to enter the no-contact order. RCW 10.99.040(2).

2. Time of entry

a. The determination should be made at the defendant's first court appearance. Normally, the first appearance is the day after arrest, or if the defendant has been charged but not arrested, the day of arraignment. These court appearances are mandatory and cannot be waived. RCW 10.99.045.

b. RCW 10.99.040 (3) provides that "[a]t the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed. If a no-contact order is issued or extended, the court may also include in the conditions of release a requirement that the defendant submit to electronic monitoring. If electronic monitoring is ordered, the court shall specify who shall provide the monitoring services, and the terms under which the

monitoring shall be performed. Upon conviction, the court may require as a condition of the sentence that the defendant reimburse the providing agency for the costs of the electronic monitoring."

If a no-contact order has previously been entered, the court, at arraignment, must determine whether the order should be extended. RCW 10.99.040(3).

3. Factors to consider

a. Although the entry of a no-contact order is discretionary with the court, the court must at least consider the possibility of such an order and determine whether a no-contact order is needed. RCW 10.99.040(2).

A no-contact order should be considered irrespective of the defendant's custodial status. It is not uncommon for an incarcerated defendant to continue contacting or tampering with the victim by mail, telephone, or through third parties.[15]

To assist the court in its decision, the prosecutor must provide the following for the court's review:

- The defendant's criminal history in any state;
- If available, the defendant's tribal jurisdiction criminal history;
- And, the defendant's individual order history.

RCW 10.99.045(3)(b).

"Criminal history" includes all previous convictions and orders of deferred prosecution, as available to the court or prosecutor. This history must be current within (i) one working day, in the case of previous actions of courts that fully participate in the state judicial information system; and (ii) seven calendar days, in the case of previous actions of courts that do not fully participate in the judicial information system, meaning they do not regularly provide records to or receive records from the system on a daily basis. *See* RCW 10.99.045(c)-(d).

b. Telephonic orders

The order may be issued by telephone if there is no outstanding restraining or protective order already prohibiting the defendant from contacting the

[15] Allison, C. J., et al. "Love as a battlefield: Dynamics in couples identified for male partner violence." *Journal of Family Issues* 20.1 (2008): 125-150.

victim. A telephone order must be reduced to writing as soon thereafter as possible. RCW 10.99.040(2).

c. Form of order

Under RCW 10.99.040(2)(c), all no-contact orders issued must comply with the pattern form developed by the administrative office of the courts. The AOC form contains the warnings mandated by RCW 10.99.040(4)(b), and alerts the accused that the order does not modify or terminate an order issued in any other case. The AOC form also informs the accused that the order is entitled to full faith and credit in all 50 states, the District of Columbia, Puerto Rico, any U.S. territory, and any tribal land within the United States.

B. Content of Order

1. Who is protected?

Generally, a no-contact order pursuant to Chapter 10.99 RCW protects only the victim. A court may enter no-contact orders covering children who may not have been the direct victim of the domestic violence at the time of filing and in pretrial proceedings. CrR 3.2(d)(1). A sentencing court can issue no-contact orders only with explicit findings by the trial court that the restriction is "reasonably necessary to prevent harm to the children." *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). The court must also justify the duration of the no-contact order relating to a defendant's children, with an increased showing of necessity with orders that are more extensive in duration. *In re personal Restraint of Rainey,* 168 Wn. 2d 367, 381-382, 229P.3d 686 (2010).

Victims of domestic violence or child abuse who are minors may be protected under a no-contact order in some situations. The definition of family or household member includes persons "who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren." RCW 10.99.020(3). In addition, children over sixteen years of age who otherwise meet the definition of "family or household members" can be included in a no-contact order in dating violence situations. Children who do not meet this definition may need to be protected by an anti-harassment, stalking, sexual assault, or other restraining order.

Witnesses may not be incorporated into no-contact orders but must be protected by an order issued pursuant to CrR 3.2(d). Release orders are discussed more fully above at Section II, C.

2. Scope of the order

A no-contact order prohibits the person charged with or convicted of a domestic violence offense from contacting the victim or from "knowingly coming within, or knowingly remaining within, a specified distance of a location." RCW 10.99.040(2)(a).

RCW 10.99.050 for post-conviction orders does not continue the language quoted above regarding coming near a specified location, which was added by Laws of 2000, ch. 119, §18.

A victim who needed further protection, such as provisions for temporary custody of a child, would need to obtain a civil protection order or restraining order.

In *In re Personal Restraint of Rainey,* 168 Wn.2d 367, 229 P. 3d 696 (2010)**,** a lifetime no-contact order with the defendant's ex-wife (telephone harassment victim) and his daughter (first degree kidnapping victim) was vacated because the court failed to consider whether a lifetime order was reasonably necessary to serve the State's interests with respect to the victims. In order to prohibit a defendant's contact with his children, the court must find that the prohibition is reasonably necessary to protect the children or to prevent further harassment of the custodial parent. The duration of any prohibition must also be reasonably necessary. *See also, State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246, 1249 (2001), (under the facts presented, a provision in a criminal no-contact barring the defendant from having any contact with his non-victim children violated his fundamental right to parent).

3. Surrender of weapons

An order requiring the surrender of a firearm or other dangerous weapon may be issued if the court finds by a preponderance of the evidence that the defendant either (1) used, displayed or threatened to use a weapon in a felony or (2) that the defendant has previously committed an offense which makes him or her ineligible to possess a firearm. RCW 9.41.800(2). Presumably, the requirement that the court find that the defendant previously committed a disqualifying offense would be satisfied if the currently charged offense meets the statutory criteria. RCW 10.99.040(2)(b) requires the court to consider RCW 9.41.800 when issuing a pretrial no-contact order.

Under some circumstances, a court is required to order surrender of weapons. RCW 9.41.800(1), RCW 9.41.800 (2)(a).

Issues concerning surrender of a firearm are discussed more fully in Chapter 3, III.

4. Global Positioning System (GPS) Monitoring

RCW 10.99.040(3) permits the court, when issuing or extending a no-contact order, to "include in the conditions of release a requirement that the defendant submit to electronic monitoring."

C. Duration of Orders

1. Pretrial orders

A pretrial no-contact order remains in effect until the expiration date specified in the order or until dismissal or acquittal. RCW 10.99.040(3). Where a written valid pretrial domestic violence order is incorporated by reference into the judgment and sentence, it is enforceable up until the expiration date on the order, even if the court has not entered a formal post-conviction order. *State v. Schulz*, 146 Wn.2d 541, 560-1, 48 P.3d 301, 310 (2002).

In contrast, a pretrial no-contact order cannot serve as the basis for a conviction for violating a no-contact order where the act is alleged to be a violation which occurred after dismissal of the underlying charge. RCW 10.99.040(3); *State v. Anaya*, 95 Wn.2d 751, 754, 976 P.2d 1251 (1999) (Discussing prior version of RCW 10.99.040(3)).

2. Post-conviction orders

A no-contact order issued in a felony case may be imposed for the maximum possible sentence, regardless of the standard range. Unless otherwise ordered by the sentencing court, the order remains in effect even after a certificate of discharge has been issued. RCW 9.94A.637(5). A post-discharge violation remains completely enforceable.

NOTE: *State v. Miniken*, 100 Wn. App. 925, 927, 999 P.2d 1289, 1290 (2000), which held that a certificate of discharge would render a no-contact order unenforceable, was decided under a prior version of RCW 9.94A.637. Its continuing validity is doubtful. See RCW 9.94A.637(5) (no-contact order entered pursuant to RCW 10.99 remains enforceable and in full effect following entry of a certificate of discharge).

In a misdemeanor or gross misdemeanor domestic violence case, the maximum term is five years from the date of conviction. RCW 3.66.067; RCW 3.66.068; RCW 35.20.255

3. Changes to no-contact orders

As of January 1, 2011, all courts are required to grant victims a process to modify or rescind a no-contact order. RCW 10.99.040(7). The Administrative Office of the Courts has developed a model policy, available at https://www.courts.wa.gov/programs_orgs/pos_genderandjustice/ModelPolicyForVictims.pdf.

4. Mandatory Language

RCW 10.99.040(4)(b) requires that the face of the order bear the legend:

> Violation of this order is a criminal offense under Chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibition. *You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.* (Emphasis added).

In *State v. Marking*, 100 Wn. App. 506, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), the court held that an order without the italicized language was invalid. The conviction for willfully violating the order was thus reversed for insufficient evidence. However, placement of the language is not required to be on the front side of the order. *State v. Turner*, 156 Wn. App. 707 (Div 1, 2010).

This italicized language is not required on a post-conviction no-contact order. Such orders, however, must indicate that "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony." RCW 10.99.050.

NOTE: Courts are not required to continually update orders to reflect all statutory changes in penalties for no-contact orders so long as the orders accurately reflect statutory notice requirements and do not mislead the defendant. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

5. Entry in Computer-Based Intelligence Information System and the Domestic Violence Database

The clerk of the court is to forward a copy of an order issued under RCW 10.99.040 or 10.99.050 to the appropriate law enforcement agency on or before the next judicial day following issuance of the order. Upon receipt, the agency shall enter the order into any computer-based criminal intelligence information system available in the state used by law enforcement agencies to list outstanding warrants. In Washington State, the system is called the Washington State Crime Information Center (WACIC). Entry into such a system constitutes notice to all law enforcement agencies of the existence of the order. The order may be enforced statewide. See Chapter 3, Section IV, B.

All Washington State no-contact orders are included in the Judicial Information System Domestic Violence Database. The Domestic Violence Database is discussed in Chapter 9.

D. Relationship to Other Proceedings

1. Criminal proceedings

If criminal charges have been filed against the abuser, the no-contact order may provide the victim with all the protection he or she needs, eliminating the need to commence a separate civil proceeding to obtain a protection order or a restraining order.

A no-contact order provides protection at no cost to the victim, and since the prosecuting attorney and the court are responsible for entry of the order, the victim need not retain counsel or bear other expenses.

2. Civil proceedings

If other civil proceedings have been commenced, a no-contact order may nevertheless be entered. Moreover, the underlying criminal proceeding may not be dismissed simply on the basis that civil proceedings are pending. RCW 10.99.040(1)(a) states that in a domestic violence case, the court "shall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings."

3.Violations and Enforcement

NOTE: The Supreme Court has determined that the validity of a no-contact order is not an element of the offense of violating an order entered for the protection of a domestic violence victim. *State v. Miller*, 156 Wn. 2d 23, 123 P.3d 827 (December 1, 2005). Furthermore, the defendant may not litigate the validity of a no-contact order in a prosecution for violation of the order unless the order is void

on its face. *City of Seattle v. May,* 171 Wn.2d 847, 256 P.3d 1161 (2011). A more detailed discussion is found in Chapter 5, Section X.

4. Jurisdiction

No-contact orders are fully enforceable in any court in the state. RCW 10.99.040(6).

When any peace officer in the state has probable cause to believe that the defendant has violated a no-contact order, arrest is mandatory. RCW 10.99.055; RCW 10.31.100(2)(a).

5. Violation as a separate crime

(a) Information or Complaint

The charging document must, at a minimum, include the date the order was issued, an identification of what court issued the order and the name of the person protected or such other information to specifically identify the order that forms the basis for the criminal prosecution. *City of Seattle v. Termaine*, 124 Wn. App. 798 at 805, 103 P.3d 209 (2004).

(b) Penalties

Any knowing violation of a domestic violence no-contact order is a separate crime. The State must prove violation of the no-contact order was "knowing" as to both the order and contact. *State v. Sisemore,* 114 Wn. App. 75 (Div.2, 2002). However, personal service of the order is not required. *Auburn v. Solis-Marcial.* 119 Wn. App 398 (Div 1, 2003). The penalties for violation are established by RCW 26.50.110. Absent the circumstances discussed below, violation of a no-contact order is a gross misdemeanor.

A violation of a no-contact order is a felony under certain circumstances:

The defendant has had two prior convictions for violating orders issued under any of the following provisions: RCW 10.99; RCW 26.09; RCW 26.10; RCW 26.26; RCW 26.50; RCW 74.34 or any valid foreign protection order as defined in RCW 26.52.020. The previous convictions need not involve the same person as is the victim in the current offense. RCW 26.50.110(5).

For purposes of RCW 26.50.110(5), a conviction occurs once a finding of guilt is entered, regardless of whether the

defendant has yet to be sentenced. *State v. Rice*, 116 Wn. App. 96, 105-6, 601 P.3d 651, 655 (2003).

Division I and Division III disagree as to whether the nature of the prior conviction presents a question of fact for the jury. Compare *State v. Arthur*, 126 Wn. App. 243, 244, 108 P.3d 169 (2005) (Division III) (jury must make determination of whether prior conviction was for violating a domestic violence order) and *State v. Carmen*, 118 Wn. App. 655, 77 P.3d. 368 (2003), review denied 151 Wn.2d. 1039 (2004) (Division I) (court may make determination; jury need only determine whether prior convictions refer to the defendant currently on trial). The State has the burden of proving the validity of a prior conviction only after a specific substantive challenge has been made. *State v. Snapp*, 119 Wn. App. 614 at 625, 82 P.3d 252 (2004).

The act which violates the order issued under RCW 10.99; RCW 26.09; RCW 26.10; RCW 26.26; RCW 26.50; RCW 74.34 or any valid foreign protection order as defined in RCW 26.52.020, is an assault (not amounting to an assault in the first or second degree) or is an act which "is reckless and creates a substantial risk of death or serious physical injury." RCW 26.50.110(4).

A felony violation of a no-contact order has been classified as a seriousness level five offense. RCW 9.94A.515. A felony violation of a no-contact order is included within the definition of "crime against person" and subject to the filing standards of RCW 9.94A.411. The new penalties apply to offenses, which occur on or after July 1, 2000, regardless of when the original order was issued. RCW 9.94A.515, RCW 26.50.021. Designation of this crime as a seriousness level five has been held to be within the authority of the legislature and not a due process violation. *State v. Wilson*, 117 Wn. App. 1, 13, 75 P.3d 573, 577-8 (2003).

(c) Effect of victim's consent to the contact

A victim's consent to the violation of a protection or no-contact order is not a defense to a subsequent criminal prosecution. *State v. Dejarlais*, 136 Wn.2d 939, 943-4, 969 P.2d 90, 92 (1998) (violation of a 26.50 protection order); *State v. Jacobs*, 101 Wn. App. 80, 88, 2 P.3d 974, 979 (2000) (violation of a 10.99 no-contact order). In fact, RCW 10.99.040(4)(b) and RCW 26.50.035(1)(c) require that the order prohibiting contact indicate on its face that the person restrained is subject to arrest even if the victim consents to the contact. Continued reliance on *Reed v. Reed*,

149 Wash. 352, 270 P. 1028 (1928), which held that a victim who consented to a violation of a restraining order could not enforce that order appears to be unwarranted. *State v. Dejarlais*, 136 Wn.2d at 943-44 (rationale of Reed severely criticized, but case not specifically overruled).

6. Violation of a no-contact order imposed as a condition of probation

Violation of a no-contact order entered pursuant to RCW 10.99.050 (post-conviction order) is also a violation of probation (including community supervision, community placement, or community custody) on the underlying offense. As such, it may result in the imposition of additional jail time. An order requiring the defendant to serve additional time for a violation of a no-contact probation condition does not bar a subsequent trial on a new criminal charge for violating RCW 10.99.050. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609, 615 (1996). *Accord, State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, 639 *review denied*, 133 Wash.2d 1008 (1997); *United States v. Soto-Olivas*, 44 F.3d 788, 789 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995).

7. Violation as contempt of court

Violation of a no-contact order also constitutes contempt of court and is punishable as such. Certainly, under most scenarios, violation of a no-contact order would be punishable as criminal—and not remedial—contempt pursuant to RCW 7.21.010. Criminal contempt requires that the prosecuting attorney file a complaint or information. The maximum penalty is $5,000 and 364 days in jail. RCW 7.21.040. A defendant charged with criminal contempt is entitled to the full panoply of rights afforded any other criminal defendant. *In re M.B.*, 101 Wn. App. 425, 439-40, 3 P.3d 780, 788 (2000).

8. Punishment as both a separate crime and contempt

(a) Double jeopardy

After some vacillation, the United States Supreme Court in *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993) reestablished the "same elements" test for determining whether successive prosecutions violate the double jeopardy clause of the Fifth Amendment. The Washington Supreme Court has also readopted the "same elements" test. *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d. 1267, 1270 (1995). *See also State v. Calle*, 125 Wn.2d 769, 778 n. 4, 888 P.2d 155, 159 (1995).

Dixon involved a consolidated appeal of two cases, one of which was a defendant's appeal from an order denying a motion to dismiss a criminal indictment which was based on the same conduct for which he previously had been found in contempt of court. The court concluded that some of the counts were barred by conviction of criminal contempt and some were not and that an analysis of both the specific statutory elements and the evidence to be adduced at each trial is necessary to resolve the double jeopardy issue. *Accord, State v. Buckley*, 83 Wn. App. 707, 713-14, 924 P.2d 40, 43 (1996) ("At Risk Youth" case). See generally Annotation: Contempt Finding as Precluding Substantive Charge Relating to Same Transaction, 26 A.L.R.4th 950 (2004).

NOTE: As discussed above in Section III, G, 3, an order imposing an additional period of confinement for violation of a probation condition of no-contact does not bar trial on a new criminal charge for violating RCW 10.99.050. *State v. Grant, supra. See also, State v. Prado, supra.*

9. Equal protection

The mere existence of these two remedies does not violate a defendant's right to equal protection. *State v. Horton*, 54 Wn. App. 837, 840, 776 P.2d 703, 704-5 (1989).

10. Alternatives to Confinement

RCW 10.99.040(4) refers to RCW 26.50.110 which provides that the court, "in addition to any other penalties provided by law," may order the defendant to submit to electronic monitoring following a conviction for violation of a no-contact order.

Under RCW 9.94A.680, presentence time served in a "county supervised community option" may be credited against the offender's sentence. This credit is discretionary. *State v. Medina,* No. 89147-8, slip op., at 11. (Wash. April 17, 2014). However, offenders convicted of a violent or sex offense may not be credited with time served in a county supervised community option before sentencing though RCW 9.94.680. *Id.,* at 9-10. In *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096, 1097 (1992), the court concluded that, under the provisions of the Sentencing Reform Act (SRA), a defendant who had been ordered to submit to electronic home detention as a condition of pretrial release must be afforded credit for such time against the sentence that was ultimately imposed.

IV. Discovery in Domestic Violence Cases

A. Limited Protection of Victim's Address

The general discovery rules of CrR 4.7 apply in domestic violence cases with one important exception. RCW 10.99.040(1)(c) provides that the court:

> Shall waive any requirement that the victim's location be disclosed to any person other than the attorney of a criminal defendant, upon a showing that there is a possibility of further violence: PROVIDED, That the court may order a criminal defense attorney not to disclose to his client the victim's location[.]

In addition, under RCW 26.50.250, courts are prohibited from ordering that the confidential addresses of domestic violence programs be disclosed in court proceedings unless the court finds by clear and convincing evidence that disclosure is necessary, after considering the safety and confidentiality concerns of other residents of the program, as well as the victim before the court, and other alternatives to disclosure.

It should be noted that a defendant does have a right under the confrontation clause to receive background information—including the addresses—of potential government witnesses. This is to permit the defense to interview persons in the witness's community to determine the witness's reputation for veracity. *Alford v. United States*, 282 U.S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931); *State v. Mannhalt*, 68 Wn. App. 757, 764-67, 845 P.2d 1023, 1027-8 (1992)(the court notes the right to confront is "not absolute" but may be subject to a "personal safety" exception, though the court acknowledges Washington has not clearly adopted this standard.). Even in a non-domestic violence case, the court may issue a protective order to safeguard witnesses who may be at risk from disclosure of such information. CrR 4.7(h)(4). Presumably, so long as the defense attorney is provided with the necessary background information, the defendant's confrontation rights will be adequately protected, even if an order barring the attorney from disclosing the victim's address to the defendant is entered.

1. Access to Witnesses

It is misconduct for a prosecutor to instruct a witness not to speak to defense counsel or to a defense investigator or to instruct a witness not to grant the defense an interview unless the prosecutor is present. This rule applies equally to the defense, except with regards to access to the defendant. However, a prosecutor or defense lawyer may inform witnesses that they may choose whether to provide an interview and that they have a right to determine who shall be present at such an interview. *State v. Hofstetter*, 75 Wn. App. 390, 402, 878 P.2d 474, 482 (1994).

2. Witness Statements and Work Product

The defense is entitled to receive the "written or recorded statements and the substance of any oral statements" of witnesses that the prosecuting attorney intends to call. CrR 4.7(a)(1)(i). The prosecution, however, cannot be required to disclose work product—that is, material which contains "the opinions, theories or conclusions of investigating or prosecuting agencies . . ." CrR 4.7(f)(1).The fact that the interview of the victim or witness was conducted by a prosecuting attorney does not, in itself, establish that the statement is work product. *State v. Garcia*, 45 Wn. App. 132, 138, 724 P.2d 412, 416 (1986).

3. Records of a Domestic Violence Program

Communications between domestic violence victim advocates and victims are privileged. RCW 5.60.060 (8). Those client records maintained by domestic violence programs which are not covered by privilege are non-discoverable absent a court order. RCW 70.123.075. Prior to ordering disclosure, the court must conduct an in camera review to determine whether the "records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records." RCW 70.123.075(1)(c).

Domestic violence program means an agency that provides shelter, advocacy, and counseling for domestic violence victims. RCW 70.123.020(7).

In 2006, the Legislature added a section regarding disclosure of recipient information. RCW 70.123.076(3) provides if disclosure of a recipient's information is required by statute or court order, the domestic violence program shall make reasonable attempts to provide notice to the recipient affected by the disclosure of information. If personally identifying information is or will be disclosed, the domestic violence program shall take steps necessary to protect the privacy and safety of the persons affected by the disclosure of the information. RCW 70.123.076(3).

B. Depositions

1. Authorization

Unlike in civil cases, the parties to a criminal case must secure the permission of court before noting a deposition. CrR 4.6 sets forth the circumstances under which a deposition may be ordered.

The court may order a deposition when:

(a) The court finds that a prospective witness may be unable to attend or prevented from attending a trial or hearing;

(b) A witness refuses to discuss the case with either counsel and the witness' testimony is material and necessary; or

(c) There is good cause shown to take the deposition.

CrR 4.6(a). CrR 4.10(c) specifically requires the court to release a material witness from custody "unless the court determines that the testimony of such witness cannot be secured adequately by deposition." *State v. Mankin,* 158 Wn. App. 111 (2010)**(**Court lacks authority to order deposition when witnesses, including police, agree to give pretrial defense interviews but refuse to allow defense counsel to tape record the interview).

C. Procedure

1. Reasonable notice as to the time and place of the taking of the deposition shall be given by the "party at whose instance a deposition is to be taken" to all other parties. CrR 4.6(b).

Significantly, CrR 4.6(c) provides that:

> No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

The deposition shall be taken as prescribed in civil rules. CrR 4.6(e) provides that objections shall be made pursuant to the civil rules. CR 32(d)(3)(A) provides:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Other, more formal objections are waived if not made at the time of the taking of the deposition. CR 32(d)(3)(B)(C).

> Objections to admissibility of the deposition or part thereof are governed by CR 32(b), which provides that objections may be made at the trial or at a pretrial hearing for any reason which "would require the exclusion of the evidence if the witness were then present and testifying."

In practice, the trial court normally rules on objections made pursuant to CR 32(b) in a pretrial hearing.

> The deposition itself is not physically admitted into evidence at the trial (although it may be admitted at the time of the pretrial hearing to preserve the record on matters excluded by the court). Deposition testimony is normally admitted at trial in what amounts to a "staged reading." The proponent of the testimony secures the services of a reader who will sit in the witness box and read the answers of the declarant (the person deposed) while the attorney for the proponent reads the questions. Matters excluded in the pretrial hearing are not read to the jury.

2. Admissibility of deposition testimony

If the deponent is unavailable for trial, deposition testimony is admissible under the Former Testimony Hearsay Exceptions of ER 804(b)(1). A discussion of what constitutes "unavailable" is found at Chapter 6, Section VI.

3. Medical Records

Medical records may be obtained either with a waiver of confidentiality from the patient or through compliance with RCW 70.02.060(1), which requires advance notice to the health care provider and to the patient or the patient's attorney. Notice must be provided at least fourteen days before the "service of a discovery request or compulsory process" is served on the health care provider so that the patient may seek a protective order.

Without written consent of the patient, a health care provider may not disclose health care information unless the provisions of RCW 70.02.060(1) have been satisfied. RCW 70.02.060(2).

Privilege issues are discussed in Chapter 6, Section II.

V. Challenges to the Charging Documents

A. Domestic Violence Designation

Because the Legislature, by enacting RCW 10.99, did not create new crimes, the failure to include the "elements" of domestic violence in an information did not render the information insufficient. *State v. Goodman,* 108 Wn. App. 355, 359, 30 P.3d 516, 519 (2001). In *State v. Hagle, 150 Wn. App 196,* 208 P.3d 32 (2009), the court found that the domestic violence designation under chapter 10.99 RCW was neither an element of nor evidence relevant to the underlying charge and determined that designating such elements might result in prejudice to the defendant. In 2010, the legislature amended the Sentencing Reform Act to consider domestic violence that was pled and proven in determining the offender's score for sentencing. RCW 9.94A.525(21).

B. Violation of court orders

An information or complaint for violation of a court order is required to include "identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, or sufficient other facts" to permit the defendant to be prepared to meet the charges against him. *City of Seattle v. Termain*, 124 Wn. App. 798, at 805, 103 P.3d 204 (2004).

C. Definition of Restraint

When "restraint" is an element of the crime charged, the definition of restraint does not need to be in the charging document. *State v. Johnson,* 180 Wn.2d 295, 325 P.3d 135 (2015).

D. Multiple assaultive acts

By strangling and otherwise assaulting his girlfriend in one short, continuous episode at one location, the defendant committed a single act of assault. His two convictions for second degree assault and fourth degree assault violate double jeopardy principles. Assault should be treated as a course of conduct crime. Whether multiple assaultive acts constitute a single course of conduct depends on time frame, location, defendant's motivation, and the presence of intervening events or acts. *State v. Villanueva-Gonzalez,* 180 Wn. 2d. 975, 329 P.3d 78 (2014).

CHAPTER 5
CRIMINAL TRIAL ISSUES

I. THE RELUCTANT VICTIM: RESEARCH

A. Not All Victims Refuse to Testify

Those who work in the court and criminal justice systems tend to remember the victims who were reluctant to testify, or who resist testifying, more clearly than they remember victims who agree to testify. Many victims are willing to testify even when anxious about testifying. Expressing ambivalence about testifying does not necessarily mean the victim will refuse to testify. If the court has a significant number of victims who refuse to testify or who do not appear, the court system may want to review its procedures to determine whether or not the court has inadvertently created obstacles to victim cooperation,

B. Reasons Underlying Victim Reluctance or Refusal to Testify

1. Victims of domestic violence are routinely threatened and manipulated by their abusers to drop charges or to refuse to cooperate with law enforcement.[1] In a recent study of how emotional manipulation can produce recantation in domestic violence cases, researchers analyzed recorded telephone calls from jailed felony defendants to their victims, most of whom ultimately agreed to recant their report of the crime. Most of the victims eventually succumbed to the defendants' appeals with their descriptions of their suffering in jail, and the prospect of their relationships ending. [2]

2. In addition to victim intimidation, domestic violence victims are reluctant to testify for many of the same reasons that other violent crime victims are reluctant. These include:

    a. A feeling of shame or guilt that perhaps their behavior in some way caused the abuse

    b. Desire to put the whole incident behind them and try to forget that it occurred

    c. Denial, ambivalence, withdrawal, and emotional swings that are a result of being a victim of severe trauma

---

[1] See Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katafiasz, & David Martin, *Meet me at the hill where we used to park,* Interpersonal Processes Associated with Victim Recantation, 73 Soc. Sci. & Med. 1054 (2011)

[2] *Id.*.

3. These reasons are often heightened by the following realities:

a. The defendant may be living with the victim, be familiar with her/his daily routine, and have ongoing access to the victim.

b. The victim's past efforts to leave the perpetrator, or to seek protection from the justice system, may have resulted in further violence. The victim has likely learned that the perpetrator will follow through with threats of retaliation for the victim's efforts to leave or to seek help from the justice system.

The court must be aware that a victim's fear is not simply theoretical. In most cases, the incident before the court has followed a history of escalating violence. Thus, there is a real basis for the victim's fears that she/he or the children will be harmed if the victim appears in court and testifies.

c. The perpetrator may be maintaining coercive control over the victim through alternating displays of affection and threats or acts of violence if the victim testifies. (See Chapter 2 for further discussion.)

d. The victim and defendant may have children together. Domestic violence must be considered by civil courts in determining child residential time in parenting plans. However, the perpetrator may have continuing access to the victim through arrangements for child visitation.

e. The victim and/or children may be dependent on the defendant for economic support. Thus, the victim may have conflicting feelings about the possibility that criminal justice intervention may result in incarceration of the defendant and the loss of support.

f. The defendant may be dependent on the victim for economic support, thus increasing the likelihood of further acts of intimidation by the defendant.

g. The victim's community and family supports who have previously provided protection in the past from the abuse may be threatening to withdraw their support and protection if the victim testifies.

h. The victim may believe that the intervention of the criminal justice system will not be effective in stopping the violence or protecting the victim and children. This belief may be a result of past experience where the system did indeed fail to prevent the

violence, and/or it may be based on the perpetrator's ability to convince the victim that "nothing will stop him."

NOTE: Suggested practices for dealing with a reluctant victim are set out in the attachment at the end of this chapter.

II. THE RIGHTS OF VICTIMS

RCW 7.69.030 requires that the court and law enforcement agencies make reasonable efforts to ensure that victims, survivors of victims, and witnesses of crimes be treated with dignity and respect. Specific provisions require that the court and law enforcement agencies make reasonable efforts to ensure the physical safety of the victim (and any other witness) both in and out of the courtroom and to notify the victim and other witnesses of significant events in the case.

In felony cases, RCW 7.69.030(12) mandates that the victim (or survivor) be informed of the time and place of sentencing. Victims are also entitled to submit a victim impact statement which is to be included in the court file. The victim impact statement must also be sent to the institution if the defendant is to be incarcerated.

In order to reduce the trauma of being present in court, the statute gives the victim the right to be provided, whenever practical, with a secure waiting area to shield the victim from contact with the defendant and family or friends of the defendant. The statute also provides for a crime victim advocate to be present at any judicial proceeding, or at any prosecutorial or defense interview. RCW 7.69.030.

Victims of domestic violence are also entitled to reasonable leave from employment and must be notified of this right. RCW 7.69.030(9). See also RCW 49.76.

III. PROCEDURES FOR COMPELLING WITNESSES TO ATTEND AND TESTIFY

This portion of the manual summarizes the mechanics of issuing and enforcing subpoenas, but some details are omitted because the subject is covered in detail elsewhere. For a thorough discussion of the rules and statutes and their interpretation, see the Washington State Judges' Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. Although that benchbook covers only the procedures in courts of limited jurisdiction, the procedures in superior court are substantially the same.

Many witnesses will testify once ordered to do so by the court. Some may feel relief at being able to inform the defendant that they have been ordered to testify, and that the decision to testify is in the control of the court, not the witness.

A. Issuance and Service of Subpoenas

In superior court, CrR 4.8 states simply, "Subpoenas shall be issued in the same manner as in civil actions." The procedures for issuing subpoenas are spelled out in CR 45. In courts of limited jurisdiction, the procedures are set forth in CrRLJ 4.8.

As a practical matter, subpoenas are usually issued by the attorney of record and the court's involvement in the issuance of subpoenas is minimal. In superior court, issuance by an attorney is authorized by CR 45(a). In courts of limited jurisdiction, the authority is found in CrRLJ 4.8.

In courts of limited jurisdiction, service of subpoenas is governed by CrRLJ 4.8(c) which allows for both personal and mailed service. Proof of service by mail, however, is not sufficient to form a basis for issuance of a material witness warrant or citation for contempt. CrRLJ 4.8(e)(2).

B. Enforcement

As discussed above, victims may have valid reasons for being unwilling (or unable) to testify. Because incarceration of a domestic violence victim/witness may often serve only to re-victimize the victim, and may deter the witness from making future complaints about the violence to law enforcement, the court may want to consider adopting internal procedures that enable an arrested material witness to be brought directly before the court without having to spend time in jail waiting for the court to reconvene.

Enforcement options include warrants, attachment, and contempt.

1. Material witness warrants

   The provisions governing issuance of a material witness warrant are covered in CrR 4.10. Such a warrant—which calls for the arrest of the witness—may be issued when:

   (a) The witness has refused to submit to a deposition ordered by the court pursuant to CrR 4.6; or

   (b) The witness has refused to obey a lawfully issued subpoena; or

   (c) It may become impracticable to secure the presence of the witness by subpoena.

   The court must hold a hearing to determine whether the proposed testimony is material and whether continued detention is appropriate no later than "the next judicial day" after arrest. CrR 4.10(b). The witness is

entitled to counsel and counsel must be appointed for an indigent witness. CrR 4.10(b).

A material witness is to be released from custody unless the court determines that the testimony of such witness cannot be secured adequately by deposition and that further detention is necessary to prevent "a failure of justice." CrR 4.10(c). Release may be delayed for a "reasonable period of time" to arrange for the taking of a deposition under CrR 4.6. CrR 4.10(c). Depositions are discussed further at Chapter 4, Section IV, E.

The court may require the witness to furnish a bond or other security as permitted by CrR 3.2 in return for his or her release, to ensure the witness's appearance at a deposition and/or trial. CrR 4.10.

As indicated above, in courts of limited jurisdiction, failure to respond to service by mail cannot, by itself, be the basis for issuance of a material witness warrant. CrRLJ 4.8(e)(2).

A decision to issue a material witness warrant lies within the discretion of the trial court and is reviewed under the manifest abuse of discretion standard. *Bellevue v. Vigil*, 66 Wn. App. 891, 895-6, 833 P.2d 445, 448 (1992). In exercising such discretion it may be worthwhile to consider the risk posed by the defendant to the victim and the public.[3] Counsel is not permitted to ask the witness about the warrant under direct testimony. *State v. Bourgeois*, 133 Wn. 2d. 389, 401-402, 945 P. 2d 1120 (1997).

2. Attachment

When a witness has actually refused to obey a subpoena, the court, under RCW 5.56.070, may direct the sheriff to "attach" a witness who has refused to obey a subpoena, and bring the witness to court to answer for contempt and in the matter the witness was originally subpoenaed for (more on contempt below). RCW 5.56.080 states that the attachment shall be executed in the same manner as a warrant. RCW 12.16.030 specifically provides for attachment of witnesses who fail to appear for district court trials.

Although technically available in criminal matters, the attachment procedure has been largely superseded by the material witness process of CrR 4.10.

[3] A helpful guide might be to consider risk factors relating to reabuse or lethality in the context of pretrial release, as referenced in Chapter IV, Section II.

3. Contempt

The court may invoke its contempt powers to enforce a subpoena or to compel a reluctant witness to appear in court or respond to questions in the courtroom. Under RCW 7.21.010(c), a person's intentional "[r]efusal as a witness to appear, be sworn, or, without lawful authority, to answer a question" is contempt of court.

IV. CONTINUANCES TO SECURE THE PRESENCE OF THE VICTIM

Difficulties can arise when a domestic violence victim fails to appear to testify on the date of trial. Case law in this area is not entirely clear—primarily because both CrR 3.3 and CrRLJ 3.3 (formerly JCrR 3.08) have been amended several times.

The current versions of CrR 3.3(f) and CrRLJ 3.3(f)(2) are identical and provide that upon motion of the court or any party, a continuance may be granted when "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." The period of the continuance is excluded in computing the speedy trial period. CrR 3.3(e)(3). Pursuant to CrR 3.3(b)(5), the speedy trial period expires no sooner than "30 days after the end of that excluded period." A decision to grant or deny a continuance lies within the discretion of the trial court. *State v. Campbell*, 103 Wn.2d 1, 13 691 P.2d 929, 937 (1984), *cert. denied*, 471 U.S. 1094 (1985). *Bellevue v. Vigil*, 66 Wn. App. 891, 892, 833 P.2d 445, 446 (1992). The following is a summary of the factors used by the appellate courts in evaluating whether the trial court abused its discretion in continuing a case.

A. Prosecutorial Efforts to Secure Victim's Presence

It is generally an abuse of discretion to continue a case to secure the presence of the victim when the prosecuting attorney did not subpoena the victim to court. *State v. Wake*, 56 Wn. App. 472, 476 783 P.2d 1131, 1133 (1989); *State v. Gowens*, 27 Wn. App. 921, 925-6, 621 P.2d 198, 201 (1980).

A continuance may still be proper if the prosecuting authority can establish that (1) it made reasonable and significant efforts to serve the missing witness with a subpoena but was unsuccessful and (2) there is good reason to believe the witness's presence can be secured in the near future. *State v. Henderson*, 26 Wn. App. 187, 191-2, 611 P.2d 1365, 1368-9 (1980). The Washington State Supreme Court has granted a continuance when the prosecutor exercised due diligence in attempting to secure a co-participant's attendance and there was no prejudice to the defendant in the delay. *State v. Nitschke*, 33 Wn. App. 521, 524-5, 655 P.2d 1204, 1205-6 (1982) (analysis under juvenile speedy trial rule).

A trial court's decision to not grant a continuance and to dismiss charges pursuant to CrR 8.3(b) and CrRLJ 8.3(b) will be reviewed under an abuse of discretion standard. *See, e.g., City of Kent v. Sandler*, 159 Wn. App. 836, 247 P.3d 454

(2011) (dismissal affirmed when subpoenaed trial witness twice failed to appear at scheduled time).

B. Absence of a Subpoenaed Witness

Where there is no prejudice to the defendant, a continuance to secure the presence of a properly subpoenaed witness generally is proper— at least where the prosecutor can establish both a valid reason for the witness's unavailability and where it is reasonable to believe that the witness will become available in a "reasonable time." *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, 1023 (1988).

CrR 4.10(a)(2) provides that the failure of a witness to respond to a subpoena may be grounds for issuance of a material witness warrant. It is thus logical to assume that the rules contemplate the granting of a continuance so that the warrant may be served. Even when the prosecuting authority has not requested a material witness warrant, a continuance may still be proper, given the psychological pressure put on domestic violence victims. Certainly, if there is any indication that the defendant has in any way encouraged the victim/witness to ignore the subpoena, a continuance would be proper. In a case where there is clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, he or she forfeits the right to confront the witness. *State v. Dobbs,* No. 87427-7, slip op. (Wash. Mar. 13, 2014)

The most difficult and most common situation occurs when a properly served witness fails to appear and the prosecuting attorney has no explanation for the witness's absence.

In *City of Bellevue v. Vigil*, 66 Wn. App. 891, 833 P.2d 445 (1992), the victim failed to appear for trial, even though she had been properly subpoenaed. The prosecution moved for a material witness warrant and for a continuance. The court declined to issue the material witness warrant but continued the case for two days. When the victim again did not appear, the trial court granted the defense motion to dismiss. The court of appeals found no abuse of discretion under the facts of *Vigil* but specifically held that a continuance to obtain the presence of a witness, even when the reason for the witness's failure to appear is unexplained, is permissible. *Id.* at 895, 448.

In *State v. Day, supra,* the Court of Appeals upheld the trial court's decision to continue a case in which the defendant was accused of murdering his first wife. Trial was continued to permit entry of a dissolution order of the defendant's second marriage so that the testimonial bar of RCW 5.60.060(1) would not apply. *Id.* at 1024, 549.

C. Prejudice to the Defendant

Prejudice in this context refers to a delay that will "substantially prejudice[d] [the defendant] in the presentation of his or her defense." CrR 3.3(f)(2). The mere fact that a continuance would permit the State to obtain evidence that is adverse to the accused does not establish "prejudice." The *Day* court emphasized that only a continuance which would result in "unfair" or "unjust" prejudice is barred.

D. Continuance Within the Speedy Trial Period

In *State v. Wake*, 56 Wn. App. at 475, the court implied that there is more latitude to continue a case when the new trial date is still within the original speedy trial period than when the new date is outside of that time frame. In *City of Seattle v. Clewis*, 159 Wn. App. 842, 237 P. 3d 449(2011), the court did not abuse its discretion when it granted a brief continuance, within the trial period, based upon the absence of the subpoenaed witness, where there was evidence that the witness feared appearing in court.

E. A Party Does Not Need to Reissue a Subpoena after a Trial Date Has Been Continued

In *State v. Tatum*, the court addressed the question of whether a party is required to reissue a subpoena to secure the presence of a witness if the original trial date is continued. *State v. Tatum*, 74 Wn. App. 81, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002 (1994). The court concluded that a witness is under subpoena until he or she is "discharged by the court or the summoning party." *Id*. at 86, 1126. The court concluded that a requirement to issue a new subpoena upon each setting of a trial date would be unduly burdensome. As the court stated:

> Particularly in the context of brief continuances of the trial date, the parties involved should have the authority to arrange for compliance with a subpoena without fear that the failure to issue a new subpoena will, as a matter of law, constitute a failure to adequately procure the witness's presence for trial.

Tatum at 85, 1126.

F. Reliance on Subpoena Issued by Opposing Party

In *State v. Simonson*, 82 Wn. App. 226, 233-4, 917 P.2d. 599, 603, *review denied*, 130 Wn.2d 1012 (1996), the Court of Appeals found that the trial court had abused its discretion in refusing to continue a case so that the defendant could secure the presence of a witness originally subpoenaed by the state. The prosecutor, who knew that the defense was intending to call the witness, excused that witness without informing either the defense attorney or the court that the witness appeared. At least where counsel makes clear his or her intent to rely on a

subpoena issued by opposing counsel, counsel may rely on the subpoena and is entitled to a continuance to secure the presence of the witness so long as it is established that the testimony of that witness would be material.

V. DISMISSALS PURSUANT TO CrR 8.3(A)

A. Dismissals Based Solely on the Request of the Victim

Sometimes, the court will be asked to dismiss a case pretrial on the grounds that the victim does not wish to pursue prosecution. The Final Report of the 1991 Washington State Domestic Violence Task Force contains the following recommendation:

> To avoid inappropriate dismissals, decisions to dismiss should be made only where evidentiary problems have developed which preclude the possibility of proving all elements of the crime. Having a reluctant witness or victim cannot be the sole basis for dismissing a case. The obstacle of reluctant witnesses can often be overcome with referral to domestic violence victims' advocates, timely processing of cases, appropriate case preparation, and appropriate procedures.

The Task Force recommends that the victim be referred to a domestic violence advocate for counseling before dismissing a case. The victim should be specifically informed that the authority to request a dismissal is vested with the prosecuting attorney's office. In counties where domestic violence legal advocates are not on staff, the prosecutor should meet with the victim to offer support and information.[4]

B. Limitations on the Power to Dismiss

RCW 10.99.040(1)(a) specifically bars certain dismissals. That statute provides that the court: "[s]hall not dismiss any charge or delay disposition because of concurrent dissolution or other civil proceedings."

RCW 10.99.040(1)(a) does not bar a trial court from exercising its discretion in evaluating whether it is proper to continue a case to secure the presence of a victim. *Bellevue v. Vigil*, 66 Wn. App. at 892-93.

[4] *Final Report of the Washington State Domestic Violence Task Force 1991* (Administrative Office of the Courts, PO Box 41170, Olympia, WA 98504-1170, 360-753-3365, 1991).

VI. JURY SELECTION

A. Peremptory Challenges

The use of peremptory challenges to exclude jurors based on their sex is prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S 127, 129, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89 (1994) (excluding men from jury). *Accord, State v. Beliz*, 104 Wn. App. 206, 213-4, 15 P. 3d 683, 688 (2001); *State v. Burch*, 65 Wn. App. 828, 836, 830 P.2d 357, 362 (1992) (excluding women). This is an extension of the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986), which barred the use of racially motivated peremptory challenges.

In *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33 (1992), the United States Supreme Court held that the defense— as well as the prosecution—is barred from engaging in intentional racial discrimination in the exercise of peremptory challenges. *Accord State v. Vreen*, 143 Wn.2d 923, 926-7, 26 P.3d 236, 237-8 (2001). The rationale of *McCollum* would apply equally to prohibit the defense from exercising peremptories on gender-based grounds.

The United States Supreme Court in *Johnson v. California*, 545 U.S. 162, 162 L.Ed. 2d 129, 125 S. Ct. 2410 (2005), clarified the quantum of proof that must be elicited by a defendant alleging purposeful discrimination in the use of peremptory challenges before the burden of justification shifts to the State. A defendant need only present sufficient evidence to raise an "inference" of discrimination. Proof by a preponderance is not required. In evaluating a prosecutor's stated rationale for a non-discriminatory use of a preemptory challenge the court is to review all available evidence to determine whether the explanation is plausible. *Miller-El v. Dretke*, 125 S. Ct. 2317, 162 L.Ed. 2d 196, (2005).

A Batson challenge to the prosecutor's use of a peremptory challenge triggers the following analysis:

1. The defendant must first establish a prima facie case of purposeful discrimination.

   The trial court may, but need not, find a prima facie case of discrimination based on striking the only juror on a venire that is from a "constitutionally cognizable group." *State v. Meredith*, 178 Wn.2d 180, 306 P.3d 942 (2013). If no prima facie case of purposeful discrimination is found, no further analysis is needed.

2. If a prima facie case of purposeful discrimination is established, the burden shifts to the prosecutor to provide a race-neutral explanation for the challenge.

3. The court then determines whether the race-neutral explanation is valid.

Race-neutral reasons recognized are discussed in the following cases:

- *State v. Thomas*, 166 Wn.2d 380, 397-98, 208 P.3d 1107 (2009) (venire member made comments hostile to the State)

- *State v. Hicks*, 163 Wn.2d 477, 494, 181 P.3d 831 (2008) (venire member was a teacher and social worker)

- *State v. Medrano*, 80 Wn. App. 108, 114, 906 P.2d 982 (1995) (venire member was a public health nurse with considerable experience with narcotics addicts and defense was diminished capacity based on drug use)

- State v. Saintcalle, 178 Wn.2d 34, 56, 309 P.3d 326 (2013) (venire member might have trouble sitting on the jury of a murder trial because someone she knew had recently been murdered)

State v. Vreen, *supra*, and *State v. Wright*, 78 Wn. App. 93, 99, 896 P.2d 713, 717, *review denied*, 127 Wn.2d 1024 (1995), contain helpful discussions of the analysis to be undertaken by a trial court in addressing a Batson challenge.

The question of whether peremptory challenges are being exercised in a discriminatory fashion may be raised *sua sponte* by the trial court. *State v. Evans*, 100 Wn. App. 757,759, 998 P.2d 373, 376 (2000).

B. CHALLENGES FOR CAUSE

Courts may dismiss prospective jurors on the basis of actual bias, which is "the existence of a state of mind . . . which satisfies the court that the challenged person cannot try the case impartially." *State v. Noltie*, 116 Wn.2d 831, 838-40, 809 P.2d 190 (1991). More than a possibility of prejudice must be shown. *Id.*

Implied bias, as defined in RCW 4.44.180, another basis for dismissal for cause, arises if the juror:

1. is a family member of a party;
2. has some other relationship to a party (e.g., employer); or
3. has served on a jury in another trial involving the defendant.

A trial court's denial of a challenge for cause is reviewed for abuse of discretion. The appellate court greatly defers to the trial court, who has the opportunity to judge the demeanor of the juror. *Noltie*, 116 Wn.2d at 840.

If a defendant's challenge for cause is erroneously denied, but the defendant then uses a peremptory challenge to remove that juror, there is no basis for reversal because the

defendant has not been prejudiced by the error. *State v. Fire*, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001).

VII. CONFRONTATION CLAUSE ISSUES

A. Closed-Circuit Television

RCW 9A.44.150, which permits a child-victim to testify under certain circumstances by way of closed-circuit television, does not apply to adult victims. There is no comparable statute for adult victims.

B. Unintentional Obstructions of the Defendant's View of Witnesses

A defendant's right to confront witnesses may be violated by even an unintentional interference. Thus, a physical barrier which exists simply as a matter of courtroom geography but which blocks a defendant's view of the witness stand may violate the confrontation clause. *State v. Wright*, 61 Wn. App. 819,829, 810 P.2d 935, 940, *review denied*, 117 Wn.2d 1012 (1991) (issue not decided because there was no showing of prejudice).

C. Prosecutorial Comment on the Defendant's Exercise of Confrontation Rights

It is misconduct for a prosecutor to cross-examine a defendant about the exercise of his right to confront the witnesses by, for example, asking the defendant if he was "staring" at the witness while the witness was testifying. Closing argument in this vein is also improper. *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85, 94 (1993), *review denied*, 124 Wn.2d 1018 (1994).

D. Hearsay/Forfeiture

A discussion of hearsay problems that frequently arise in domestic violence cases is found in Chapter 6.

VIII. SPECIAL SUBSTANTIVE LAW ISSUE: THE APPLICABILITY OF COMMUNITY PROPERTY LAWS IN CRIMINAL PROSECUTIONS

The applicability of community property laws to criminal prosecutions has at times been somewhat confusing. The Washington Supreme Court clarified the issue in *State v. Coria*, 146 Wn.2d 631, 642, 48 P.3d 980, 984 (2002). In *Coria*, the Court held that a spouse who destroys community property may be criminally prosecuted for destruction of the "property of another" under the malicious mischief statute. As the Court explained, "damaging co-owned personal property is effectively like an ouster of other co-owners. The defendant's right to possess his community property is not a defense here, because his right was not exclusive of his wife's right to possession. Both spouses have undivided half interests in community property. The defendant's rights in their community property,

as co-owner, do not include the right to infringe Mrs. Coria's." *Id.* at 639 (internal citations omitted).

IX. SPECIAL JURY INSTRUCTION ISSUE: MULTIPLE ACTS OF THE CHARGED OFFENSE

Where the evidence adduced at trial establishes more than one instance of the charged offense, either the prosecution must elect the act on which it is relying for conviction or the court must instruct the jury that it must unanimously agree that the same criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173, 178 (1984); *State v. Dyson*, 74 Wn. App. 237, 249, 872 P.2d 1115, 1122, *review denied*, 125 Wn.2d. 1005 (1994). No election or instruction is required, however, where the evidence shows that there was a continuing course of conduct. *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000, 1003, *review denied*, 111 Wn.2d 1012 (1988).

The courts use a "common sense" approach in determining whether the evidence establishes a continuing offense. For example, in *Dyson*, 74 Wn. App. at 249, the court concluded that multiple phone calls constituted a continuing offense because one of the means of committing the offense of telephone harassment requires proof of repeated calls.

X. TRIAL COURT'S ROLE IN DETERMINING VALIDITY OF NO-CONTACT, RESTRAINING, OR PROTECTION ORDER

In *City of Seattle v. May*, 171 Wn.2d 847 (2011), the Supreme Court held that in in a proceeding for violation of a domestic violence protection order, the defendant may not litigate the validity of the protection order unless the order is void on its face. The *May* court upheld *State v. Miller*, 156 Wn. 2d 23, 123 P.3d. 827 (2005), which had unanimously concluded that the validity of a no-contact order is not an implied element of the offense of violation of a no-contact order.

The *Miller* Court, however, did recognize that trial courts have an important "gateway" function and that only "applicable" orders are properly admitted into evidence.

> An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. *State v. Miller* at 31.

XI. JURY ACCESS TO 911 TAPE DURING DELIBERATION

A frequent exhibit in a domestic violence prosecution is a recording of a 911 call made by the victim or by a witness. Although the tape recordings are hearsay, they are often admissible as either excited utterances or present sense impressions. Of course, the usual foundation requirements for voice recordings must also be satisfied. *See* ER 901(b)(5).

Assuming that the 911 tape is admitted into evidence as an exhibit, the court must decide how the tape is to be handled when deliberations begin.

In *State v. Ross*, the Court of Appeals held that a trial court abused its discretion by sending the 911 tape and a playback machine into the jury room. 42 Wn. App. 806, 812, 714 P.2d 703, 707 (1986) (effectively overruled on other grounds in *State v. Palomo*, 113 Wn. 2d 789, 783 P.2d 575(1989), cert denied, 489 U.S. 826, 111 S. Ct. 80, 112 L.Ed 2d 53 (1990)). The court was concerned that the jury would place too much emphasis on this one item of evidence and that the court had no means of controlling how often the tape was reviewed by the jury.

Later cases have significantly pulled back from *Ross*. *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997) involved a tape recording of a tape recording made of a drug transaction. The tape was admitted into evidence and both the tape and a playback machine were provided to the jury during deliberations. The court found because the tape recordings bore directly on the charge and were not unduly prejudicial, there was no error. An exhibit is unduly prejudicial if it is likely to stimulate "such an emotional response in the jury as to overpower reason." *Castellanos* at 100. *Accord, State v. Elmore*, 139 Wn.2d 250, 296, 985 P.2d 289, 316 (1999) (no error in providing jury with playback machine with taped confession of defendant).

Certainly, a trial court may exercise discretion in this regard and may decide, particularly if the tape recording is especially graphic, to limit access. Courts have approved several different procedures. *See, e.g., State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126, 132 (1983) (playback machine not provided to jury; tape included with other exhibits; jury permitted to re-hear tape upon request); *State v. Smith*, 85 Wn.2d 840,852, 540 P.2d 424, 431 (1975) (after notification to counsel, tape played in absence of counsel and parties). On the other hand, it is error to refuse a jury's request to rehear—at least once—a 911 tape. *State v. Oughton*, 26 Wn. App. 74, 82, 612 P.2d. 812, 817, *review denied*, 94 Wn.2d 1005 (1980).

XII. POST-TRIAL MOTION FOR NEW TRIAL: RECANTING WITNESS

When a defendant is convicted solely on the testimony of a witness who has subsequently recanted, the trial court must first determine the reliability of the recanting testimony before ruling on a motion for new trial. *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996).

Whether there is independent corroborating evidence to support the recanting witness' original testimony is not a controlling factor. Recantations are inherently suspect and "[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court." *Macon* at 804 (*quoting State v. Wynn*, 178 Wash. 287, 289, 34 P.2d 900 (1934)).

Cases such as *State v. Landon*, 69 Wn. App. 83, 90, 848 P.2d 724, 729 (1993), which appeared to have adopted a "bright line" requiring the granting of a new trial when a defendant is convicted solely on the testimony of a witness who later recants, are of doubtful continuing validity.

When independent evidence corroborates the testimony of a witness who later recants, the decision to grant a new trial has always been vested in the trial court. *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078, 1079 (1974), *overruled on other grounds*, *Wright v. Morris*, 85 Wn.2d 899, 905, 540 P.2d 893, 897 (1975).

Procedurally, a motion for new trial based on a recanting witness requires sworn testimony. *See Landon, supra* at 90-93 (personal restraint petition supported by unsworn statement of recanting witness does not justify the granting of new trial by the appellate court but does support ordering trial court to hold evidentiary hearing).

Motions for withdrawal of a guilty plea based on manifest injustice under CrR 4.2(f) may also involve recanting victims. In general, a defendant who has pled guilty by way of an Alford/Newton plea is entitled to an evidentiary hearing to determine the credibility of the recanting witness. *State v. D.T.M.*, 78 Wn. App. 216, 220-1, 896 P.2d 108 (1995). In contrast, a defendant who admits guilt may have a more difficult time establishing a manifest injustice, particularly where independent evidence (aside from the recanted testimony) exists. *State v. Mitchell*, 81 Wn. App. 387, 914 P.2d 771 (1996).

ATTACHMENT 1

VICTIM RELUCTANCE OR REFUSAL TO TESTIFY: RECOMMENDED PRACTICES

1. Require a victim's presence in court by issuing a subpoena or ordering a victim already in court to return on another date.

Most victims will testify once ordered to do so by the court. Many feel considerable relief at being able to tell the defendant that the decision to testify is out of their hands, as they have been ordered to do so by the court. Even victims who are willing to testify should be ordered by the court to do so. This reinforces to the defendant that the court, not the victim, controls the proceedings, and that any attempt to manipulate or intimidate the victim in an effort to avoid criminal prosecution will be unavailing.

2. If the victim appears reluctant to testify, the reasons underlying the reluctance should be assessed in order to determine the best course of action.

The following checklist is intended to assist the court in discovering the reasons a victim is reluctant or refuses to testify, and in ascertaining whether a victim has been coerced or intimidated into asking that the charges against the defendant be dropped. Generally these questions should be asked by the prosecutor in the course of interviewing the victim. Where there is no advocate, the court should establish procedures for obtaining this information.

- ☐ Why do you feel reluctant to (or refuse to) testify?
- ☐ When did you become reluctant (or decide to refuse) to testify?
- ☐ Were you living with the defendant when the incident happened?
- ☐ Are you now living with the defendant?
- ☐ If not, does the defendant know where you are staying?
- ☐ Are you financially dependent on the defendant?
- ☐ Do you and the defendant have children together?
- ☐ Have you discussed the case with the defendant?
- ☐ Has the defendant made any promises to do something for you if you do not testify?
- ☐ Is that promise to do something the reason you do not wish to proceed/testify?

- ☐ Has the defendant or anyone else threatened you, your children, or your family and told you not to testify?
- ☐ Is there some other reason you are afraid of the defendant?
- ☐ Are you aware that this court can issue an order telling the defendant to stay away from you and have no contact with you or your family?
- ☐ Are you aware that if the case is prosecuted that the defendant can be required to get counseling, pay for your damages, and stay away from you and your family?
- ☐ (If injuries alleged or visible) How did you receive the injuries (allude to police reports, medical reports, photos, injuries still visible in court, etc.)?
- ☐ Have you talked about your desire not to testify with the prosecutor, victim/witness staff, or staff of the local domestic violence agency?
- ☐ If not, would you be willing to talk with them now?
- ☐ Are you aware that the people of this state are bringing these charges, and that the decision to prosecute the defendant is up to the prosecutor rather than up to you?
- ☐ (If victim was subpoenaed) Are you aware that the fact that you have been subpoenaed means that the prosecutor decided to call you as a witness, that you must testify, and that you may be held in contempt if you do not do so?
- ☐ Would you like to have a court officer to escort you from the building when you leave today?

3. If the victim remains reluctant to testify, the court may want to consider continuing the case for a period of hours to permit the victim to obtain information and options counseling from the victim/witness program or local domestic violence program.

a. Victim advocates can give accurate information regarding the court process and can assist the victim in setting up a safety plan. This can often remedy reluctance, which may stem from fear of the defendant, belief that there is no alternative but to return home, or inaccurate information regarding possible outcomes of the criminal court process.

b. Referring reluctant victim/witnesses to a victim advocate can play a critical role in reducing victim reluctance and, thus, reduces the perpetrator's ability to control the victim.

Often, domestic violence victims are more willing to cooperate and testify when they receive information, emotional support, community referrals, and trial preparation from victim advocates.

4. Most victims will appear when ordered by the court. In rare instances however, it may be necessary for the court to require law enforcement to bring the witness before the court to testify.

a. See subsection 5, on contempt, below.

b. The courts should require that the victim be personally served with the subpoena before requiring law enforcement to bring the witness to court. The victim may not have received the subpoena, either because of being in hiding or because the defendant intercepted the subpoena.

c. In domestic violence cases, requiring law enforcement to bring a victim/witness before the court may serve only to re-victimize the victim, and should only be considered after the victim has been given ample opportunity to speak with domestic violence victim advocates. For this reason, every effort should be made to avoid scheduling domestic violence cases on the last day possible in order to allow the court time to ensure that the victim speaks with a victim advocate.

d. In cases where the victim was personally served with the subpoena, and is brought before the court, the witness should be brought directly before the court without having to spend time in jail waiting for the court to reconvene.

5. Use of the court's civil contempt power to insure compliance with its orders.

a. A small percentage of victims may refuse to testify even after the above-listed steps have been taken. In some of these cases, the victim has accurately concluded based on past experience that testifying against the defendant is more dangerous to the victim, the victim's children, and the victim's family than seeking protection from the criminal justice system. If the court concludes that there is a reasonable likelihood that the perpetrator may inflict lethal violence on the victim in retaliation for testimony, the court should not coerce victim testimony unless the victim is provided with a victim/witness protection program, such as is provided for witnesses in drug and organized crime cases.

b. The court may want to consider granting a similar stay of execution to victims of domestic violence charged with contempt for failing to testify against the alleged assailant. This will allow the victim time to speak with a victim advocate who can assist her/him in setting up a safety plan and in realistically assessing the consequences of testifying in light of that plan.

c. Incarceration of a domestic violence victim to compel testimony generally should not be ordered, since such an action may serve only to re-victimize the victim and discourage future help-seeking behaviors. Instead, the court could consider ordering a victim/witness who is found to be in civil contempt, to attend or to do community service with a group that serves victims, such as with the local domestic violence program.

6. Presence of victim support persons in court.

RCW 7.69.030(10) provides victims of violent and sex crimes the right to a crime victim advocate or other support person present at any prosecutorial or defense interviews and at any judicial proceedings related to the acts committed against the victim. It is noted that this right applies "if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case." Some communities have programs within the courts, which provide victim advocacy for domestic violence victims.

See Section II, The Rights of Victims for additional information.

CHAPTER 6
EVIDENTIARY ISSUES[1]

I. Applicability of the Rules of Evidence to Hearings on Petitions for Protection and Anti-Harassment Orders

ER 1101(c)(4) provides that the Rules of Evidence, except for the rules and statutes concerning privileges, need not be applied during hearings for protection or anti-harassment orders. *See Gourley v. Gourley*, 158 Wn.2d. 460, 145 P.3d 11835 (2006) (recognizing that ER 1101(c)(4) permits the admission of hearsay in hearings for protection orders).

A court may still require "a certain measure of reliability with respect to the admission of evidence in the proceedings specified in section (c). The court should have the discretion to require an appropriate level of formality." Comment to ER 1101(c)(1). In *Gourley*, the Court concluded that there was no due process violation in not requiring testimony or cross-examination at the hearing for protection order, but stated that such might be "appropriate in other cases."

However, if a protection order is being requested as part of another type of proceeding, such as a dissolution action, it may be appropriate to apply the rules of evidence in making any final orders. The rationale for not mandating application of the rules of evidence in protection order hearings was to further public policy in creating a simple, pro se–friendly procedure. However, when the parties are afforded a full trial with sufficient time to call witnesses and engage in discovery, such as a dissolution trial, the rationales for dispensing with the rules of evidence are less persuasive.

ER 1101(c)(4) provides that if a judge is considering information from the domestic violence database:

> …the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does *not* propose to consider. (*Emphasis added*.)

[1] For a more thorough discussion of the evidentiary issues presented here, see 5D, K. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence* (2013)

II. Privileges

A. Privileges Potentially Applicable in a Domestic Violence Case

Washington has a wide variety of privileges, some of which are potentially applicable in a domestic violence case. A partial catalog of privileges can be found in ER 501, by way of illustration, and not by way of limitation. The following are examples of privileges recognized in this state:

a. Attorney-Client. RCW 5.60.060(2).
b. Clergyman or Priest. RCW 5.60.060(3), 26.44.060, 70.124.060.
c. Dispute Resolution Center. RCW 7.75.050.
d. Counselor. RCW 18.19.180.
e. Spouse-Spouse. RCW 5.60.060(1), 26.20.071
f. Interpreter in Legal Proceeding. RCW 2.42.160, GR11.1 (e)
g. Journalist. [*See Senear v. Daily Journal-American*, 97 Wn.2d 148, 641 P.2d 1180 (1982); *State v. Rinaldo*, 102 Wn.2d 749, 689 P.2d 392 (1984).]
h. Optometrist-Patient. RCW 18.53.200, 26.44.060.
i. Physician-Patient. RCW 5.60.060(4), 26.44.060, 51.04.050, 69.41.020, 69.50.403, 70.124.060
j. Psychologist-Client. RCW 18.83.110, 26.44.060, 70.124.060.
k. Public Assistance Recipient. RCW 74.04.060.
l. Public Officer. RCW 5.60.060(5).
m. Registered Nurse. RCW 5.62.010, 5.62.020, 5.62.030. But see, *State v. Vietz*, 94 Wn. App. 870, 973 P.2d 501 (1999) (privilege does not apply to licensed practical nurses).
n. Sexual Assault Advocate. RCW 5.60.060(7).
o. Domestic Violence Advocate. RCW 5.60.060(8)

Testimonial privileges do not prevent third party testimony about extrajudicial statements. *See State v. Burden*, 120 Wn. 2d 371, 841 P.2d 758 (1992).

The discussion that follows briefly mentions issues that are of particular interest in domestic violence cases.

B. Spousal Privilege

Washington has two spousal privileges, both defined in RCW 5.60.060(1). The first protects confidential communications between spouses, forbidding one spouse from testifying about confidential communications without the consent of the other. The second prevents one spouse from testifying against the other spouse, regardless of whether the testimony relates to a confidential communication. Neither privilege applies to quasi-marriage or meretricious relationships. *State v. Cohen*, 19 Wn. App. 600, 608-9 576 P.2d 933, 938, *review denied*, 90 Wn.2d 122 (1978).

RCW 5.60.060(1) provides:

> A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. *But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other*, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian…[emphasis added].

1. When may the marital privilege be asserted?

The confidential communication applies to communications made during the marriage and bars a former spouse from testifying concerning the content of such communications even after the marriage is terminated. *State v. Thorne*, 43 Wn.2d 47, 56, 260 P.2d 331, 336 (1953). *Compare State v. Burden*, 120 Wn.2d 371, 376-7, 841 P.2d 758, 760-1 (1992) (third party testimony about extrajudicial statements of a spouse are admissible).

In contrast, the testimonial bar applies only during the pendency of a valid marriage. Legal status is determinative. The privilege, if applicable at all, applies even after a petition for dissolution has been filed so long as the marriage has not yet been legally terminated. *State v. Moxley*, 6 Wn. App. 153,491 P.2d 1326 (1971) (*overruled on other grounds*, *State v, Thornton*, 119 Wn.2d 578 (1992).

Significantly, in *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021, 1024 (1988), the court held that the trial court's decision to continue a criminal case at the request of the prosecuting attorney to permit entry of a dissolution order was not an abuse of discretion under CrR 3.3(h)(2).

2. The "personal violence" limitation

Although the language emphasized above appears to make either privilege inapplicable to any domestic violence case, until 1992,

Washington courts applied the common law rule limiting the inter-spousal crime exception only to crimes of "personal violence." *See, e.g., State v. Kephart*, 56 Wash. 561,106 P. 165 (1910). The Washington State Supreme Court overruled *Kephart* and its progeny in *State v. Thornton*, 119 Wn.2d. 578, 583, 835 P.2d 216, 219 (1992). The statutory exception for inter-spousal crimes now applies to any crime and is not limited to crimes of violence.

In a prosecution for witness tampering, neither marital privilege applies if the defendant could not have asserted the privilege at the trial of the underlying offense. *State v. Sanders*, 66 Wn. App. 878, 884, 833 P.2d 452, 456 (1992).

3. Comment on the exercise of the spousal privilege

It is misconduct for a prosecutor to comment in closing argument on the failure of the defendant's spouse to testify. *State v. Charlton*, 90 Wn.2d 657, 667, 585 P.2d 142, 147 (1978) (*distinguished from State v. Carneh*, 153 Wash.2d 274, 292, 103 P.3d 743 (2004); *State v. Smith*, 82 Wn. App. 327, 338, 917 P.2d. 1108, 1113 (1996) (*overruled by State v. Martin*, 151 Wash. App. 98, 210 P.3d 345 (2009)). Similarly, it is misconduct for the prosecutor to call the defendant's spouse to testify to force the defendant to assert the privilege in front of the jury. *State v. McGinty*, 14 Wn.2d 71, 78, 126 P.2d 1086, 1089 (1942) (*also distinguished from State v Carneh*, 153 Wash.2d 274, 292, 103 P.3d 743 (2004)).

C. Physician-Patient Privilege

RCW 5.60.060(4) provides that a physician may not testify in a civil action concerning information obtained from a patient. To some extent, that privilege has been incorporated in criminal cases by RCW 10.58.010, which provides that "[t]he rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions." When applying the privilege in the criminal context, the trial court must balance the "benefits of the privilege against the public interest of full revelation of the facts." *State v. Stark*, 66 Wn. App. 423, 438, 832 P.2d 109, 117(1992). *Accord State v. Smith*, 84 Wn. App. 813, 820, 929 P.2d 1191, 1195 *review denied*, 133 Wn.2d 1005 (1997). The privilege does not apply to statements made to a paramedic who is not acting under the direction of a physician. *State v. Ross*, 89 Wn. App. 302, 306, 947 P.2d 1290, 1292 (1997), *review denied*, 135 Wn.2d 1011 (1998).

A victim, at least in the context of a domestic violence case, cannot assert the privilege in order to prevent the State from offering evidence of his or her injuries. *State v. Boehme*, 71 Wn.2d 621, 637, 430 P.2d 527, 536-7 (1967).

In *State v. Cahoon*, 59 Wn. App. 606, 611, 799 P.2d 1191, 1194 (1990), *review denied*, 116 Wn.2d 1014 (1991), the court concluded that the privilege does not apply when the medical information is being used only to establish probable cause for a search warrant.

Discovery issues concerning medical records are discussed in Chapter 4, IV, F.

D. Psychologists

Confidential communications between a psychologist and a patient are privileged to the same extent as confidential communications between attorney and client. RCW 18.83.110.

The holder of the privilege is the patient, and the patient alone has the power to assert or waive the privilege.

The privilege is strictly construed. It is inapplicable to communications that were not intended to be confidential. *In re Henderson*, 29 Wn. App. 748, 752, 630 P.2d 944, 947 (1981). It is likewise inapplicable to forensic examinations by court-appointed psychologists. *State v. Holland*, 30 Wn. App. 366, 376, 635 P.2d 142, 148 (1981), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The privilege applies only to communications with a licensed psychologist. It does not apply to communications with other counselors or therapists. *State v. Harris*, 51 Wn. App. 807, 813, 755 P.2d 825, 829 (1988). Communications with other counselors or therapists may, however, have at least a measure of confidentiality under other statutes (see below).

E. Counselors, Social Workers, and Therapists

Under RCW 18.19, social workers, therapists, and other counselors (other than psychologists and psychiatrists) must be registered with, and certified by, the state. The same legislation creates a privilege for information acquired in a professional capacity. The statute contains a number of exceptions, including a provision for reporting child abuse, and concludes with a catch-all exception allowing disclosure "in response to a subpoena from a court of law or the Secretary." RCW 18.19.180(5).

If a litigant makes "particularized factual showing" that the records of a therapist or counselor are "likely" to contain helpful information, the court is to undertake an *in camera* review of the records. *State v. Diemel*, 81 Wn. App. 464, 468, 914 P.2d 779, 781 *review denied*, 130 Wn.2d 1008 (1996) (*quoting State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993)) (defendant's declaration was insufficient to support his request for an *in camera* review of files of a counselor

who treated a rape victim). As a general matter, a request for an *in camera* review is addressed to the sound discretion of the trial court. *Diemel* at 467.

F. Sexual Assault Advocates

RCW 5.60.060(7) prohibits the discovery of the records of a rape crisis center. "A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made by the victim to the sexual assault advocate." RCW 5.60.060(7)

"Sexual assault advocate" means an employee or volunteer from a rape crisis center, victim assistance unit, or any other program that provides information, advocacy, and counseling to a sexual assault victim. RCW 5.60.060(7)(a). There is nothing in this definition that makes the privilege inapplicable to a victim advocate employed by a prosecuting attorney, though under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecutor has a duty to disclose materially exculpatory evidence to a defendant. Application of the privilege to prosecution-based advocates and issues of waiver if communications are disclosed by the advocate to a prosecutor will need to be resolved by the court.

Disclosure is permitted without the consent of the victim when the advocate believes the failure to disclose is likely to "result in a clear, imminent risk of serious physical injury or death" to the victim or other person. RCW 5.60.060(7)(b).

RCW 70.125.065, which has been in effect since 1981, protects the records and professional communications of a rape counselor from discovery. A court, however, may order disclosure under appropriate conditions.

Example: In *State v. Espinosa*, 47 Wn. App. 85, 90, 733 P.2d 1010, 1013 (1987), a prosecution for rape, the trial court acted within its discretion in refusing to order disclosure of certain information to defense counsel. The court rejected a defense argument that the privilege had been waived because a police officer had been present during the counselor's interview with the victim.

Example: In *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064, 1078 (1993), the court upheld the trial court's decision not to undertake an *in camera* review of the records of a rape crisis center where there was no affidavit which set forth "specifically the reasons" why such a review was appropriate. *See also Pennsylvania v. Richie*, 480 U.S. 39, 61, 107 S. Ct. 989, 1003, 94 L. Ed. 2d 40 (1987) (where records are conditionally privileged, court should undertake *in camera* review where appropriate showing of potential materiality made).

NOTE: The court in *Kalakosky* declined to address the question of whether 42 U.S.C. § 10604(d), which purports to establish an absolute privilege for the

records of a rape crisis center, preempts that part of RCW 70.125.065 which authorizes disclosure after *in camera* review.

G. Domestic Violence Advocate

RCW 5.60.060(8) provides that "a domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate."

For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

Also, confidentiality provisions in RCW 70.123 and the Violence Against Women Act (VAWA), 2013, codified at 42 U.S.C. §13925, provide protections against release of information by domestic violence programs.

With respect to domestic violence programs, courts are prohibited from compelling the disclosure of the name, address, or location of a domestic violence program in any civil or criminal case or in any administrative proceeding unless the court makes a finding by clear and convincing evidence that "disclosure is necessary for the implementation of justice after consideration of safety and confidentiality concerns of the parties and other residents of the domestic violence program, and other alternatives to disclosure that would protect the interests of the parties." RCW 26.50.250

In cases where the court orders that a domestic violence program name, address, or location be disclosed, the court must bar the parties from further disseminating the confidential information, and shall seal the portions of any records containing such confidential information. RCW 26.50.250.

NOTE: There is an *in camera* review process provided for records held by a domestic violence program, but there is also testimonial privilege.

III. Admissibility of Defendant's Prior Bad Acts Against the Victim

Issues concerning the admissibility of other acts of misconduct allegedly perpetrated by the defendant against the victim frequently arise in domestic violence cases. Such evidence is not admissible to show that the defendant had the propensity to commit acts of violence against the victim. It may, however, be admissible for other purposes such as

showing absence of accident, intent, motive, the victim's state of mind (to prove reasonable fear or reasonable apprehension of harm), or to the victim's credibility.

When deciding whether to admit ER 404(b) evidence, "the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder." *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974, 977-8 (2002). This balancing must occur on the record. *See State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

The court is not required to hold an evidentiary hearing to determine whether the proponent of the testimony can establish the existence of the prior bad act by a preponderance of the evidence, even where prior acts are specifically challenged, when the finding can be made on the offer of proof. *State v. Kilgore*, 147 Wn.2d at 295. *See also State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000).

Example: Admissible to explain delay in reporting abuse – In *State v. Baker* 162 Wn. App. 468, 474-75, 259 P. 3d 270 (2011), the defendant argued on appeal that the trial court improperly admitted evidence of prior assaults under ER 404(b). The Court disagreed, holding that the trial court properly decided that the defendant's prior acts in which he strangled the victim were admissible to assist the jury in assessing the credibility of the victim who delays in reporting domestic violence, changes her story, or minimizes the degree of violence.

Example: Admissible to help jury assess credibility of victim's recantation – In *State v. Magers*, 164 Wash.2d 174, 186 189 P.3d 126 (2008), the Supreme Court concluded that prior acts of domestic violence, involving the defendant and the victim, were admissible in order to assist the jury in judging the credibility of a recanting victim. The *Magers* court affirmed the rationale set forth in *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609, 614 (1996), in which the trial court permitted the prosecution to introduce evidence of prior assaults by the defendant against the victim. The Court of Appeals affirmed the domestic violence conviction concluding that such evidence was useful in explaining the victim's actions. *Accord State v. Nelson*, 131 Wn. App. l08 (2006); *State v. Cook*, 131 Wn. App. 845, 129 P.3d 834 (2006).

Example: Admissible to determine credibility – In *State v. Baker*, 162 Wn. App. 468 (2011), the court held that evidence of a defendant's prior assaults on the victim were admissible to aid the jury's assessment of the victim's credibility.

Example: Admissible to explain reasonable apprehension of fear in harassment case – In *State v. Ragin*, 94 Wn. App. 407, 412-13, 972 P.2d 519, 521 (1999), the defendant was charged with felony harassment, and the court concluded that his prior bad acts were admissible to explain why the victim was placed in reasonable fear that the charged threat would be carried out. *Accord, State v. Johnson*, 172 Wn. App 112, 297 P.3d 710 (2010),

petition for review pending (evidence admissible under ER 404(b) to prove "fear of bodily injury"); *State v. Barragan*, 102 Wn. App. 754, 760, 9 P.3d 942, 946 (2000);

Example: Admissible to explain motive as part of "res gestae" – In *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615, 625 (1995), a spousal murder case, the Supreme Court concluded that evidence of prior assaults by the defendant against the victim was properly admitted to help the jury understand the defendant's motive and the entire situation. The court, however, concluded that where opportunity and intent were not at issue it was error to admit the evidence on those grounds. *Powell* at 262. *Accord*, *State v. Grier*, 168 Wn.App. 635, 278 P.3d 225 (2012) (Defendant's prior threatening acts and name-calling found admissible as part of the chain of events leading to the crime); *State v. Gresham*, 173 Wn. 2d 405, 269 P.3d 207 (2012) (finding Defendant's prior acts against four other victims admissible under ER 404(b) as common scheme, and striking down RCW 10.58.090 as conflicting with ER 404(b)); *State v. Stenson*, 132 Wn.2d 668, 708, 940 P.2d 1239, 1260(1997), *cert. denied* 523 U.S. 1008 (1998).

Limiting Instruction: Under *State v. Gresham*, 173 Wn. 2d 405, 269 P. 3d. 207, (2012), once a criminal defendant requests a limiting instruction regarding admission of prior bad acts, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction.

IV. Admissibility of Prior Misconduct by Victim to Show Self-Defense

If the defendant claims self-defense, prior misconduct by the victim may be admissible to show that the defendant had a reasonable apprehension of danger. The principal requirement is one of relevance—the victim's misconduct must have been of the sort to suggest danger, and the defendant must have been aware of that misconduct at the time the defendant claims to have acted in self-defense. *State v. LeFaber*, 77 Wn. App. 766, 769, 892 P.2d 1140, 1143 (1995), *rev. on other grounds*, 128 Wn.2d 896, 913 P.2d 369 (1996); *State v. Walker*, 13 Wn. App. 545, 550, 536 P.2d 657, 662 (1975) (acts of violence by victim inadmissible because defendant was unaware of them).

Specific acts of misconduct, if not known to the defendant, are not admissible to establish the victim's violent disposition and to prove that the victim acted in conformity with that trait. ER 404(a) and ER 405. Unless known by the defendant and offered to support self-defense, the victim's violent disposition is character evidence and may only be admitted through reputation evidence. *State v. Hutchinson*, 135 Wn. 2d 863 (1998). See also, *State v. Callahan*
87 Wn. App. 925, 943 P.3d 636 (1997) (Victim's reputation for violence was properly excluded where it was unknown to the defendant. Though the victim's reputation for violence was relevant to probability that victim was aggressor, it was excluded in case where the proffer was police officers' testimony based on their encounters).

V. Admissibility of Offers of Compromise as Proof of Guilt in Criminal Prosecutions

ER 408 prohibits evidence of "(1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount" to prove civil liability or "invalidity of the claim or its amount."

The Supreme Court held that ER 408 does not prevent the use of evidence of attempts to compromise civil claims in criminal trials "arising from the same conduct, as between the alleged offender and victim, where relevant to establishing guilt." *State v. O'Connor*, 155 Wn. 2d 235, 119 P.3d 306 (2005). In *O'Connor*, the defendant appealed a felony domestic violence conviction stemming from a tire-slashing incident. The defendant argued that ER 408 should have prevented the admission of evidence by the prosecution that he offered to pay the victim for the tire damage. The Court explained that because the defendant's criminal charge was not subject to compromise, the policy behind ER 408, encouraging out of court settlement, would not be advanced by its application to criminal prosecutions. *Id.*

VI. The Hearsay Rule and Its Exceptions/Exemptions

All of the exceptions to the hearsay rule are, of course, potentially available in a domestic violence case. In practice, however, only a handful of exceptions are normally applicable to the out-of-court statements of the victim or other witnesses.

As will be seen, Washington has a body of case law governing the availability of the normally invoked exceptions, making it somewhat easier to predict the outcome in a given factual situation. Nevertheless, the discretion inherent in the rules has afforded trial courts considerable leeway in ruling on the admissibility of such evidence.

This portion of the domestic violence manual emphasizes issues that may arise in domestic violence cases. The material in the domestic violence manual is not, however, a comprehensive discussion of all aspects of the hearsay rule, and the reader is referred to the standard evidence treatises for more detail. *See, e.g.*,
K. Tegland, 5D, *Washington Practice: Courtroom Handbook on Washington Evidence*, 4th ed., (2013).

A. Hearsay Exceptions (non-testimonial hearsay exceptions)

There is no constitutional bar to the admission of the hearsay testimony if the declarant testifies and is questioned about the incident, even if he or she recants or indicates little or no remembrance of the incident. *State v. Mobley*, 129 Wn. App. 378, 118 P.3d 403 (2005), *review denied*, 157 Wn.2d 1002 (2006) (*Child hearsay*). If a declarant is doing "precisely what a witness does on direct examination," then he or she is a witness. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2278, 165 L. Ed. 2d 224 (2006) (discussing the facts in *Hammon v. State*, 829 N.E.2d 444, 453

(Ind. 2005), *rev'd, Davis v. Washington*, 126 S.Ct. 2266 (2006). Hearsay exceptions that are otherwise supported by the record continue to apply in such a situation.

NOTE: This section provides a brief summary of hearsay issues that frequently arise in domestic violence prosecutions. In light of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), care must be taken, when the declarant has not testified, in relying on this summary.

1. Hearsay Exceptions – Excited Utterance – ER 803(A)(2)

Under ER 803(a)(2), a statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition, is not objectionable as hearsay. The rule presumes that the element of spontaneity reduces the chance of misrepresentation to an acceptable level.

In a domestic violence case, the rule may have many potential applications when the victim or another witness is unwilling or unable to testify, or is reluctant to testify fully and openly. Prosecuting attorneys have, for example, often succeeded in using this exception to introduce statements describing an assault or sexual abuse.

Statements made while under the stress of the event may be admissible as excited utterances even though they are made sometime afterward. The statements need not be spontaneous, and may be made in response to questions, because they were "under the influence of the event." *State v. Bache*, 146 Wn. App. 897, 193 P.3d 198 (2008)

A trial court's decision to admit a statement as an excited utterance is reviewable for abuse of discretion. "[W]here the trial judge is required to assess body language, hesitation, or lack thereof, manner of speaking, and all the other intangibles that go into the evaluation which cannot be reflected on a written record, the trial judge is entitled to absolute deference." *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097, 1103 (2000).

NOTE: In domestic violence cases, the excited utterance is frequently contained on a 911 tape. In such a situation, other foundational requirements for admission—particularly authentication of the voice of the person allegedly making the statement—must be satisfied. *See State v. Mahoney*, 80 Wn. App. 495, 498, 909 P.2d 949, 951 (1996).

Example: Admissible – A statement may qualify as an excited utterance even though the out-of-court declarant recants or otherwise disavows the statement. *State v. Magers*, 164 Wn. 2d 174, 189 P.3d 126 (2008) (statements by assault victim to officer responding to 911 call admissible as excited utterances, even though victim's statements were not consistent, and victim later recanted some of her statements).

Example: Inadmissible – In prosecution for domestic violence assault, the victim's description of the incident to a police officer did not qualify as an excited utterance. The victim made the statement approximately 45 minutes after the incident, after discussing the incident with a friend and stopping at a Safeway store to "get something to drink." The court noted that the victim and her friend had ample time to reflect on what they were going to tell the police and, in fact, decided not to mention to the police that victim's boyfriend was also present, to protect her boyfriend from being arrested on an outstanding warrant. *State v. Hochhalter*, 131 Wn. App. 506, 128 P.3d 104 (2006).

Example: Inadmissible – A statement, alleged to be an excited utterance that contains an intentional misrepresentation, is not admissible as an excited utterance. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d. 549, 564 (1995). However, the mere fact that a victim recanted after making the excited utterance does not render the original statement inadmissible as an excited utterance. *State v. Briscoeray*, 95 Wn. App. 167,174, 974 P.2d 912, 916, *review denied*, 139 Wn.2d 1011 (1999).

2. Hearsay Exceptions – State of Mind or Bodily Condition – ER 803(a)(3)

ER 803(a)(3) defines the hearsay exception in the following language:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In a domestic violence case, the rule has many potential applications. The rule, for example, might be used by the prosecuting attorney to introduce the victim's out-of-court statements expressing fear of the defendant, or describing the pain of injuries inflicted by the defendant. The scope of the rule is developed more fully in the subsections that follow, with emphasis on issues that may arise in domestic violence cases.

a. Intent or plan

ER 803(a)(3) establishes a hearsay exception for expressions of intent or plan. Thus, a statement by A that she intends to go to Vancouver is admissible as proof that A went to Vancouver, a statement by B that he plans to talk to C is admissible as proof that B talked to C, and so forth.

In a criminal prosecution, a statement of intent by the defendant, suggesting that he planned to commit the crime charged, would be admissible on the issue of guilt.

However, it is ordinarily unnecessary to resort to the instant hearsay exception in this situation because the defendant's out-of-court statement would be party admission, excluded from the definition of hearsay altogether by ER 801(d)(2).

More often, the instant hearsay exception is invoked in an effort to introduce a statement by the victim or some other person. The victim's intentions are, of course, often irrelevant in a criminal case and may be excluded on that basis. However, in a variety of situations, prosecuting attorneys have succeeded in establishing some link between the intent of the victim or a third person and the crime charged – a link sufficient to satisfy the requirement of relevance.

Example: Admissible – In *State v. Terrovona*, 105 Wn.2d 632, 642, 716 P.2d 295, 300 (1986), a prosecution for murder, the State was properly allowed to introduce evidence that after hanging up the telephone, the victim had said that the caller was the defendant and that he, the victim, was going to go to 116th Street to meet the defendant. The court held that the evidence was admissible to implicate the defendant in the crime charged.

Example: Admissible – *State v. Alvarez*, 45 Wn. App. 407, 410, 726 P.2d 43, 46 (1986), a prosecution for being an accomplice to murder, a statement by the accused murderer, in the defendant's presence, that he and the defendant intended to kill the victim was admissible to prove the underlying offense for which the defendant was charged as an accomplice.

Example: Admissible – In *State v. Bernson*, 40 Wn. App. 729, 738, 700 P.2d 758, 766, *review denied* 104 Wn.2d 1016 (1985), a prosecution for murder in which the defendant was accused of killing a woman who applied to him for a job, the trial court properly admitted evidence that shortly before the killing, the victim said she had received a job offer to sell women's apparel.

b. Motive

In the context of assault and homicide prosecutions, statements by the defendant expressing hatred or ill-will towards the victim are clearly within the rule and relevant to the issue of guilt. The usual reasoning is that the statements show motive or intent. *See, e.g., State v. Hoyer*, 105 Wash. 160, 177 P. 683 (1919); *State v. Spangler*, 92 Wash. 636, 159 P. 810 (1916).

c. State of mind, emotion, sensation, or physical condition

ER 803(a)(3) establishes an exception to the hearsay rule for statements describing the declarant's then-existing state of mind, emotion, sensation, or physical condition. Although the rule is potentially applicable in a variety of situations, the most common use of the rule is to introduce out-of-court statements describing pain and suffering in personal injury litigation, to show the nature and extent of injury, and in prosecutions for assault and homicide.

In *State v. Johnson*, 172 Wn.App.112, 289 P.3d 662, *modified on denial of reconsideration*, 297 P.3d 710 (2012), the court of appeals held that the defendant's prior acts of domestic violence were admissible in order to show the victim's state of mind. In *Johnson*, the defendant was charged with several acts of violence against his wife over a three-day period. Formal charges included second-degree assault, felony harassment, and unlawful imprisonment. At trial, the State was allowed to present testimony regarding the defendant's coercive and controlling behavior prior to the three-day charging period, including the defendant's attempts to isolate his wife from others, his monitoring of her conversations, his accusations that his wife had been unfaithful, threats to tie her up with duct tape, and threats to kill her.

In affirming the admission of the evidence, the court determined that one of the elements of felony harassment is a showing that the defendant threatened a person with bodily harm, and that the person being threatened had a reasonable fear that the threats would be carried out. Thus in the present case, the court said, the evidence in question was directly relevant to prove the victim's state of mind relating to her reasonable fear of the defendant's threats.

In addition, the court of appeals said the victim's state of mind was similarly relevant, and thus properly admitted, on the charge of second degree assault. The court said that *assault* is defined, in part, as an act by the defendant that creates in another person a reasonable apprehension and imminent fear of bodily injury. Thus, the court said, the evidence in question was directly relevant to prove this element.

d. Limitations on the admissibility of state of mind testimony

(1) The testimony must be relevant.

A major limitation, easily overlooked, is that a statement may be within this hearsay exception and yet the statement may be inadmissible because it is irrelevant. In other words, if the state of mind of the declarant is not at issue in the case, a statement expressing the declarant's state of mind remains inadmissible.

As stated above, threats by the defendant toward the victim are generally admissible under this subsection. More troublesome issues arise with respect to the relevance of statements by the *victim*, typically expressing fear of, or anxiety about, the defendant. Is the victim's statement admissible as evidence of the defendant's guilt?

The general answer is no; the victim's statement is not admissible (even though within this exception to the hearsay rule) because the victim's state of mind is irrelevant to the issue of whether the defendant committed the act charged. The connection between the victim's fears and the defendant's guilt is too remote to justify admissibility. *State v. Parr*, 93 Wn.2d 95, 100, 606 P.2d 263, 265 (1980).

Example: Inadmissible – In *State v. Cameron*, 100 Wn.2d 520, 530, 674 P.2d 650, 655 (1983), a prosecution for murder in which the defendant claimed insanity, the trial court should not have admitted the victim's out-of-court statements to the effect that she was having problems with the defendant and that she feared him. The court rejected the State's argument that the statements were admissible to show the victim's state of mind, saying that the victim's state of mind was irrelevant because it did not relate to either premeditation or insanity, the two principal issues in the case.

However, if the defendant interposes a defense of accident or self-defense, the victim's state of mind may become relevant in the sense that suggests that the victim may not have acted as claimed by the defendant. Thus, in the leading case of *State v. Parr, supra*, at 106, the defendant claimed that the victim had grabbed a gun and lunged at him, and that he acted in self-defense but did not intend to actually kill the victim. The court held the victim's out-of-court statement that she feared the defendant was admissible because it was relevant to rebut the defendant's theory that the victim was the first aggressor.

Likewise, previous threats against the defendant by the victim may be offered by the defense to show that the victim was the first aggressor in support of a claim of self-defense. *State v. Reuben*, 156 Wash. 655, 661, 287 P. 887, 889 (1930).

(2) Statements about the past excluded.

It must be remembered that the instant rule is concerned with statements describing the declarant's then-existing state of mind or bodily condition. Statements describing a previous state of mind or bodily condition—termed statements of memory or belief—are not admissible under the instant rule. It has often been said that if statements of memory or belief were admissible, the hearsay rule would be virtually eliminated.

In the leading Washington case, *State v. Parr*, 93 Wn.2d 95, 106, 606 P.2d 263, 269 (1980), a prosecution for murder, a witness was allowed to recount the victim's out-of-court statement that she feared the defendant. By contrast, the witness was not allowed to recount the victim's statement that the defendant had threatened her. The latter statement was a factual assertion about something that had happened in the past and was not within this exception to the hearsay rule.

While a statement may not be barred as hearsay, a victim's out-of-court statement may be barred by the confrontation clause. *State v. Fraser,* 170 Wash. App 13, 282 P.3d 152 (2012).

(3) Statement admitted to show effect on the hearer.

An out-of-court statement offered to prove the mental or emotional effect upon the hearer or reader is not objectionable as hearsay. The result is usually based not upon the theory that the instant hearsay exception applies, but upon the theory that the statement is not offered to prove the truth of the matter asserted, *i.e., the statement is not within the definition of hearsay in the first place.*

The rule is often invoked in civil litigation to show that the hearer or reader received notice of some fact, had knowledge of some fact, or the like. Although the rule is less frequently invoked in criminal cases, some applications can be found in the case law.

Example: Admissible – In *State v. Mounsey*, 31 Wn. App. 511, 523, 643 P.2d 892, 899 (1982), the prosecution sought to prove that the defendant had entered a home with the intent to commit rape. The defendant sought to prove that he could not have intended to commit rape because he had heard from a friend that the victim was accustomed to late-night visitors and that, in fact, he expected to be welcomed. The court stated that the statement by the friend was not hearsay when offered to prove the defendant's state of mind.

Example: Admissible – In *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d. 892, 898 (1996), the prosecution was permitted to introduce a threat allegedly made by the defendant to a third party to explain why the third party had not reported the crime earlier. The statement was not hearsay because it was not being admitted to prove that the defendant intended to carry out the threat but simply to show the effect on the hearer.

However, if the out-of-court statement is offered to prove the state of mind of a third person (a person other than the declarant or the hearer or reader), the statement is hearsay.

3. Statements for Medical Diagnosis or Treatment – ER 803(a)(4)

Under ER 803(a)(4), statements made for the purpose of, and "reasonably pertinent to," medical diagnosis or treatment are not objectionable as

hearsay. This exception is "firmly rooted." *State v. Woods* 143 Wn.2d 561, 602, 23 P.3d 1046, 1069 (2001) (internal citation omitted). Unlike the hearsay exception for state of mind (above), the rule is not limited to statements describing the declarant's then-existing symptoms. The instant rule is much broader and includes statements of past symptoms as well as statements of medical history.

The rule is based upon the assumption that a person making such a statement is motivated to be truthful by the hope for an accurate diagnosis and successful treatment.

The rule is not limited to statements made to physicians. Statements made to hospital employees, ambulance drivers, and the like are included so long as the requirements of the rule are met. *In re Welfare of J.K.*, 49 Wn. App. 670, 675, 745 P.2d 1304, 1307 (1987), *review denied,* 110 Wn.2d 1009 (1988).

In a domestic violence case, the rule has many potential applications. Prosecuting attorneys have succeeded in using this exception to introduce statements by victims of assault or sexual abuse under a variety of circumstances.

Example: Admissible – *State v. Sandoval,* 137 Wn. App 532, 154 P.3d 271 (2007), in a domestic violence assault case, the victim's description to an emergency room doctor was held admissible, including statements identifying the defendant as the perpetrator.

As a general rule, statements attributing fault are not relevant to diagnosis or treatment and hence are not admissible under this rule. Thus, statements as to causation ("I was hit by a car . . .") would normally be admissible, but statements as to fault (". . . driven by John Smith") would not. *See State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505, 507, *review denied*, 112 Wn.2d 1014 (1989). . However, in a case involving an adult domestic violence victim, a statement as to fault may be admissible because it is reasonably pertinent to treatment and diagnosis. *State v. O'Cain,* 169 Wn. App 228, 279 P.3d 926 (2012) (statements by victim to medical personnel about injuries and the defendant's attempts to kill her did not violate confrontation clause). *See also, State v. Sims*, 77 Wn. App. 236, 239-40, 890 P.2d 521, 523 (1995). Further, "a statement made by the child abuse victim identif[ying] the abuser as a member of the victim's immediate household" is admissible because it is relevant to preventing recurrence of the injury. *Butler* at 220-21.

NOTE: The record in *Sims* contains extensive testimony from the medical personnel as to why it is important to elicit the identity of the assailant

when treating a domestic violence victim. It is unclear whether, without such testimony, statements of fault or identity are admissible.

In practice, of course, statements do not fall neatly into one category or another. It is often difficult to separate statements of causation from statements attributing fault, particularly when the declarant is a young child. In this sort of situation, the courts tend to admit the evidence.

4. Prior Inconsistent Statement Given Under Oath – *Smith* Affidavits (Not Hearsay)

Under ER 801(d)(1), prior inconsistent statements of a witness are considered not to be hearsay when:

> The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding . . .

In *State v. Smith*, 97 Wn.2d 856, 863, 651 P.2d 207, 211 (1982), the Supreme Court held that an affidavit sworn before a notary public fell within the "other proceeding" requirement of ER 801(d)(1)(i) and admitted the affidavit as substantive evidence after the declarant, at the subsequent trial, testified inconsistently. The court concluded that because prosecuting attorneys rely on such affidavits when deciding whether to file an information, the affidavits come within the "other proceedings" requirement of ER 801(d)(1)(i).

The *Smith* court declined to establish a bright-line rule providing for the admissibility of all such affidavits. Rather, it established a four-part test for determining whether an inconsistent statement is sufficiently reliable to be admitted as substantive evidence:

(1) Did the witness make the statement voluntarily?
(2) Were there minimal guaranties of truthfulness?
(3) Was the statement taken as standard procedure in one of the four permissible methods for determining probable cause for the instigation of a criminal proceeding?
(4) Was the witness subject to cross-examination when giving the subsequent inconsistent statement?

In *State v. White*, 152 Wn. App. 173, 215 P.3d 251 (2009), the court upheld the admission of a statement of a witness recorded by a police officer, citing other indicia of reliability, by examining the totality of the

circumstances. *See also State v. White*, 152 Wn. App 173, 215 P.3d 251(2009) (admission of testimony upheld as recorded recollection because of other indicia of reliability related to domestic violence cases).

Example: Inadmissible – In *State v. Nieto*, 119 Wn. App. 157, 163, 79 P.3d 473, 477 (2003), prosecution for rape of a child, the victim recanted a statement that she had consensual intercourse with defendant before she was sixteen. The Court held the statement was not sufficiently reliable to be admissible as a prior inconsistent statement because it was not under oath, there was no notary, no other formal procedure was followed, and the declarant testified she had not read language about perjury on the boilerplate statement form. *See also State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234, 1243 (2003) (statement was not admissible as a prior consistent statement because it was not "under oath subject to the penalty of perjury").

5. Prior Consistent Statement by Witness – ER 801(d)(1)(Not hearsay)

A statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. By its terms, the rule applies only when the declarant is present and has already testified as a witness. ER 801(d)(1).

Because the rule applies only to prior statements by a witness, the rule is unavailable to the prosecution in a domestic violence case if the victim refuses altogether to testify. The rule, however, may be useful to the prosecution when the defense claims the victim or witness is biased or has fabricated the allegations against the defendant.

Example: Admissible – In *State v. Smith*, 30 Wn. App. 251, 255, 633 P.2d 137, 140 (1981), *aff'd*, 97 Wn.2d 801, 650 P.2d 201 (1982), a prosecution for assault, defense counsel's cross-examination of the victim, designed to show that the victim had on previous occasions falsely accused the defendant of misconduct, justified the admission of the victim's prior consistent statements to other persons about the alleged incident involving the defendant.

Example: Admissible – In *State v. Osborn*, 59 Wn. App. 1, 7, 795 P.2d 1174, 1177, *review denied*, 115 Wn.2d 1032 (1990), a prosecution for statutory rape, the victim testified and was cross-examined only briefly. Defense counsel then conducted a more extensive cross-examination of the victim's mother, designed to reveal a conspiracy by the mother and the victim to falsely accuse the defendant. Thereafter, the trial court properly allowed other witnesses to reiterate the victim's out-of-court descriptions of the alleged incident. The appellate court said it saw "no problem" with

the fact that the prior statements of the victim were offered to rebut inferences raised during cross-examination of a different witness, the mother.

Example: Admissible – In *State v. Walker*, 38 Wn. App. 841, 845, 690 P.2d 1182, 1185 (1984), *review denied*, 103 Wn.2d 1012 (1985), a prosecution for statutory rape, after defense counsel asserted that a witness was biased because of a "trade-off" deal with the prosecutor, the prosecution was properly allowed to offer the prior consistent statements of the witness through the testimony of four other witnesses.

The prior consistent statement is admissible only if it is offered to rebut a charge of *recent* fabrication. The rule is inapplicable when the defendant claims that the victim's story was a fabrication from the inception.

Furthermore, the prior consistent statement is admissible only if it was made under circumstances minimizing the risk that the declarant foresaw the legal consequences of the statement (i.e., before the existence of any motive to fabricate a new story). *State v. Ellison*, 36 Wn. App 564, 568, 676 P.2d 531, 534-5, *review denied*, 101 Wn.2d 1010 (1984).

6. Prior Testimony – ER 804(b)(1)

When a declarant is unavailable for trial, prior sworn testimony of the declarant may be admissible. ER 804(a) sets forth under what situations a declarant is unavailable. These include:

(1) A witness who has been exempted from testifying on the grounds of privilege;
(2) A witness who persists in refusing to testify despite an order of the court;
(3) A witness who testifies to a lack of memory concerning the subject of the proposed testimony;
(4) A witness who is unable to be present because of "death or then-existing physical or mental illness or infirmity;"
(5) A witness who is absent from the hearing and the proponent has been unable to prosecute his attendance by "process or other reasonable means."

The proponent must establish that a "good faith" effort has been made to secure the presence of the witness. *State v. Dictado*, 102 Wn.2d 277, 287, 687 P.2d 172, 188 (1984), *rev'd on other grounds,* 244 F.3d 724 (9th Cir. 2001). The mere issuance of a subpoena is not enough. *State v. Rivera*, 51 Wn. App. 556, 560, 754 P.2d 701, 703 (1988). In *State v. Hobson*, 61 Wn. App 330, 338, 810 P.2d 70, 73-4, *review denied*, 117 Wn.2d 1029 (1991),

the court stated that under the facts of that case the State need not have moved for a material witness warrant for the now-absent witness in order to establish a "good faith" effort to secure his presence at trial.

Medical unavailability requires more than a showing of inconvenience to the witness. The medical condition must make appearance of the witness "relatively impossible." *State v. Young*, 129 Wn. App. 468, 481, 119 P.3d 870 (2005).

ER 804(b)(1) states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Depositions are discussed more fully at Chapter 4, Section IV, E.

7. Hearsay Exceptions – Complaint of Sexual Abuse

At common law, the courts made an exception to the hearsay rule to allow an out-of-court complaint of a sexual offense to be introduced as evidence. *State v. Hunter*, 18 Wash. 670, 672, 52 P. 247, 248 (1898). *See also State v. Pugh*, 167 Wash.2d 825, 841-842 225 P.3d 892 (2009). This exception, sometimes called the "fact of complaint" or "hue and cry" rule, is a relatively narrow exception in the sense that only the fact of the declarant's complaint and the general nature of the crime could be related by the witness. "Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible." *State v. Alexander*, 64 Wn. App. 147, 151, 822 P.2d 1250, 1253 (1992).

Although the common law rule is nowhere to be found in the Evidence Rules, it continues to be available. *See, e.g., State v. Ackerman*, 90 Wn. App. 477, 481, 953 P.2d 816, 819 (1998).

Example: In *State v. Ferguson*, 100 Wn.2d 131,137, 667 P.2d 68, 72 (1983), a prosecution for indecent liberties, the trial court properly allowed the victim's school teacher to testify that the victim reported "some sexual advances" towards her, but the trial court should not have permitted the teacher to testify that the victim had identified the defendant as the offender.

8. Public Records Exception

RCW 5.44.040 creates a statutory exception to the hearsay rule for public records. In *State v. Phillips,* 94 Wn. App. 829, 836, 972 P.2d 932 (1999), the Court of Appeals affirmed a conviction for violation of a domestic violence protection order. The trial court had admitted a return of service, which had been filed in the court file during the protection order proceeding to establish that the respondent/defendant had been served with a copy of the protection order and thus had knowledge of its existence. The Court of Appeals concluded that this was admissible.

In *Phillips,* the return of service was admitted to corroborate defendant's admission and to establish independent proof of the *corpus delicti.* However, there is no reason to believe that the ruling is limited to this situation. It appears that, so long as the return of service had been filed in the court file in the protection order proceeding and otherwise meets the requirements of RCW 5.44.040 (no expertise or opinion), the return of service is admissible as substantive evidence in a subsequent criminal prosecution.

The confrontation clause is not at issue when the certification simply attests to the authenticity of the document. *Id. See also, State v. Jasper,* 174 Wn. 2d 96, 115-116, 271 P.3d 876 (2012) (violation of the confrontation clause found where the Department of Licensing prepared documents for the purpose of prosecution).

B. The Relationship Between the Hearsay Rule and the Confrontation Clause

The broad issue of the relationship between the Confrontation Clause contained in The Sixth Amendment to the United States Constitution and the hearsay exceptions embodied in the Rules of Evidence was defined by the United States Supreme Court in its landmark decision of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

In *Crawford*, the Supreme Court rejected its decision in *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) that an out-of-court hearsay statement was admissible and did not violate the Confrontation Clause if the statement was reliable; in other words, if it qualified for admission under a firmly rooted hearsay exception. The *Crawford* court held that the Confrontation Clause prohibits testimonial hearsay without regard to whether a firmly rooted hearsay exception applies, or whether there is adequate indicia of reliability. The "unpardonable vice of the *Roberts* test . . . [was] not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the

Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. The Court held that an out-of-court testimonial statement is in admissible if the declarant is unavailable unless the defendant had a prior opportunity for cross-examination.

The type of evidence most likely to be the subject of a *Crawford* objection in a domestic violence prosecution is evidence of statements a non-testifying victim made to law enforcement. Most commonly, these statements have been admitted as present sense impressions (ER 803(a)(3)) or excited utterances ER 803(a)(2). Statements made for the purposes of medical diagnoses or treatment pursuant to ER 803(a)(4) may also present issues.

Crawford also refers to types of hearsay that are not testimonial. These include: (1) "[a]n off-hand, overheard remark;" (2) "a casual remark to an acquaintance;" (3) "business records or statements in furtherance of a conspiracy;" and (4) "statements made unwittingly to an FBI informant" by a co-conspirator.

1. Impact of *Crawford* if declarant testifies at trial

In considering the reach of *Crawford*, it must be emphasized that the prohibition against admitting evidence that falls within a hearsay exception applies only when the declarant does not testify at trial. A witness on the stand who simply refuses to answer questions has not testified within the meaning of the confrontation clause. *In re Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004) (Contrasting child who says, "I don't want to talk about it," with child who says, "I can't remember," after being questioned about the incident).

2. What is "testimonial evidence"?

The Confrontation Clause is implicated by "testimonial" statements—those that "look and feel like testimony." *Davis*, 126 S.Ct. at 2278. As summarized by the Court in *State v. Walker*, 129 Wn. App. 258, at 267, 119 P.3d 935 (2005) (most internal citations omitted):

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to

> believe that the statement would be available for use at a later trial."

Additionally, the Court determined "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard" whether or not they are sworn statements. *Id.* The Court indicated that "[p]olice interrogation" should be given its colloquial meaning and that a recorded statement "knowingly given in response to structured police questioning, qualifies [as interrogation] under any conceivable definition." *Id.* And in a subsequent case, the United States Supreme Court found that "police questioning during a Terry stop qualifies as an interrogation," and that "responses to such questions are testimonial in nature." *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 124 S. Ct. 2451, 2463, 159 L. Ed. 2d 292 (2004).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224, (2006), the court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to future prosecution. *Davis*, 527 U.S. 813-814. The opinion embraced two separate cases: *Davis*, in which the trial court admitted a 911 call by a woman who claimed her former boyfriend had beaten her, and *Hammon v. Indiana*, in which the trial court admitted a wife's statements, to police who responded to the scene of a reported domestic disturbance, that her husband had assaulted her. In each case, the complainant did not appear to testify at trial.

The court determined that the statements to the 911 operator in *Davis* did not offend the confrontation clause, affirming the Washington State Court's opinion in *State v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (2005). The *Indiana* conviction was reversed because the affidavit had been improperly admitted.

a. "Primary Purpose" of a statement

> Determining the primary purpose of statements is an objective inquiry that considers the questions and the answers as well as the totality of the circumstances, including elapsed time, presence of weapons, whether there is a public threat versus a private dispute, and the victim's injuries. *Michigan v. Bryant*, 131 S. Ct 1132 (2011). When the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial; therefore, statements made in such an interrogation are non-testimonial and not within the scope of the confrontation clause. *Id. See also, State v. Pugh*, 167 Wn. 2d 825, 225 P.3d 892 (2009) (emergency was ongoing where it was unclear whether

defendant had left for good); *State v. Saunders*, 132 Wn. App. 592 (Div.1, 2006) (911 recording held non-testimonial where victim called 911, crying and upset, describing assault and injury and concern that the defendant would return).

b. Statement to law enforcement officers: excited utterance

As stated above, the United States Supreme Court in *Davis v. Washington*, 547 U.S. 813,126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), concluded that a statement made to law enforcement during an existing emergency is properly admitted even when the declarant does not testify at trial. Presumably, such statements would qualify as excited utterances under ER 803(a)(2).

The standard was updated in *Michigan v. Bryant*, clarifying that statements in response to police questioning (911 or at scene) may or may not be "testimonial." Only testimonial statements violate the Confrontation Clause if the declarant is unavailable for cross-examination. If the primary purpose of questioning is to enable police to deal with ongoing emergency, statements are not testimonial. But if primary purpose of questioning is to gather evidence about the past, then statements are testimonial. Determining the primary purpose of statements is an objective inquiry that considers the questions and the answers as well as the totality of the circumstances, including elapsed time, presence of weapons, whether there is a public threat as opposed to a private dispute, and the victim's injuries. *Michigan v. Bryant*, 562 U.S. 131, 131 S.Ct. 1143 (2011).

PRACTICE TIP: Judges should consider holding a pretrial hearing to listen to the 911 tapes, and redact portions that are testimonial, and allow the other portions in.

c. Statement for the purposes of medical diagnosis

Statements that victims make to healthcare providers are not testimonial where there is no indication that the patient made statements to medical personnel, including social workers, with the belief that they would be used at a subsequent trial. *State v. Moses*, 129 Wn. App. 718, 730-731, 119 P. 3d 906 (Div. 1 2005). *See also State v. Fisher*, 130 Wn. App. 1, 108 P.3d 1262 (Div. 2 2005); *State v. Sandoval*, 137 Wn. App 532, 154 P.3d 271 (Div. 3, 2007).

However, the presence of a police officer in the examining room, even if those statements were made for treatment or diagnoses purposes, made the victim's statements to the emergency room nurse testimonial, because a reasonable person would anticipate the statements would be used in

prosecution. *State v. Hurtado,* 173 Wn. App 592, 294 P.3d 838, *rev. denied,* (Div. 1, 2013).

d. Statements to family members

Statements that victims, in particular, child victims, make to their family members are generally not testimonial and thus admissible. *State v. Hopkins* 137 Wn. App. 441, 154 P.3d 250 (2007) (in child sexual abuse case, statements to family members are not testimonial). In determining whether statements to family members are testimonial, there must be a threshold evaluation of the underlying circumstances to examine the purpose and formality of the statements. *State v. Alvarez-Abrego***,** 154 Wn. App. 351, 225 P.3d 396 (2010)

e. Governmental records

As discussed in Chapter 4, III, G, a defendant who is convicted of violating a protection or no-contact order following two prior convictions for such an offense may be charged with a felony. Admission of certified copies of the judgment and sentences from the prior convictions does not violate *Crawford. State v. Benefiel*, 131 Wn. App. 651, 128 P.3d 1251 (February 2006); *State v. Hubbard*, 169 Wn. App. 182, 279 P.3d 521 (2012) (court clerk's minute entry showing that the defendant was served with a no-contact order was not testimonial, because it was not prepared for use in a criminal proceedings); *State v. Mares*, 160 Wn. App. 558, 248 P.3d 140 (2011) (certificate authenticating DOL photo was not testimonial.); *State v. Lee*, 159 Wn. App. 795 (2011)(admission of cell phone records through affidavits, prepared in compliance with RCW 10.96.030 that attest to the authenticity of those records does not violate a defendant's Sixth Amendment right to confrontation); *State v. Iverson* , 126 Wn. App. 329 (2005)(jail booking records properly admitted to establish non-testifying DV victim's identity).

f. Statements not admitted for their truth

When a statement of a non-testifying declarant is admitted for some purpose other than its truth, there is no confrontation clause violation. *State v. Athan*, 160 Wn. 2d 354, 158 P. 3d 27 (2007) (statements of defendant's brother regarding the defendant's location were not offered for their truth, thus the confrontation clause was not implicated). *But see, State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007)("…[W]e are not convinced . . . that a statement . . . offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis")**.**

3. Confrontation Clause and Expert witnesses

In *State v. Lui*, 179 Wn. 2d 457, 315 P.3d 493, *cert. denied* 134 S. Ct. 2842 (2014), the Supreme Court declared a new test for the right to confront expert witnesses. An expert comes within the scope of the confrontation clause if two conditions are satisfied: (1) the person must be a "witness" by virtue of making a statement of fact to the tribunal; and (2) the person must be a witness "against" the defendant by making a statement that tends to inculpate the accused.

Under *Lui*, an expert witness may rely on technical data prepared by others, without each technician testifying as a witness. This only applies if the underlying data is not inherently inculpatory. If the data requires expert interpretation to be inculpatory, it is admissible as part of the testimony of an expert witness who provides such interpretation. If the data is inculpatory without any interpretation, it requires the testimony of the person who obtained it. Furthermore, *Lui* disallows laboratory reports to be admitted into evidence and used against a defendant without effective cross-examination.

4. Forfeiture by wrongdoing

In September 2013, the Supreme Court adopted ER 804(b)(6) which creates an exception to the hearsay rule allowing for admission of a statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The adoption of this exception clarifies that it applies not only to Confrontation Clause objections but also to hearsay rule objections. This amendment to ER 804(b) should apply to all cases, including crimes that occurred before the amendment, without violating the Ex Post Facto Clause. *See State v. Scherner*, 153 Wn. App. 621, 637, 225 P.3d 248 (2009), *affirmed on other grounds*, 173 Wn.2d 405 (2012) (stating that changes in ordinary rules of evidence do not violate the Ex Post Facto Clause).

In *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008), the U.S. Supreme Court considered the application of the forfeiture by wrongdoing exception under the Confrontation Clause, which allows an un-confronted testimonial statement to be admitted where a defendant commits a wrongful act that makes the witness unavailable to testify at trial. For testimonial statements to be admissible under the forfeiture exception to hearsay, the Court held the proponent must show the defendant intended to make the witness unavailable for trial. *Id.*, 554 U.S. at 361.

"Where there is clear, cogent and convincing evidence that the witness has been made unavailable by the wrongdoing of the defendant, and the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying, the defendant forfeits the Sixth Amendment right to confront a witness." *State v. Dobbs,* 180 Wn.2d 1 (2014) (Where evidence supported that the defendant engaged in a campaign of threats, harassment and intimidation against his ex-girlfriend, including telling her she would "get it" for calling the police, the trial court properly found by clear, cogent and convincing evidence that he intentionally caused her absence at trial and forfeited his confrontation rights and hearsay objections).

A defendant who procures a witness's absence waives his hearsay objections to that witness's out-of-court statements. *Id.* The State is not required to produce a direct statement from the witness who is intimidated into silence that the defendant's actions are the reason that the witness refuses to testify. *Id. See also, State v. Mason,* 160 Wn. 2d 910, 926, 162 P.3d 396 (2007).

VII. Children as Witnesses

The possibility of a child's testimony in a domestic violence case raises several issues. On one hand, children are often present during the violence, so their testimony may have great probative value. On the other hand, the child may suffer great trauma from testifying and may be subject to great stress from other family members for "taking sides." Continuances can cause significant distress to child witnesses. The court can prevent the child from being further traumatized by avoiding unnecessary continuances.

A. Children's Statutory Rights

In addition to the statutory rights granted to all witnesses, children are given special statutory rights tailored to their needs. RCW 7.69A.030 states that these special rights are not "substantive rights," but that "there shall be every reasonable effort made by law enforcement agencies, prosecutors, and judges to assure that child victims and witnesses are afforded the rights enumerated in this section."

Of particular significance in domestic violence cases are a child's right to a secure waiting area, the right to have an advocate or support person present, and the right to a measure of privacy with respect to names and addresses.

The Washington statute expressly authorizes the child's advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the

child, and to provide the court with information "to promote the child's feelings of security and safety." RCW 7.69A.030(2).

A. Competency

1. The legal standard for competency

RCW 5.60.050(2) prohibits testimony by "[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." Although the statute does not mention age as a factor, the case law makes it clear that the trial judge has considerable discretion in deciding whether a child should be permitted to testify.

Both children and adults are presumed competent until proven otherwise by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 343-45 P.3d 209 (2011). The *Brousseau* court held that age alone is insufficient to trigger a competency hearing, and further held that a child is not required to testify at a pretrial competency hearing under RCW 9.44.120 (admissibility of out-of-court statements by child sexual abuse victims). *Id.*

The following factors are to be considered in evaluating competency:

a. The child's understanding of the obligation to speak the truth on the witness stand;

b. The child's mental capacity, at the time of the events in question, to receive an accurate impression of the events;

c. Whether the child's memory is sufficient to retain an independent recollection of the events;

d. Whether the child has the capacity to express in words his or her memory of the events; and

e. Whether the child has the capacity to understand simple questions about the events.

State v. Wyse, 71 Wn.2d 434, 437, 429 P.2d 121, 123 (1967).

Each case must be judged on its own facts and on the trial court's judgment as to the competency of the particular child involved.

2. Procedure for determining competency

a. The party objecting to a child's competence bears the burden of proof. The challenger is not entitled to a competency hearing as a matter of right, but

must instead make a threshold showing of incompetency. *State v. Rousseau*, 172 Wn. 2d at 343-345.

b. In determining whether a child is competent to testify, the court may, but need not, question the child about the actual events that are at issue in the case. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203, 1205 (1987).

c. The child should be examined out of the presence of the jury. *State v. Tuffree*, 35 Wn. App. 243, 246-7, 666 P.2d 912, 914-5 (1983) (noting that in previous decisions the Court of Appeals had observed it was a "better practice" to conduct hearing out of presence of jury).

d. If the child is found competent to testify, the court should administer the usual oath or at least elicit some form of declaration from the child that he or she will testify truthfully. ER 603 gives the court discretion to fashion a procedure appropriate for the circumstances presented.

3. Relationship to hearsay rules

A child might be too overwhelmed by the courtroom setting to testify accurately, and yet the child's out-of-court statements might seem reliable. Thus, as a general rule, the fact that a child is incompetent to testify does not bar introduction of a child's out-of-court statement under an exception to the hearsay rule. *State v. Robinson*, 44 Wn. App. 611, 616, 722 P.2d 1379, 1383, *review denied*, 102 Wn.2d 1009 (1986) (excited utterance by three-year-old); *State v. Justiniano*, 48 Wn. App. 572, 574, 740 P.2d 872, 874 (1987) (statement by abused four-year-old, under RCW 9A.44.120). *See supra* Section VI. A. for a discussion of the relationship between the Confrontation Clause and the Hearsay Rule.

NOTE: RCW 9A.44.120, the "Child Hearsay Statute," was amended in 1995 to broaden its scope to include physical as well as sexual abuse of a child. The statute is not available for use when the child is testifying as a non-victim witness. The statute operates only in criminal proceedings. *See In re the Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985). The constitutionality of the statute was upheld in *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

B. Use of Closed-Circuit Television Testimony

RCW 9A.44.150, which expressly allows the use of closed-circuit television to convey the testimony of children, on its face refers only to cases in which a child is testifying concerning an act or attempted act of "sexual contact" or "physical abuse" on that child. Before closed-circuit television testimony can be used, the trial court must find by substantial evidence that "requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the

child from reasonably communicating at the trial." RCW 9A.44.150(1)(c). The constitutionality of RCW 9A.44.150 was upheld against both a state and federal constitutional challenge in *State v. Foster,* 135 Wn.2d 441, 472, 957 P.2d 712, 729 (1998).

VIII. Expert Witnesses

In both civil and criminal cases, experts on domestic violence are occasionally called to assist the jury. When an expert testifies, "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. However, this rule has a limitation in a criminal trial when expert testimony is introduced in a trial where the batterer is the defendant. Under no circumstances may an expert opine that, in the opinion of the expert, the defendant committed the act for which he or she is charged. *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12, 19 (1987) (rape trauma syndrome). In *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199, 210 (1994), *review denied*, 126 Wn.2d 1010(1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426, 430 (1994) (drug sales case).

The following is a summary of some of the purposes for which expert testimony may be introduced.

A. Battered Women's Syndrome

The collection of specific characteristics and effects of abuse on battered women is known as the battered woman syndrome—it is sometimes also referred to as the battered person syndrome. The battered woman syndrome results in a victim's decreased ability to respond effectively to the violence. Victims may appear traumatized, withdrawn, and non-responsive. They may suffer from lowered self-esteem and may have developed coping behaviors to increase their personal safety. They may minimize and deny the danger they have endured, and at times, may rely on alcohol or drugs to cope with the severity of the violence. Testimony addressing these characteristics may be of considerable assistance to the trier of fact.

Testimony about the battered woman syndrome is generally offered by way of an expert witness. In Washington, the courts have said that the admissibility of such testimony, and testimony about related syndromes, is determined by reference to

the *Frye* rule.[2] Under *Frye*, scientific testimony is admissible only if two conditions are met: (1) the theory underlying the expert's testimony must have general acceptance in the scientific community; and (2) there must be techniques, experiments or studies utilizing the theory that are capable of producing reliable results and that are generally accepted in the scientific community.

Even if scientific testimony satisfies *Frye*, such testimony should be admitted only if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

The existence of the battered woman's syndrome—a subset of post-traumatic stress disorder—has been accepted in cases to explain victim conduct. *See*, *State v. Ciskie*, 110 Wn.2d, 263, 279, 751 P.2d. 1165, 1173 (1988) (prosecution for rape where battered woman syndrome testimony admissible to explain victim's failure to discontinue relationship and delay in reporting); *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d. 609, 612 (1996) (upholding admissibility of expert testimony opinion as to why the victim continued to see the defendant despite the existence of a no-contact order and why the victim minimized the extent of the violence).

1. Offered By Defendant-Victim

a. Self-Defense

If a woman is accused of assaulting or killing a man who allegedly abused her, evidence of battered woman syndrome is admissible in support of a claim of self-defense. *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984); *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984); *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d. 1194 (1996). *See also State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (battered child syndrome). This testimony is helpful to the trier of fact because it can show how "severe abuse within the context of a battering relationship affects the battered person's perceptions and reactions in ways not immediately understandable to the average juror." *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

The presence of battered woman syndrome alone, however, is not a defense. To justify submitting the issue of self-defense to the jury, the defendant must provide at least some evidence, other than the syndrome, that she perceived imminent danger from the batterer. *State v. Walker*, 40 Wn. App. 658, 700 P.2d 1168 (1985). In *State*

[2] The rule originated in *Frye v. United States*, 293 F. 1013, 3 A.L.R. 145 (DC Cir., 1923).

v. Hanson, 58 Wn. App. 504, 793 P.2d 1001, *review denied*, 115 Wn.2d 1033 (1990), a woman was accused of murdering the man with whom she lived. She did not assert a claim of self-defense but rather claimed that the killing was an accident. The appellate court held that under this record, evidence concerning the battered woman syndrome was irrelevant. (A dissenting judge flatly disagreed, saying, "Evidence that [defendant] retrieved the gun out of fear and not anger tends strongly to make the theory that the gun discharged accidentally more probable." *Hanson* at 510 (Webster, J., dissenting). *See also State v. Callahan*, 87 Wn. App. 925, 943 P.2d 767 (1997) (self-defense available under some circumstances, even when defendant claims that act was accidental).

A defendant who testifies that she does not remember stabbing her boyfriend may still assert self-defense. In that instance, testimony concerning the battered woman's syndrome may also be appropriate. *State v. Hendrickson*, 81 Wn. App. 397, 914 P.2d 1194 (1996)

b. Duress

A battered woman who commits welfare fraud at the behest of her batterer should have been permitted to assert a defense of duress, even though the batterer was on a merchant marine vessel at the time the incident occurred.

Although the trial court permitted an expert to testify about battered woman syndrome, the court declined to instruct on duress because the defendant faced no immediate harm from her batterer. The Supreme Court reversed, stating that "the reasonableness of the defendant's perception of immediacy should be evaluated in light of the defendant's experience of abuse." *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

In contrast, in *State v. Riker, supra*, testimony concerning battered woman syndrome was properly excluded where the individual who allegedly placed the defendant under duress was a casual business acquaintance and was not her batterer.

2. Offered By Prosecution Against Abuser

a. Expert testimony inadmissible if invades province of jury, comments on defendant's guilt, or amounts to profile evidence.

When it is the abuser who is charged with assault or homicide, the courts have not been receptive to evidence of the battered woman

syndrome. The evidence is not admissible to corroborate the victim's allegation of abuse because the expert would simply be stating an opinion on the ultimate issue of the defendant's guilt and would thus invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (rape trauma syndrome). In *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995), the court concluded that, while a social worker's testimony that a child sex-abuse victim suffered from post-traumatic syndrome was properly admitted, it was error to permit the expert to testify that that the trauma was caused by sexual abuse.

Particular care must be exercised in not admitting "criminal profile" evidence to establish that the defendant is the kind of person likely to commit the crime charged. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994) (drug sales case).

B. Expert Testimony Admissible to Explain Demeanor, Delay in Reporting Domestic Violence, Recantation, or Minimizing of Incident by Victim

Expert testimony in domestic violence prosecutions is often admissible to explain the actions of the victim.

In *State v. Aguirre* 168 Wn.2d 350, 229 P.3d 669 (2010**),** the court ruled that the trial court properly permitted the testimony of an experienced investigator explaining the demeanor of victims of sexual assault and domestic violence, as well as testimony describing objective observations of this victim's demeanor during her interview as compared with observations of other victims interviewed. Because the expert did not state or imply that the victim had been a victim of domestic violence, and testified that victims respond to abuse differently, the testimony was not an opinion regarding the defendant's guilt or the victim's veracity.

In *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165, 1173 (1988), a prosecution for rape, testimony about battered woman syndrome was admissible to assist the jury in understanding the victim's delay in reporting the alleged rape and the victim's failure to discontinue her relationship with the defendant.

Similarly, in *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609, 612 (1996), the court upheld the admissibility of evidence of past acts of domestic violence perpetrated by the defendant against the victim and expert testimony intended to explain the victim's conduct. Specifically, the expert was permitted to give an opinion as to why the victim continued to see the defendant even after a no-contact order had been issued and why she minimized the extent of the violence in conversations with defense counsel. As the court stated, "[t]he jury was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a

relationship has on the victim." *Grant,* at 108. *Accord State v. Madison*, 53 Wn. App. 754, 766, 770 P.2d 662, 669 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify). *See also State v. Magers*, 164 Wash.2d 174, 184–186 189 P.3d 126 (2008). *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989) (expert testimony admissible to explain why abused children may be reluctant to testify).

C. In a Civil Case, Expert Testimony May Be Used to Assist the Jury in Evaluating Damages

An expert may be able to explain why the victim is unable to work in order to assist the jury in evaluating a request for special damages. Similarly, an expert may have relevant testimony on the issue of pain and suffering.

D. Family Law Cases

1. Parenting plans

As discussed in greater detail in Chapter 11, allegations of domestic violence frequently arise in family law cases. RCW 26.09.191(1) prohibits the court from ordering mutual decision-making if the court has found that one parent has a "history" of domestic violence. Similarly, residential time shall be limited where one parent has a history of domestic violence. RCW 26.09.191(2)(a). Expert testimony may assist the court in evaluating the effect of domestic violence on the children so that appropriate limitations may be put into place.

2. Scope of testimony of guardian ad litems and parenting evaluators

Although technically guardian ad litems are not experts, such persons may not only testify as to their opinions and conclusions but, pursuant to ER 703, may give the basis for such opinions. *Stamm v. Crowley*, 121 Wn. App. 830, 91 P.3d 126 (2004) (Title 11 GAL); *Fernando v. Nieswandt*, 81 Wn. App. 103, 940 P.2d 1380 (1997) (Title 26 GAL). Presumably this same logic would control when the witness is a parenting evaluator appointed pursuant to RCW 26.09.220 as opposed to a guardian ad litem appointed pursuant to RCW 26.12.175.

CHAPTER 7
CRIMINAL CASE DISPOSITIONS

In Washington, the law governing sentencing and other dispositional matters is generally the same in domestic violence cases as it is in other criminal prosecutions. Washington's general provisions are covered in other publications, and the discussion need not be repeated here. In superior court, *see* Washington State Judges Benchbook, Criminal Procedure, Superior Court and the Adult Sentencing Manual, which is issued annually by the Sentencing Guidelines Commission. In courts of limited jurisdiction, *see* Washington State Judges Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. These books cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and State
- Pre-sentence investigation and report
- Forms of sentences, imprisonment, community service, treatment, etc.
- Mitigating and aggravating circumstances
- Exceptional sentences outside standard range
- Credit for time served
- Consecutive and concurrent sentences
- Restitution and costs
- Assessments in addition to fines, restitution, and costs
- Other assessments
- Procedure at sentencing hearing
- Probation, suspended sentences, and deferred sentences
- Scripts for judges

In this domestic violence manual, the discussion focuses on the special considerations that should be taken into account in domestic violence cases.

I. Dispositions and Domestic Violence

Stopping domestic violence requires changing both behaviors and belief systems. Perpetrators are more likely to change when they have several experiences of being held accountable. Domestic violence is learned through a variety of experiences and stopping it requires a variety of experiences. It is not arrest alone, or prosecution alone, or conviction alone, or perpetrator treatment alone that brings about change, but rather, a combination of these experiences. Abusers tend to minimize, deny, or rationalize their behavior. Often they blame others for their abusive behavior. They are more apt to change their abusive behavior when there is external motivation for change. See Chapter 2 for a more in-depth discussion about perpetrators of domestic violence.

In addition, victims are often told to just leave the situation, to stand up for themselves, to protect the children from the batterer, to go to marriage counseling, etc. This advice is given in the hope that somehow these actions will provide the consistent motivator the

perpetrator needs to make changes. Expecting the victim to take this role may not only put her or him in further danger, but also ignores the reality that domestic violence victims may be in crisis and unable to act as the consistent motivator for the perpetrator. Instead, the community, through the criminal legal system, must frequently play that role.

To maximize the effectiveness of dispositions, judges should provide multiple ways to convey the message that domestic violence is never justified and that it is the responsibility of the perpetrator to change that behavior. This may be done through a combination of jail time, restitution, community service, fines, restrictions on access to the victim, and court-ordered treatment. It is the consistency and repetition of the message in multiple ways with clear sanctions that changes perpetrators of domestic violence.

The objectives of a disposition in a domestic violence case should be to:

1. **Ensure a fair trial for all participants.**
2. **Stop the violence.**
3. **Protect the victim.**
4. **Protect the children and other family members.**
5. **Protect the public.**
6. **Uphold the legislative intent that domestic violence be treated as a serious crime, and to communicate that intent to the offender and to the victim.**
7. **Hold the offender accountable for the violent behavior and for stopping that behavior.**
8. **Rehabilitate the offender.**
9. **Provide restitution for the victim.**

Whether a domestic violence case results in conviction and sentencing, diversion, or even dismissal, the court's handling of the case plays a critical role in addressing the conditions that allow domestic violence to continue and to escalate.

II. Pretrial Dispositions

A. Options: Limitations and Recommendations

The following is a brief summary of the various options for pretrial disposition of a case. Sentencing options, whether following trial or a guilty plea, are discussed in Section III. A brief discussion of domestic violence treatment occurs in Section VI, with a more thorough discussion in Appendix A.

1. Diversion by prosecuting authority before charges are filed

Although the term diversion is used somewhat loosely, the 1991 Washington State Task Force on Domestic Violence recommended that

use of this term be restricted to programs operated by the prosecuting authority. Specifically, diversion programs are those in which, before charges are filed, the defendant agrees to complete a number of conditions—normally treatment and good behavior. If the defendant successfully complies, the prosecutor will decline to file the charges. If the defendant does not comply, charges will be filed and the case will be handled in the same way as all other criminal cases. The Domestic Violence Task Force recommended that diversion not be used in domestic violence cases.[1]

Furthermore, recent research has found that a significant percentage of domestic violence defendants who are diverted from prosecution or sentencing reabuse or violate the terms of their conditional release.[2]

RCW 9.94A.411(2) discourages the use of diversion in prosecutions for rape, child molestation, and incest. Although not absolutely prohibiting diversion in these cases, the Legislature has indicated that pre-filing counseling is not a substitute for criminal prosecution.

The victim should be notified by the prosecutor of any decision to divert or otherwise to decline to file a case.

In any event, diversion as defined above requires little, if any, involvement by the court, and thus is beyond the scope of this domestic violence manual.

2. Deferred prosecutions

Deferred prosecutions are provided for in Chapter 10.05 RCW, which provides for a structured two-year program of treatment when it has been established that the wrongful conduct was caused by alcoholism, drug addiction, or mental illness. Deferred prosecutions are available only for misdemeanors and gross misdemeanors. A defendant who successfully completes a deferred prosecution program is entitled to have his or her case dismissed.

---

[1] *Final Report of the Washington State Domestic Violence Task Force 1991* (Administrative Office of the Courts, PO Box 41170, Olympia, WA 98504-1170, 360-753-3365, 1991).

[2] A. Klein and T. Tobin. (2008). "Longitudinal Study of Arrested Batterers, 1995-2005: Career Criminals." *Violence Against Women* 14(2) (February 2008): 136-157, NCJ 221764, available at: http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=243648; *See also,* Hartley, C., and L. Frohmann. "Cook County Target Abuser Call (TAC): An Evaluation of a Specialized Domestic Violence Court." Final report for National Institute of Justice, grant number 2000-WT-VX-0003. Washington, DC: U.S. Department of Justice, National Institute of Justice, August 2003, NCJ 202944.

Although alcoholism, drug abuse, or mental illness may exacerbate the violence, domestic violence is not caused by any one of these factors and does not stop when these factors are resolved.

The Domestic Violence Task Force recommended that deferred prosecutions not be granted in cases of domestic violence.

3. Dispositional continuances

Dispositional continuances are court-approved agreements between the prosecuting attorney and the defense. In essence, the court agrees to dismiss the charges if certain conditions are met. A speedy trial waiver is always required. In some cases, the defendant may also (1) waive his or her right to a trial by jury or (2) agree to a stipulated facts trial (submittal) if a violation of the conditions is established.

4. Stipulated Order of Continuance (SOC)

A Stipulated Order of Continuance (SOC) is a specialized form of a dispositional continuance. In an SOC, the defendant agrees to complete a structured domestic violence treatment program and other conditions in return for eventual dismissal of the charge. The defendant is required to waive his or her right to a speedy trial and to agree to submit the case on the basis of the police reports if the conditions are not satisfied.[3] In considering whether or not to approve a SOC, courts should consider the likelihood of the defendant reoffending, and whether the order provides sufficient accountability structures, including, but not limited to: the availability of the appropriate treatment options for defendants and whether or not there are methods to monitor compliance with the conditions of the order.

The Task Force recommended that an SOC program be developed for handling appropriate domestic violence cases. This option is discussed in detail at Section II, B, *infra*.

5. Civil compromise

A civil compromise is essentially an agreement by which the defendant compensates the victim for any loss in return for dismissal of the charges. RCW 10.22.010. A civil compromise is not available in domestic violence cases. RCW 10.22.010(4) provides:

[3] King County has promulgated a local court rule governing stipulated orders of continuance, LCrRLJ 8.3, available at: http://www.kingcounty.gov/courts/DistrictCourt/About/LocalRules/Stipulated%20Orders%20of%20Continuance.aspx

> [An] offense may be compromised . . . except when it was committed: . . . [b]y one family or household member against another as defined in RCW 10.99.020 and was a crime of domestic violence as defined in RCW 10.99.020.

B. Stipulated Order of Continuance (SOC)

A Stipulated Order of Continuance (SOC) is a pretrial disposition option in the state of Washington. In an SOC, in return for completion of a number of conditions, a case is dismissed at the end of the monitored program. For a more detailed discussion regarding the pros and cons of entering such an order, *see* the Final Report of the Washington State Domestic Violence Task Force. Such programs require careful screening by the prosecuting authority and are inappropriate when the crime in question is particularly serious.

SOC programs allow for continued control of the offender and are designed to assist the repentant perpetrator in stopping the violence. The SOC program allows the court to exercise some control over the defendant but avoid the time of a trial.

SOCs have the advantage of offering a quick resolution of the matter. Rehabilitation programs appear to be more effective when they quickly follow the arrest.

The court is not a party to the SOC, as it is an agreement between the prosecutor and the defendant. The court's role is typically limited to granting the continuance, deciding whether there has been of breach of the terms, and whether to grant the dismissal motion made by the prosecutor. Generally the court does not decide what the consequences a breach will be. *State v. Kessler*, 75 Wn. App. 634, 879 P.2d 333 (1994).

1. Procedure

a. Waiver of defendant's rights

The Task Force recommended that only Stipulated Orders of Continuance (SOC), which require a stipulation to the police report, be approved by the court. If (as would be the usual situation), this stipulation also is intended to waive the right to trial by jury, a written waiver must be obtained. *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). CrRLJ 6.1.2 contains a model form for a "submittal."

Every SOC must be accompanied by a speedy trial waiver.

b. Presence of counsel

Because entry into an SOC program involves the waiver of a number of important constitutional rights, the defendant is entitled to be represented by an attorney. If counsel is not present, a full colloquy concerning waiver of the right to counsel must be undertaken by the court. *See State v. Christensen*, 40 Wn. App. 290, 295, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985).

c. Length of an SOC

The Task Force recommended that the SOC period be for two years. A dismissal date must be set at the time the order is initially entered.

2. Eligibility requirements

The Domestic Violence Task Force set forth the following recommendations concerning eligibility for domestic violence treatment:

a. No prior convictions for crimes of violence within seven years (including juvenile convictions committed after age 16).

b. No prior convictions for domestic violence crimes within seven years.

c. Current offense is not a felony.

d. No use of weapons in current offense.

e. Current offense did not result in injuries that required medical treatment.

f. Current offense is not a violation of an existing domestic violence protection order, no-contact order, or restraining order.

g. Offender does not have an extensive criminal record of any kind.

h. Before signing the order, the court should advise the defendant that an SOC will not be granted in a case where the defendant sincerely believes he or she is innocent of the charge.

3. Content of an SOC

a. Domestic violence perpetrator programs

Domestic violence perpetrator treatment is a specific treatment modality. The experience of practitioners in the field has shown that generic counseling or even “anger management” is not

adequate. Domestic violence is the result of multiple factors that must be specifically addressed if the pattern is to be eliminated. An agency that holds itself out as treating domestic violence perpetrators must be certified by the Department of Social and Health Services. RCW 26.50.150.

A review of the statutory requirements for domestic violence treatment is found in Section VI. A copy of the Washington Administrative Code provisions implementing RCW 26.50.150 is contained in Appendix A. A discussion of the components of an appropriate domestic violence treatment program is also contained in Appendix A.

b. No-contact order

When desired by the victim (or otherwise deemed appropriate by the court), a no-contact order should be entered pursuant to RCW 10.99.040(2),(3). In addition, the SOC should specifically indicate that violation of the no-contact order will result in revocation of the SOC.

c. No criminal law violations

d. Restitution (where appropriate)

e. Substance abuse treatment (where appropriate)

Substance abuse treatment, although often required, is not a substitute for domestic violence rehabilitation. Although some incidents of battering may be more severe when the batterer is under the influence of alcohol or drugs, the battering does not stop simply because the substance abuse problem is cured. In addition, as part of the assessment interview required under WAC 388-60-0165, the agency doing batterer's treatment must obtain a substance abuse screening. The agency may allow a client to participate in other types of therapy, including substance abuse evaluations or treatment, during the same period the client is participating in the required domestic violence treatment. The program must determine that the participant is stable in the participant's other treatments before allowing the participant to participate in treatment for domestic violence. WAC 388-60-0095.

f. Court costs and monitoring fees

Court costs cannot be imposed in an SOC because a finding of guilty has not been entered. *State v. Friend*, 59 Wn. App. 365, 367,

797 P.2d 539 (1990). In response to *Friend*, the Legislature amended RCW 10.05.170 to permit imposition of court costs in deferred prosecution orders. This amendment, however, did not repeal RCW 10.01.160 – the general authority to impose court costs that was at issue in *Friend*.

Probation monitoring fees can be imposed whenever an individual has been referred to probation. There is no requirement that the defendant have been convicted of a crime.

NOTE: Only agreements that comport with the revenue distribution scheme outlined in RCW 3.50.100 and RCW 3.62.090 should be approved by judicial officers. *See* Washington State Ethics Advisory Opinion 04-05 (Aug. 16, 2004).

g. Court monitoring of offender

The order must provide for some clear monitoring of the rehabilitation provisions. Ideally, this should be done through review hearings, or through court probation, if such services exist. In courts without probation officers, rehabilitation agency reports should be monitored monthly by the prosecuting attorney or by court personnel.

4. Revocation

Because the granting of an SOC is similar to the granting of a deferred prosecution, due process requirements must be met in revoking an SOC. *See State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984).

a. Inability to pay for treatment

If the court concludes that a defendant cannot pay for the cost of treatment, termination of the SOC is not appropriate. However, a finding that a defendant made a deliberate choice to make treatment a low priority will support revocation. *State v. Kessler*, 75 Wn. App. 634, 640, 879 P.2d 333 (1994) (pre-filing diversion case). At least under the Sentencing Reform Act (SRA), once the State has established noncompliance, the burden of showing that the violation was not willful shifts to the defendant. A mere claim of indigence is insufficient to meet this burden. *State v. Gropper*, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995). *Accord, State v. Woodward*, 116 Wn. App. 697; 667 P.3d 530 (2003).

b. Lack of amenability for treatment

The WAC provisions governing domestic violence treatment programs require that every defendant referred for batterer's treatment undergo a significant assessment process. If the defendant is eligible for treatment, a treatment plan is adopted.

The question of whether revocation is proper for a defendant who made a good faith effort to gain entrance into a treatment program but who was found to be not amenable to treatment is complex. Under the SRA, the question of whether a violation is willful is relevant only when considering allegations of failure to pay financial obligations and failure to complete community service hours. RCW 9.94B.040; 9.94A.737[4]. However, in *State v. Peterson*, 69 Wn. App. 143, 148, 847 P.2d 538 (1993), Division III held that it was improper to sanction an offender for not complying with a sentence requirement that he participate in crime-related treatment or counseling services where he was unable to enroll in the particular program he had been referred to by his CCO. The court did not address the question of whether an offender who was not amenable to any available treatment could be sanctioned for not entering treatment.

As concerns for both victim and community safety are not satisfied when a defendant either does not enter or does not successfully participate in domestic violence treatment, great care should be taken in crafting a sentence that includes domestic violence treatment as a component to avoid the problems confronting the court in *Peterson*.

NOTE: Statutory and WAC provisions regarding perpetrator treatment are discussed in detail at Section VI of this chapter. A copy of the current WAC provision is found in Appendix A.

III. Sentencing Under the Sentencing Reform Act (SRA) in Domestic Violence Cases

The sentence options available to the court in a felony case involving domestic violence under the SRA are generally the same options available for any other crime subject to the SRA. In determining a felony domestic violence offender score, RCW 9.94A.525(21) provides direction in scoring points for prior convictions for domestic violence, where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011.

[4] The prior version was held unconstitutional by *State v. Madsen* 153 Wn. App. 471 (2009)(overruled by *In re Flint*, 174 Wn.2d 539 (2012). The current version is effective as of June 1, 2012, and does not mention willfulness.

Of particular note, RCW 9.94A.525(21) allows certain prior misdemeanor domestic violence convictions to be included in the scoring, if they are considered "repetitive domestic violence offenses" as defined in RCW.9.94A.030(41).
"Repetitive domestic violence offense" includes:

> (a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;
> (ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;
> (iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;
> (iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or
> (v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense; or
>
> (b) Any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that under the laws of this state would be classified as a repetitive domestic violence offense under (a) of this subsection.

In sentencing, the court should be particularly sensitive to the mandate of RCW 9.94A.500 which requires that the court allow participation by the victim, the survivor of the victim, or a representative of the victim, and from an investigating law enforcement officer before imposing sentence.

All offenders who are subject to post-confinement release are sentenced to a community custody range. An allegation that an offender has violated a term of community custody is now handled by the Department of Corrections; the offender is not referred back to the sentencing court.

Community custody must be ordered by the court pursuant to RCW 9.94A.701 and 9.94A.702. Once community custody is ordered, the Department will conduct a risk assessment on ***only*** those cases where community custody has been ordered by the court. Supervision for felony cases is no longer offense-based but is now based upon a defendant's risk level for qualifying crimes. Supervision for misdemeanor cases is not determined by a defendant's risk level, but rather strictly supervision is strictly offense-based.

The Department uses a risk assessment tool developed by the Washington State Institute for Public Policy[5]. This tool evaluates defendants based upon their risk factor and puts defendants into categories of High Violent, High Non-Violent, Moderate and Low. The main factors used to determine risk are prior criminal history and age. The Legislature

[5] *See*, http://www.assessments.com/assessments_documentation/a%20Case%20study%20-%20WA%20DOC%20Implements%20the%20STRONG.pdf

has eliminated Department of Corrections supervision of: (1) offenders convicted of virtually all misdemeanors and gross misdemeanors in Superior Court and (2) felony offenders who were placed into the two lowest risk assessment categories, low or moderate risk, on violent offenses, crimes against persons, felony domestic violence, or controlled substances violations. Defendants convicted of Fourth Degree Assault (domestic violence) or Violation of a domestic violence protective order are only supervised if the offender also has a prior conviction of a qualifying domestic violence offense.

DOC will supervise the following cases after risk assessment:

- All High Violent Offenders
- All High Non-Violent Offenders
- All Felony Sex Offenses (regardless of risk level)
- All Serious Violent Offenses (regardless of risk level)
- All DMIO defendants (regardless of risk level)
- All ISRB defendants (regardless of risk level)
- All First Time Offender Waivers (regardless of risk level)
- All DOSA defendants (regardless of risk level)
- All SSOSA defendants (regardless of risk level)
- All Interstate Compact cases (regardless of risk level)

The Department will only supervise the following misdemeanors:

- Communication with a Minor for Immoral Purposes
- Custodial Sexual Misconduct 2
- Sexual Misconduct with a Minor
- Failure to Register as a Sex Offender
- Assault Fourth Degree or a Violation of a DV Court Order **and a prior conviction** for any of the following:
    - violent offense
    - sex offense
    - crime against persons
    - assault 4
    - violation of a DV court order

A. Conditions Other Than Confinement

1. Domestic violence perpetrator treatment programs under the SRA

Conviction of most felony domestic violence offenses will result in the imposition of a community custody term. Community custody is to be imposed when a defendant is convicted of a "sex offense," a "violent offense," or a "crime against person." RCW 9.94A.701. Definitions of

violent and sex offenses are contained in RCW 9.94A.030. The definition of a crime against person is contained in RCW 9.94A.411(2), and includes violation of protection and no-contact orders. Finally, when the court sentences a defendant pursuant to the "first offender waiver," a term of community custody may be imposed. Community custody ranges are found in WAC 437-20-010.

Under the current statutory scheme, a court may order the defendant to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d).

RCW 9.94A.703(3)(d) appears to authorize a court to impose domestic violence treatment whenever the court deems such a requirement appropriate. In cases where the defendant is convicted of a domestic violence offense, and the offender or victim has a minor child, the court may require the defendant to complete a certified domestic violence perpetrator program. RCW 9.94A.703(4)(a). Whether the Department of Corrections will supervise an affirmative condition of the sentence depends on the nature of the conviction and static risk score according to the Department's risk assessment tool.

2. No contact with the victim

The court may issue a written no-contact order for a period up to the maximum allowable sentence for the crime (not merely for the standard range). *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201(2007); RCW 10.99.050. A certificate of discharge issued pursuant to RCW 9.94A.637 does not, by itself, act to terminate a no-contact order. Unless the order has been terminated by the sentencing judge or has expired by its own terms, violation of the order is a crime and is fully prosecutable as such. *Id.*

Violation of a domestic violence no-contact order is a separate offense. RCW 10.99.050(2). Imposition of a period of confinement following a finding that defendant violated a "crime-related" condition by contacting the victim does not bar a subsequent trial for the crime of violating a no-contact order. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d. 609 (1996). Accord, *State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, *review denied*, 133 P.2d 1018 (1997).

3. No contact with witnesses or non-victim children

RCW 9.94A.703(3) provides that the court may enter an order prohibiting the defendant from having any contact with the victim or a specific class

of individuals. The potential duration of the order is the maximum allowable sentence for the crime, regardless of the expiration of the defendant's term of community supervision.

A condition of sentence prohibiting a defendant from all contact with his/her children who were witnesses but not victims of a crime of domestic violence is, under some factual situations, an abuse of discretion. The "fundamental right to parent" can only be subject to limitations that are "reasonably necessary to accomplish the essential needs of the state." *State v. Ancira*, 107 Wn. App. 650, 653-4, 27 P.3d 1246 (2001) (quoting *State v. Riles*, 135 Wn.2d 326, 350, 959 P.2d 655 (1998)). *See also In re Rainey*, 168 Wn.2d 367, 377–380 229 P.3d 686 (2010). The record before the court in *Ancira* did not support a conclusion that the State's valid interest in protecting the children from witnessing future acts of domestic violence could be satisfied only by an order prohibiting all contact.

On the other hand, a criminal judge is not prohibited from imposing some limitations on a defendant's contact with his children. As the court stated,

> On this record, some limitations on *Ancira's* contact with his children, such as supervised visitation, might be appropriate even as part of a sentence. Generally, however, the criminal sentencing court is not the proper forum to address these legitimate concerns other than on a transitory basis . . . We agree that *Ancira's* children, as witnesses, were directly connected to the circumstances of the crime.

Ancira at 655-57.

Further, a no-contact order barring a defendant from having contact with the mother of his children, following a criminal conviction, is not violative of the defendant's due process right to parent simply because it makes the practicalities of exercising that right more cumbersome. *State v. Foster*, 128 Wn. App. 932, 117 P.3d 1175 (2005).

4. Restitution[6]

a. When may restitution be ordered?

Restitution is an independent element of the sentence that may be ordered regardless of the determinate sentence imposed by the court. The decision on whether to order restitution is not dependent

[6]All statutory citations in this section are to the versions that control for crimes committed after July 1, 1985. For crimes committed before that day, see RCW 9.94A.750.

upon the seriousness level, the offender score, or the sentencing range.

b. When must restitution be ordered?

Restitution must be ordered whenever an offender is convicted of an offense resulting in injury to any person or loss/damage to property unless extraordinary circumstances exist, which, in the court's judgment, makes restitution inappropriate. In those cases the court must set forth the circumstance in the record. RCW 9.94A.753.

c. What losses are compensable?

Restitution must be based on easily ascertainable damages, actual expenses incurred, or lost wages. Thus, in *State v. Lewis*, 57 Wn. App. 921, 926, 791 P.2d 250 (1990) (*see also State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 793–795 291 P.3d 939 (2013), the court held that future earning losses were not compensable because they were neither "easily ascertainable damages" nor lost wages. Exact accounting is not, however, required. Where the amount of loss is not specifically provable, restitution may still be ordered so long as the record provides a reasonable basis for the court to estimate loss so that the award of restitution is not based on "mere speculation." *State v. Fleming*, 75 Wn. App. 270, 275, 877 P.2d 243 (1994) (internal citation omitted) (overruled on other grounds by *State v. Griffith*, 164 Wn.2d 960 ,195 P.3d 506 (2008). An award of restitution may include an obligation to pay damages that flowed from the crime, even if such loss were not foreseeable. *State v. Enstone*, 137 Wn.2d 675, 682-3, 974 P.2d 828 (1999).

Restitution may include payment for both public and private costs. Costs of counseling reasonably related to the offense may be ordered as a part of restitution. However, restitution may not include reimbursement for mental anguish, pain and suffering, or other intangible losses. RCW 9.94A.753(3).

Thus, in a domestic violence case, compensable items might include:

(1) Lost wages
(2) Medical bills, including ambulance and emergency room fees
(3) Destroyed clothing, automobiles, or other property
(4) Replacement of locks

(5) Transportation expenses related to medical treatment for injuries related to the violence
(6) Motel or hotel bills
(7) Moving expenses
(8) Counseling for the victim and children

The amount may not exceed double the amount of the defendant's gain or the victim's loss. RCW 9.94A.753(3)

d. Enforcement of the restitution order

RCW 9.94A.753(4) establishes the enforcement period for restitution obligations.

For offenses committed prior to July 1, 2000, the defendant remains under the court's jurisdiction for up to ten years after the imposition of sentence, or release from confinement, regardless of the expiration of the defendant's term of supervision and regardless of the statutory maximum for the crime. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction for an additional ten years.

For offenses committed after July 1, 2000, the offender remains under the court's jurisdiction until the restitution obligation is satisfied, regardless of the expiration of the term of supervision and regardless of the statutory maximum for the crime.

B. The Exceptional Sentence Under the SRA

Under the watershed case *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), with the exception of prior convictions, only those facts found by a jury or stipulated to by the defendant can serve as basis for enhancing a sentence over what otherwise would be the maximum imposable sentence. *See also, State v. Aguirre,* 168 Wn. 2d 350, 229 P.3d 669 (2010). In this context, the maximum sentence is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)).

The jury must be unanimous to either accept or reject the aggravating circumstances. *State v. Nuñez,* 174 Wn. 2d 707, 285 P.3d 21 (2012).

1. What are "prior convictions?"

Blakeley excluded "prior convictions" from the facts that must be found before a sentence above the statutory maximum can be

imposed—as such a fact already has been established beyond a reasonable doubt, with at least the right to have had the determination made by a jury.

a. Community custody status

RCW 9.94A.525(19) provides that an offender on "community placement" (defined in RCW 9.94B.020) shall be scored with an additional point. This is a question of law to be determined by the sentencing court. *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006), *cert. denied sub nom. Thomas v. Washington*, 167 L. Ed. 2d 790 (2007).

b. Determination that sentence is clearly too lenient to be made by jury

The Sentencing Reform Act has long contained a provision authorizing the imposition of an exceptional sentence if the "presumptive sentence" would result in a sentence that is clearly too lenient. The current version is contained in RCW 9.94A.535(2)(b). The court in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *abrogated on other grounds, Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546 (2006), concluded that, even though based on defendant's prior convictions, the determination that a sentence is "too lenient" must be made by the jury.

2. The legislative response

As a result of *Blakely*, the legislature amended RCW 9.94A.535 and adopted RCW 9.94A.537 to address to include a number of potential aggravating and mitigating factors and limited the court to considering only those factors in determining the sentence. Laws of 2005, ch. 68; 2005 Final Legislative Report, 59th Wash. Leg., at 289. In addition, some of the factors, all based on questions of law, are to be determined by the court, but the others pose questions of fact, to be determined by the jury. RCW 9.94A.537 sets out the procedures to be followed.

3. The exceptional "up"

Statutory grounds for an exceptional up are contained in RCW 9.94A.535(2)(3). Great care should be taken in relying on prior case law affirming an exceptional sentence on grounds not specifically authorized by RCW 9.94.535(2)(3) or by other provisions of the SRA.

The following is a list of those statutory factors most likely to apply in a domestic violence prosecution. The letters refer to the subsection of RCW 9.94A.535(3) in which they are contained. Case law citations summarize pre-*Blakely* rulings that appear to still be relevant. In light of *Hughes*, no

summary of the judge-imposed findings authorized by RCW 9.94A.535(2) is included.

(3) Aggravating Circumstances – Considered by a Jury – Imposed by the Court. RCW 9.94A.535.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(e) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(f) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; *See State v. Sweat*, No. 88663-6, slip opinion (Wash. S.Ct. April 3, 2014) (RCW 9.94A.535(3)(h)(i) applies when the pattern of abuse was not perpetrated against the victim or victims of the currently charged offense); *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001) (two-week period of abuse is not a prolonged period of time);

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(g) The offense resulted in the pregnancy of a child victim of rape.

(h) The offense involved a high degree of sophistication or planning.

(i) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. *See also State v. Perez-Garnica*, 105 Wn. App. 762, 771-2, 20 P.3d 1069 (2001) (defendant in special position of trust to sister-in-law: minor victim); *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994) (defendant used his position as a family member to facilitate offense: adult victim).

(j) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment. *See also State v. Barnes*, 117 Wn.2d 701, 712, 818 P.2d 1088 (1991); *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990) *overruled in part on other grounds by State v. Ritchie*, 126 Wn. 2d 388, 395, 894 P.2d 1308 (1995).

(k) The offense involved an invasion of the victim's privacy. *State v. Falling*, 50 Wn. App. 47, 55-56, 757 P.2d 1119 (1987) (rape of victim in her bedroom). *Accord, State v. Collicott*, 118 Wn.2d 649, 662, 827 P.2d 263 (1992) (bedroom in a temporary residence such as a treatment center can be a "zone of privacy"). Where commission of the offense, by its very terms, requires that the "zone of privacy" be invaded, this factor cannot be used to grant an exceptional sentence upward. *See State v. Post*, 59 Wn. App. 389, 401-2, 797 P.2d 1160 (1990), *aff'd* 118 Wn.2d 596, 826 P.2d 172 (1992) (burglary conviction). The "at home" burglary situation has not been addressed by RCW 9.94A.535(b)(3)(u).

(l) The defendant demonstrated or displayed an egregious lack of remorse.

(m) The offense involved a destructive and foreseeable impact on persons other than the victim. *See State v. Barnes*, 58 Wn. App. 465, 475, 794 P.2d 52 (1990) (children were present when the defendant murdered his wife and assaulted her cousin), *rev'd on other grounds*, 117 Wn.2d 701, 818 P.2d 1088 (1991).

(n) The defendant committed the current offense shortly after being released from incarceration. *State v. Combs*, 156 Wn. App. 502, 232 P.3d 1179 (2010) (offense of attempting to elude police, committed six months after release from prison for drug possession not considered an offense committed "shortly after being released from incarceration).

(o) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(p) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

4. The exceptional "down"

RCW 9.94A.535 (1) provides mitigating factors for the court to consider in granting an exceptional sentence downward. Some factors may involve the domestic violence as a factor, including the following:

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.
(b) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.
(c) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime
(d) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim
(e) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse
(f) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

In *State v. Hobbs*, 60 Wn. App. 19, 24-25, 801 P.2d 1028 (1990), *review denied*, 116 Wn.2d 1022, 811 P.2d 219 (1991), the Court of Appeals held that it was error to grant an exceptional sentence downwards because the offender and the victim reconciled. The court stated:

> If reconciliation in itself were to be considered a mitigating factor, a number of principles of the Sentencing Reform Act would be compromised. First, because it has nothing to do with the seriousness of the offense, treating reconciliation as a mitigating factor frustrates the goal of proportionality of punishment. In addition, by allowing a later reconciliation to excuse prior violence, the goal of promoting respect for the law through just punishment would be thwarted. (Citations omitted.)

In *State v.* Bunker, 144 Wn. App. 407 (2008), the court found that the person named in a no-contact order could be considered a willing participant in violation of order, establishing a mitigating factor). In another case examining mitigating factors, *State v. Combs*, 156 Wn. App. 502 (2010), the court found that the offense of attempting to elude police, committed six months after release from prison for drug possession, was not an offense committed "shortly after being released from incarceration," for purposes of rapid recidivism aggravating factor. What constitutes rapid recidivism depends on the circumstances, including nature of the crime, and six months might constitute rapid recidivism for more serious crimes.

C. The First Offender Option

1. In certain crimes if the offender is a "first offender," the court has more sentencing options available.

A first time offender is any person who has never before been convicted of a felony in any state or federal jurisdiction and has never participated in a program of deferred prosecution for a felony offense. Additionally, to be eligible for first offender treatment the offense must not be classified as a violent offense, sex offense or most drug offenses. RCW 9.94A.650(1). A juvenile adjudication for an offense committed before age fifteen is not a previous felony offense for purposes of determining first offender status unless it was an adjudication involving a sex offense or a serious violent offense.

2. In sentencing a first time offender the court may:

a. Waive the imposition of a sentence within the standard range and impose a sentence which may include up to 90 days of confinement in a facility operated under contract with the county and require that the offender refrain from committing any new offenses;

b. Require up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year. In addition to any crime-related prohibitions, may require that the offender pay all court-ordered legal financial obligations and/or perform community restitution work. RCW 9.94A.650.

In certain domestic violence offenses, the use of the first offender option allows the court to structure a rehabilitation program that

affirmatively addresses the underlying issues of domestic violence. The court has the authority to order batterer's counseling and substance abuse treatment where appropriate.

A discussion of the statutory requirements for domestic violence treatment providers is found in Section VI. The efficacy of treatment is discussed in Appendix A.

D. Other Alternative Sentencing Options

1. Parenting Sentencing Alternative – RCW 9.94A.655 available if:

• The high end of the defendant's standard range is greater than one year.
• The defendant has no current or prior sex or violent offense charges or convictions.
• The defendant not currently subject to immigration removal proceedings.
• The defendant has physical custody of minor children at time of crime.
• A report from DSHS Children's Administration is required.
• If the defendant is eligible, the court imposes 12 months of community custody in lieu of confinement.

2. DOSA – RCW 9.94A.660 available if:

• The current offense not violent or sex, felony DUI, or any crime with a weapon enhancement.
• The defendant has not been convicted of prior sex offenses.
• The defendant has no convictions for violent offenses within ten years before conviction of current offense.
• The defendant is not currently subject to immigration removal proceedings.
• The high end of standard range for the defendant's conviction is a sentence greater than one year.
• The defendant has not had more than one prior DOSA in previous ten years.

3. Residential DOSA – RCW 9.94A.664

- In order to be eligible, the midpoint of the standard range must be 24 months or less.
- The court imposes community custody for 24 months. The defendant must enter and remain in certified residential chemical dependency treatment for 3 to 6 months.
- The court must also schedule a progress hearing for 3 months prior to expiration of community custody (21 months after sentencing).

4. Prison-based DOSA – RCW 9.94A.662

- Court imposes confinement and community custody.
- Confinement term is ½ midpoint of standard range or 12 months, whichever is longer.
- Community custody = ½ midpoint of standard range.
- Must include DSHS-approved substance abuse treatment program.

IV. Non-SRA Sentencing: Misdemeanors and Gross Misdemeanors

A. Comparison of Felony and Non-Felony Sentencing

A court, whether a superior court or a court of limited jurisdiction, imposing a sentence upon conviction of a misdemeanor or gross misdemeanor is not bound by the Sentencing Reform Act.

The non-felony sentencing judge is not bound by the presumptive range of the comparable felony and may impose up to the maximum misdemeanor or gross misdemeanor sentence subject to the Eighth Amendment proscription against cruel and unusual punishment. *State v. Bowen*, 51 Wn. App. 42, 48, 751 P.2d 1226, *review denied, 111 Wn.2d 1017* (1988) (defendant acquitted on the felony and convicted of the lesser-included misdemeanor: defendant could be sentenced to a sentence greater than that of the presumptive range on the felony).

B. Factors in Misdemeanor Sentencing

In 2010 the Legislature amended RCW 10.99 to provide additional guidance in misdemeanor sentencing for domestic violence offenses. RCW 10.99.100, provides that courts shall consider, among other factors, whether:

(a) The defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse;

(b) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; and

(c) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years.

C. Misdemeanor Probation

1. Length of probation

The maximum jurisdiction of a court of limited jurisdiction over domestic violence offenses is five years. RCW 3.66.067; RCW 3.66.068; RCW 35.20.255. This period cannot be increased by agreement or stipulation. *See In re Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959). **NOTE**: For misdemeanors in Superior Court the length of jurisdiction is two years)

If the court originally imposes a period of probation shorter than the five-year period, the defendant is entitled to notice and a hearing before the length of probation can be increased to the five-year maximum. *Accord, State v. Campbell*, 95 Wn.2d 954, 958-59, 632 P.2d 517 (1981).

The period of probation is tolled when the defendant has absconded, is in custody in another jurisdiction, is in a mental hospital, or has otherwise removed himself or herself from the power of the court. *State v. Campbell*, *supra*. *But see Spokane v. Marquett*, 103 Wn. App. 792, 14 P.3d 832, *review granted*, 143 Wn.2d 1013 (2001).

2. Restitution

In non-felony cases, restitution is generally imposed as a condition of probation and is discretionary with the court. RCW 9A.20.030, RCW 9.94A.753. RCW 9.95.210. Restitution in lieu of a fine is authorized, within certain limits, by RCW 9A.20.030.

Where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW, if the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order. RCW 9.94A.753(7). Defendants are not required to reimburse the Department when the Department pays benefits to victims of uncharged offenses. *State v. Osborne*, 140 Wn. App. 38, 42, 163 P.3d 799 (2007).

As is the case with felonies, restitution must be easily ascertainable. Restitution for future medical expenses, future earnings, or lost retirement benefits is not proper. *State v. Lewis*, 57 Wn. App. 921, 926, 791 P.2d 250 (1990).

Restitution is not limited to the amount necessary to establish a conviction and may be up to the amount of actual loss. *State v. Rogers*, 30 Wn. App. 653, 658, 638 P.2d 89 (1981).

3. No-contact orders

If the victim desires to have no contact with the defendant (or if the court, for some other reason, believes imposition of such an order is appropriate), the order should be fashioned to meet two separate (but related) concerns.

a. No-contact order as a condition of a suspended or deferred sentence

(1) Violation of this type of order, like violation of other conditions of probation, can result in revocation of any period of confinement that had been suspended or deferred.

(2) The standard of proof for revoking probation is preponderance of the evidence. *In re Boone*, 103 Wn.2d 224, 691 P.2d 964 (1984).

(3) A probation revocation matter is heard by the court; there is no right to trial by jury. *See State v. Cyganowski*, 21 Wn. App. 119, 122, 584 P.2d 426 (1978) (revocation based on a violation of a probation condition of no criminal law violations can be heard before trial on the new case).

(4) Revoking probation for violation of a provision of no contact does not act as a bar to a subsequent criminal prosecution for a violation of RCW 10.99.050. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609 (1996). *Accord, State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, *review denied*, 133 Wn.2d 1018 (1997).

b. No-contact order pursuant to RCW 10.99.050

(1) A no-contact order under Chapter 10.99 RCW may be imposed even when the court imposes the maximum possible term of incarceration.

(2) Violation of a no-contact order entered pursuant to RCW 10.99.050 is a separate crime. When an assault or reckless endangerment is committed while a no-contact order is pending, violation of the order is a felony. A third violation of any order entered for the protection of a domestic violence victim is a felony.

(3) The standard of proof for establishing a conviction under RCW 10.99.050 is proof beyond a reasonable doubt. There is, of course, a right to a trial by jury.

4. Other conditions of probation: treatment requirements

A court in a non-SRA setting may impose treatment programs or other conditions that are reasonably related to the rehabilitation of the offender. *State v. Barklind*, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), *aff'd*, 87 Wn.2d 814, 557 P.2d 314 (1976). The court is given wide discretion in fashioning appropriate terms of probation. However, such discretion is limited; a probation requirement that would subject the probationer to a significant risk of harm is unreasonable. *State v. Langford*, 12 Wn. App. 228, 230, 529 P.2d 839 (1974), *review denied* 8 Wn.2d 1005 (1975) (requirement that defendant reveal the names of drug dealers as a condition of probation).

5. Supervision of defendant sentenced for a gross misdemeanor in superior court.

RCW 9.95.204 provides that the Department of Corrections has "responsibility for supervision of defendants pursuant to RCWs 9.94A.501 and 9.94A.5011, but authorizes the county to contract with the Department to undertake supervision. In counties where no such agreement has been reached, only those defendants who meet the requirements of RCW 9.94A.501 will be supervised by the Department of Corrections.

RCW 9.94A.501 directs the Department of Corrections to supervise those offenders who have:

(1) A current conviction for a repetitive domestic violence offense[7] where domestic violence has been plead and proven after August 1, 2011; ***and***

(2) A prior conviction for a repetitive domestic violence offense or domestic violence felony offense where domestic violence has been plead and proven after August 1, 2011.

In addition, the Department of Corrections shall supervise offenders with felony domestic violence convictions whose risk assessment classifies the offender as one who is at high risk to offend, and any offender who has a current conviction for a domestic violence felony offense where domestic violence has been plead and proven after August 1, 2011, and a prior

[7] "Repetitive domestic violence offense" is defined at RCW 9.94A.030.

conviction for a repetitive domestic violence offense or domestic violence felony offense where domestic violence has been plead and proven after August 1, 2011. RCW 9.94A.501

V. Imposition of Sanctions Under SRA or Revocation of a Suspended or Deferred Sentence for Failure to Comply with Treatment Requirement

A. Inability to Pay for Treatment

If the court concludes that a defendant cannot pay for the cost of treatment, revocation is not appropriate. However, a finding that a defendant made a "deliberate choice to make this [therapy] obligation a low priority" will support revocation. *State v. Kessler*, 75 Wn. App. 634, 640, 879 P.2d 333 (1994) (pre-filing diversion case). At least under the SRA, once the State has established noncompliance, the burden of showing that the violation was not willful shifts to the defendant. A mere claim of indigence is insufficient to meet this burden. *State v. Gropper*, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995). *Accord, State v. Woodward*, 116 Wn. App. 697; 667 P.3d 530 (2003).

B. Lack of Amenability for Treatment

The WAC provisions governing domestic violence treatment programs require that every defendant referred for batterer's treatment undergo a significant assessment process. WAC 388-60-0165. An agency is free to reject an applicant for treatment. WAC 388-60-0115.

The question of whether revocation is proper for a defendant who made a good faith effort to gain entrance into a treatment program but who was found to be not amenable to treatment is complex. In *State v. Peterson*, 69 Wn. App. 143, 148, 847 P.2d 538 (1993), Division III held that it was improper to sanction an offender for not complying with a sentence requirement that he participate in crime-related treatment or counseling services where he was unable to enroll in the particular program he had been referred to by his Community Corrections Officer (CCO). The court did not address the question of whether an offender who was not amenable to any available treatment could be sanctioned for not entering treatment.

As concerns for both victim and community safety are not satisfied when a defendant either does not enter or does not successfully participate in domestic violence treatment, great care should be taken in crafting a sentence that includes domestic violence treatment as a component to avoid the problems confronting the court in *Peterson.*

VI. Statutory Requirements for Domestic Violence Treatment Providers

A. Statutory Authority

RCW 26.50.150 requires the Department of Social and Health Services to adopt "standards of approval of domestic violence perpetrator programs that accept *perpetrators* of domestic violence into treatment to satisfy court orders or that represent the programs as ones that treat domestic violence perpetrators."

The Legislature also adopted a number of minimum standards that must be satisfied before a program can properly be so qualified. These programs must include:

1. A full clinical intake before the defendant is accepted into treatment.

2. The defendant must be required to sign a release allowing *inter alia*, the victim, the legal advocate, other treating agencies, the court, and probation services access to information.

3. Weekly treatment in a group setting "unless there is a documented, clinical reason for another modality." The statute specifically provides that other therapies such as individual, marital, family, substance abuse, medication, or psychiatric treatment cannot be substituted for the specialized group domestic violence treatment. A minimum period of treatment is to be set by rule of the Department.

4. The treatment "must focus primarily on ending the violence, holding the perpetrator accountable for his or her violence, and changing his or her behavior."

5. The Secretary [of the Department of Health and Human Services] is to establish criteria concerning when treatment is successfully completed—the mere passage of time is not enough.

6. The program must "have policies and procedures for dealing with reoffenses and noncompliance."

7. All staff must be qualified.

RCW 26.50.150.

B. Department of Social and Health Services (DSHS) Regulations

In response to the statutory mandate, DSHS enacted regulations, which are found at WAC 388-60. The regulations were initially enacted effective April 1993. The most recent version of the WACs became effective on April 30, 2001. A copy is contained in Appendix A.

The current regulations allow concurrent treatment, including for chemical dependency, and require that the offender be stable in other treatment before beginning domestic violence treatment. WAC 388-60-0095(3).

Issues may arise when a defendant refuses to comply, for example, with the agency's requirement that he or she complete chemical dependency treatment when such treatment was not specifically ordered by the court. To date, there are no reported cases dealing with a court finding a violation of probation under these circumstances. It would appear, however, that so long as the reviewing court found that the chemical dependency treatment requirement was reasonable, the refusal to enter chemical dependency treatment would be a violation of probation.

C. Does RCW 26.50.150 Require the Sentencing Court to Refer All Domestic Violence Offenders to Treatment Meeting the Requirements of WAC 388-60?

The scope of who is considered a domestic violence offender is quite broad and can include roommates and former roommates who have never been involved in an intimate relationship, siblings, parents, and children. A sentencing court may conclude that the treatment outlined in WAC 388-60 is not appropriate and that some other intervention may be needed. RCW 26.50.150 is not addressed to the sentencing court but rather is addressed to those agencies that hold themselves out as providing treatment for domestic violence perpetrators. Under the statute, a court does not appear to be required to order "non-intimate domestic violence offenders" into WAC 388-60 treatment.

In addition, RCW 26.50.150 clearly does not require that domestic violence treatment be imposed in every case where a judge is sentencing an "intimate domestic violence offender." A court may conclude that an "intimate domestic violence offender" is not appropriate for treatment because treatment has failed in the past, the current offense is particularly egregious, the defendant has failed to accept responsibility for the battering behavior, or because a history of sexual deviancy make it unlikely that the defendant could ever be accepted into a treatment program. All of these factors must be considered by a treatment agency in determining whether a defendant is amenable to treatment. As discussed in Section II, B, 4, difficulties arise in revoking a defendant who is not amenable to treatment. Thus, a court sentencing a defendant who appears to be inappropriate for batterer's treatment should not impose treatment.

Finally, as discussed in Appendix A, if the court concludes that the defendant and victim had been involved in a dating or intimate relationship and the defendant is amenable to treatment, perpetrator treatment pursuant to WAC 388-60 may be imposed.

VII. Victim Input at Sentencing

The Washington State Constitution provides that victims of a crime, which is charged as a felony, have a right to make a statement at sentencing.[8] RCW 7.69.030 notes, "There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have . . . rights, which apply to any criminal court and/or juvenile court proceeding."

Although there is no such mandate binding judges in a misdemeanor setting, victim input is desirable for many reasons. The President's Task Force on Victims of Crime in 1982 recommended:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime . . . [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice . . . Defendants speak and are spoken for often at great length before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.[9]

A retrospective, published in 2004, affirmed the continuing need "to achieve a balanced criminal justice system that treats crime victims fairly and with sensitivity."[10]

---

[8] Washington State Constitution, Article I, Declaration of Rights, Section 35, http://www.leg.wa.gov/pub/other/WA_CONSTITUTION.htm.

[9] *The President's Task Force on Victims of Crime, Final Report, December 1982* (Washington, D.C., December 1982), www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/front.pdf.

[10] M. Hook and A. Seymour, *A Retrospective of the 1982 President's Task Force on Victims of Crime* (Office for Victims of Crime, Office of Justice Programs, & U.S. Department of Justice, December 2004).

CHAPTER 8
CIVIL PROTECTION ORDERS

I. Purpose and Effectiveness of Protection Orders

Protection orders have emerged during the past three decades as an accessible and effective justice system response to domestic violence. They can play a critical role as part of a comprehensive plan designed to protect victims. Studies show that protection orders are associated with a significant decrease in risk of violence against women by their male intimate partners.[1] Protection orders are particularly helpful when seen as part of a comprehensive approach aimed at achieving the goals of civil court intervention.

The legislature has recognized that protection orders are a "valuable tool to increase safety for victims and to hold batterers accountable." *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 209, 193 P.3d 128 (2008), citing Laws of 1992, Ch. 111 §1. Judges have a unique opportunity to intervene in domestic violence cases. For those victims who petition early in an abusive relationship, before violence begins to escalate to serious injury, judges can structure needed protection.[2]

Protection orders can be effective whether the parties are together or separated. Many studies have documented that domestic violence either started, continued, or increased in severity after separation.[3] Many batterers who kill their partners do so at the time the victim is in the process of separating from an abuser.[4]

It should be noted that Chapter 26.50 has been upheld against a challenge that the statutory procedures do not provide sufficient due process. As stated by the court in *State v. Karas*, 108 Wn.2d 692, 700, 32 P. 3d. 1016 (2001):

---

[1] T.K. Logan, Robert Walker, William Hoyt, Teri Faragher, "The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs," *Final report to the National Institute of Justice*, (2009): NCJ 228350; Victoria L. Holt, Mary A. Kernic, Thomas Lumley, Marsha E. Wolf and Frederick P. Rivara, **"Civil Protection Orders and Risk of Subsequent Police-Reported Violence,"** *Journal of the American Medical Association* 288, no. 5 (August 7, 2002): 589-594.

[2] K.A. Vittes & S.B. Sorenson, " Restraining Orders Among Victims of Intimate Partner Homicide," *Injury Prevention*, 14, (2008), 191-195

[3] J. Hardesty & L. Ganong, "Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for intervention and future research. *Family Relations*, 55 (2006): 200-210; C. Krebs, M. Breiding, A. Brown, & T. Warner, The Association Between Different Types of Intimate Partner Violence Experienced by Women. *Journal of Family Violence*, 26 (2011), 487-500; B. Hayes, Abusive Men's Indirect Control of their Partner During the Process of Separation. *Journal of Family Violence*, 27, (2012)333-344

[4] The Washington State Domestic Violence Fatality Review found that 29% of the 463 abusers who committed homicides between January 1997 and June 2010 committed homicide-suicide. An additional 53 abusers killed themselves after attempting homicide. 46% of the homicides too place after the domestic violence victim had left, divorced or separated from the abuser, or was attempting to separate from the abuser. Jake Fawcett, "Up to Us-Lessons Learned and Goals for Change After Thirteen Years of the Washington State Domestic Violence Fatality Review," *Washington State Domestic Violence Fatality Review 2010* (Washington State Coalition against Domestic Violence, 2010), available at : http://dvfatalityreview.org/

> Considering the minor curtailment of [respondent's] liberty imposed by the protection order and the significant public and governmental interest in reducing the potential for irreparable injury, the Act's provision of notice and a hearing before a neutral magistrate satisfies the inherently flexible demands of procedural due process.
>
> *See also, Gourley v. Gourley,* 158 Wn.2d 460, 145 P.3d 1185 (2006).

This chapter is intended to assist the court in crafting effective orders and in developing effective and efficient procedures for handling domestic violence, consistent with the rights of all parties.

II. Scope of this Chapter and Terminology

A. Orders Available for the Protection of a Victim

Washington statutes provide for the issuance and enforcement of protection orders in a variety of contexts:

1. Civil protection orders (RCW 26.50)
2. Restraining orders (RCW 26.09.060 and 26.09.300; RCW 26.10.040, 26.44.063, 26.26.130)
3. Criminal no-contact orders (RCW 10.99)
4. Anti-harassment orders (RCW 10.14; 9A.46.050)
5. Sexual assault protection orders (RCW 7.90)
6. Vulnerable adult protection orders (RCW 74.34)
7. Enforcement of foreign protection orders (RCW 26.52)

In recognition that domestic violence concerns can arise in a large number of other contexts, courts are also authorized to issue protection orders when addressing non-parental custody actions (RCW 26.10) and paternity actions (RCW 26.26). *See also* RCW 26.50.025(1), 26.09.050, 26.09.060, 26.10.040, and 26.10.115. A court may issue a protection order regardless of "whether or not there is a pending lawsuit, complaint, petition, or other action between the parties." RCW 26.50.030(2).

B. Scope of this Chapter and Cross-References

This chapter is primarily concerned with Orders of Protection issued pursuant to RCW 26.50. Issues concerning the enforcement of foreign protection orders will also be discussed. RCW 26.52.

Although the policy concerns addressed in this chapter apply whenever a court is issuing an order for the protection of a domestic violence victim and often apply when a court is concerned with issues of child abuse or vulnerable adult abuse, the procedural discussions in this chapter apply only to orders initially obtained pursuant to RCW 26.50.

Chapter 3, IV of this manual contains a brief review of the many types of orders available to victims of domestic violence, including a chart summarizing the significant attributes of the various types of orders.

Criminal no-contact orders are discussed in detail in Chapter 4, III.

C. Terminology: Ex Parte and Final Orders

RCW 26.50 provides for the issuance of two types of orders.

RCW 26.50.070 provides for the issuance of an "ex parte temporary order of protection" upon a showing of "irreparable injury." Because the distinguishing characteristics of these orders are not their temporary nature, but the fact that they may be issued ex parte, they will be referred to throughout this chapter as "ex parte orders."

RCW 26.50.060 provides for the issuance of an order "upon notice and after hearing." These orders are occasionally referred to as "permanent orders." This is a misnomer. If the order does not restrain the respondent from contacting his or her own child and if the court determines that the respondent is likely to resume acts of domestic violence when the order expires, the court may issue an indefinite order or a long-term order with a specified expiration date. In other situations, the order is issued for no more than one year. Orders issued following notice and hearing will be referred to in this manual as "final orders."

III. Standard Forms

A. Statutory Authority

RCW 26.50.035 directs the Administrator for the Courts to develop standard petition and orders of protection forms and instructional brochures to be available in all court clerk offices. *See* court forms at:
http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=16.

B. Use of Mandatory Forms Ensures that the Orders Will Be Enforceable

All courts should use the approved Washington State forms as those forms have been drafted to meet all state and federal requirements regarding domestic violence cases. The Order for Protection, WPF DV 3.015, is a mandatory form. Law enforcement officers, judicial and criminal information gathering agencies, and other courts are familiar with and rely upon those forms.

If the court uses orders prepared by an attorney, attach and incorporate by reference the mandatory court form to make sure that the order contains all necessary language, including, in a conspicuous location, notice of the criminal penalties resulting from violation of the order, and the following statement:

You can be arrested even if the person or persons who obtained the order invite or allow you to violate the order's prohibitions. The respondent has the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application. RCW 26.50.035(1)(c).

NOTE: A protection order that does not contain this language may still be sufficient to sustain a criminal conviction. *City of Seattle v. May*, 171 Wn. 2d 847, 256 P.3d 1161 (2011).

1. Listing of Current Forms

Washington's protection order forms can be found at the courts' website at http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=16.

IV. Filing Deadlines – Statute of Limitations

Washington law places no limitation on the time within which an abused party must file for a protection order.

Recent acts of domestic violence are not required in order to obtain or renew a domestic violence protection order. The petitioner must only show present fear of harm based on past violence or threats of violence. *Spence v. Kaminski*, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000); *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P. 3d 592 (2002); *Barber v. Barber*, 136 Wn. App 512, 516, 150 P.3d 124 (2007).

In *Spence*, 103 Wn. App. at 333-334, the Court of Appeals upheld the issuance of a protection order where the petitioner did not allege a recent overt act of domestic violence. The petitioner, who had been victimized by the respondent for a period of years, was granted the order based on her current fears, even though most of the overt acts of domestic violence occurred five years before the filing of the petition.

V. Grounds for Issuance of a Domestic Violence Protection Order

A. RCW 26.50.010(1) Defines "Domestic Violence" As:

1. Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; or
2. Sexual assault of one family or household member by another; or
3. Stalking . . . of one family or household member by another family or household member. "Stalking" is defined in RCW 9A.46.110 and includes harassment and following the other person. The stalking statute also refers to the definition of harassment in RCW 10.14.020.

NOTE: A final order of protection can be issued *without* a showing of a recent overt act of domestic violence, so long as the victim, based on prior acts of domestic violence, remains in fear of the respondent. In contrast, an ex parte order cannot be issued unless there is a danger of "irreparable injury" to the petitioner—which generally will require a recent act. *Compare*, RCW 26.50.060 and RCW 26.50.070.

B. Comparison of RCW 26.50.010(1) Definition with Definition of "Domestic Violence" Contained in RCW 10.99.010

RCW 26.50 includes a behavior-based definition. That is, it defines certain behaviors as domestic violence when they occur between family or household members. In contrast, RCW 10.99.020(3) includes a non-exclusive list of crimes, which are "domestic violence" when "committed by one family or household member against another." Significantly, RCW 10.99.020(3) includes prosecutions for acts of malicious mischief, criminal trespass, and burglary which, depending on the specific facts of the incident, might not permit issuance of a protection order under RCW 26.50.

C. Grounds for Issuance of Protection Orders

Grounds	Applicable Statutes Granting Authority to Issue Orders
Physical harm, bodily injury	RCW 26.50.010(1)
Assault, including sexual assault	RCW 26.50.010(1)
Infliction of fear of imminent physical harm, bodily injury or assault	RCW 26.50.010(1)
Stalking	RCWs 9A.46.010, 10.14.020, and 26.50.010(1)

VI. Who May Seek a Protection Order

A. "Family or Household Members" May Apply for Protection Order

1. The statute defines family or household members as:

> [S]pouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a

> person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren. RCW 26.50.010(2).

2. "Dating relationship" in the context of the statute means:

> [A] social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) the length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties. RCW 26.50.010(3).

3. Same-sex relationships

The protections provided by RCW 26.50 apply equally to those in a gay or lesbian relationship. Nothing in the definition of "family or household member" limits RCW 26.50 to those in a heterosexual relationship.

For additional information on same-gender domestic violence, see Appendix D.

B. Petitions for and by Minors

A person may petition the court for a protection order on behalf of a minor family or household member.

A person thirteen years of age or older may petition the court alleging that he or she has been the victim of violence in a dating relationship in cases where the respondent is sixteen years of age or older, through a parent, guardian, guardian ad litem, or next friend. RCW 26.50.020(1)(b) and (2)(b).

A person over 16 and under 18 years of age may petition for a protection order on his or her own behalf without appointment of a guardian or next friend. The court need not appoint a guardian or guardian ad litem on behalf of a respondent who is over 16 but under 18 years of age. RCW 26.50.020(2) and (3).

The court in its discretion may appoint a guardian ad litem for a petitioner or respondent. RCW 26.50.020(4).

A guardian ad litem is required for a petitioner who is under the age of 16.

C. Protection Order on Behalf of a "Vulnerable Adult"

A petition under RCW 74.34 may be brought not only by the "vulnerable adult" but where necessary by family members, a guardian, and/or a legal fiduciary. RCW 74.34.210.

The Department of Social and Health Services (DSHS) may also file a protection order on behalf of a "vulnerable adult" if they have the consent of the person to be protected. RCW 26.50.021; RCW 74.34.150.

VII. Jurisdiction and Venue

A. Level of Court that Can Issue the Protection Order

1. Ex parte orders

Any Washington State court (district, municipal, or superior) may issue an order pursuant to RCW 26.50.070. RCW 26.50.020(5).

2. Final orders

Superior courts and courts of limited jurisdiction have concurrent jurisdiction to issue protection orders in most situations. However, a final order cannot be issued by a court of limited jurisdiction when:

a. A superior court has exercised or is exercising jurisdiction over a proceeding under RCW 26 or RCW 13.34 involving the parties; or

b. The petition for relief presents issues of residential schedule of and contact with children of the parties; or

c. The petition for relief under RCW 26.50 requests the court to exclude a party from the dwelling which the parties share.

RCW 26.50.020(5).

Many district and municipal courts routinely forward requests for final protection orders to Superior Court when the parties have children together. Even if the protection order does not directly address the minor children, an order barring contact between the adults may make compliance with the parenting plan impractical, (e.g., the arrangements for exchange of the children may need to be adjusted).

3. Authority of superior court commissioners to issue final protection orders

A court commissioner appointed pursuant to WA Const. Art IV Sec. 23 has the authority to enter final protection orders, even though such authority is not specifically granted by RCW 2.24.040. *State v. Karas*, 108 Wn. App. 692, 32 P.3d 1016 (2001). *See also* RCW 26.12.060(6) (Family law commissioners have the power to "cause the orders and findings of the family court to be entered in the same manner as orders and findings are entered in cases in the superior court.")

B. Venue

Venue lies in the county or in the municipality where the petitioner resides unless the petitioner has left the residence or household to avoid abuse, in which case the action may be commenced in the county or municipality of either the previous or the new household or residence. RCW 26.50.020(6).

A person's right to petition for relief under the Domestic Violence Protection Act is not affected by the person leaving the residence or household to avoid abuse. RCW 26.50.020(7).

C. Interaction with Jurisdictional and Venue Provisions Concerning Children (Parenting Plans)

Even if a particular county or state has jurisdiction to enter a protection order, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (RCW 26.27) or venue provisions may require that parenting plan issues be litigated in another forum. "Child custody proceedings" under the UCCJEA include protection order proceedings. RCW 26.27.021(4). In such cases, the court may exercise emergency jurisdiction until the appropriate forum determines whether it will exercise jurisdiction, if it determines that the victim and/or children will be inadequately protected as a result.[5] *See* RCW 26.27.231.

Regardless of a court's jurisdiction to adjudicate longer-term parenting plan issues, the adult victim is still entitled to seek a "permanent" protection order concerning her own person if she otherwise satisfies the requirements. In addition, emergency residential provisions relating to children should be provided on the same basis as is provided in RCW 26.09. RCW 26.50.060(1)(d).

D. Personal Jurisdiction

Personal jurisdiction over the domestic violence perpetrator is based on the fact that an act was committed which caused a tortious injury in the state. RCW 4.28.185(1)(b). Jurisdiction is in any state where any part of the act occurred, whether or not any of the parties actually reside in the state where the act was committed.

Washington law provides for obtaining jurisdiction over a non-resident under RCW 26.50.240, which provides for personal jurisdiction if:

- The individual is personally served with a petition within this state;

[5] See Deborah M. Goelman, *Shelter from the Storm: using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence of Women Act of 2000*, 13 COLUM. J. GENDER & L. 101(2004).

- The individual submits to Washington's jurisdiction by consent, entering a general appearance, or filing a responsive document having the effect of waiving any objection to consent to personal jurisdiction;

- The act or acts of domestic violence occurred within this state;

- The act or acts of domestic violence occurred outside this state and are part of an ongoing pattern of domestic violence or stalking that has an adverse effect on the petitioner or a member of the petitioner's family or household and the petitioner resides in Washington; or

- As a result of acts of domestic violence or stalking, the petitioner or a member of the petitioner's family or household has sought safety or protection in Washington and currently resides in this state; or

- There is any other basis consistent with RCW 4.28.185 or with the Constitutions of this state and the United States.

Where the acts of domestic violence took place outside of Washington state, or the petitioner is in Washington to seek safety or protection, the perpetrator must have communicated with the petitioner or a member of the petitioner's family, directly or indirectly, or made known a threat to the safety of the petitioner or member of the petitioner's family while the petitioner or family member resides in Washington. "Communicated or made known" includes, but is not limited to, through the mail, telephonically, or a posting on an electronic communication site or medium. Communication on any electronic medium that is generally available to any individual residing in the state shall be sufficient to exercise jurisdiction. RCW 26.50.240(2).

Furthermore, jurisdiction over the perpetrator may be obtained if the perpetrator has minimum contacts with the state. Reported case law is sparse on this issue but includes the following cases:

- *A.R. v. M.R.*, 799 A.2d 27 (N.J. App. 2002) (finding that the trial court had personal jurisdiction over the respondent who resided in Mississippi, and could issue an ex-parte protection order against him because he had made a series of calls to New Jersey to locate the victim); *M.P. v. M.S.* , 715 N.Y.S.2d 831 (2000) (New York may have jurisdiction over non-resident even though threats occurred outside of New York, if nonresident travels to New York from time to time to conduct business and New York resident is fearful of his conduct); *Hughs on Behalf of Praul v. Cole*, 572 N.W.2d 747 (Minn. 1997) (Minnesota has jurisdiction over non-resident father even where threats to non-resident father's child occur outside of state, where child lives in Minnesota, father has telephone contact with child, and child suffers resulting emotional distress).

- A person who resides within the state, even if on a federal enclave, is still subject to the jurisdiction of a Washington court. *See, e.g., Tammy S. v. Albert S.* 408 N.Y.S.2d 716 (1978) (court has jurisdiction over the residents although they lived in a federally owned installation); *Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989) (wife's status as a member of Armed Forces residing and working at a military installation in an area ceded to the federal government did not preclude the issuance of an abuse protection order. Further, protection order was effective in the ceded area, absent any indication that order interfered with federal function); *Anthony T. v. Anthony J.*, 510 N.Y.S.2d 810 (1986) (no personal jurisdiction over defendant when service cannot be accomplished out of state using the state's long-arm statute).

- Foreign protection orders are valid and entitled to recognition if the issuing court had jurisdiction over the parties and matter under the law of the state, territory, possession, tribe, or United States military tribunal. There is a presumption in favor of validity, where an order appears authentic on its face. RCW 26.52.020.

VIII. Filing Fees

No fees for filing may be charged to a petitioner seeking relief under Chapter 26.50 RCW. Petitioners shall be provided with the necessary number of certified copies at no cost. RCW 26.50.040. However, service fees can be collected from respondents. RCW 26.50.060(1)(g), 26.50.090(7).

IX. Service of Process and Service of Protection Orders

A. Service of Process

1. Ex parte orders

By their nature, a hearing on a petition for an ex parte order does not require the respondent to have been served with notice of the hearing. RCW 26.50.080.

2. Final orders

a. Personal Service shall be made upon the respondent "not less than five days prior to the hearing." RCW 26.50.020. If an ex parte order has been issued, the respondent shall be served with a copy of the ex parte order, and a copy of the petition and notice of date set for hearing on the final order. RCW 26.50.070.

b. If timely personal service cannot be accomplished, the court may:

(i) Continue the hearing for further attempts at personal service; and

(ii) If the court concludes, that the respondent is concealing himself to avoid personal service, it may:

Allow service by publication as provided in RCW 26.50.085.

Allow service by mail as provided in RCW 26.50.123, if the court determines that the circumstances justifying publication exist and the service by mail is as likely to give actual notice to the respondent as would publication.

c. If timely personal service cannot be accomplished, the court may reissue the ex parte order for an additional 14-day period. If the court determines that service by publication or mailing is appropriate, the ex parte order may be reissued for a 24-day period. RCW 26.50.085, 26.50.123.

d. The court shall not require more than ***two*** attempts at obtaining personal service and shall permit service by publication or by mail unless the petitioner requests additional time to attempt personal service. RCW 26.50.050.

B. Service Period of the Order

1. Ex parte order

Personal service of the order (along with a copy of the petition for final order and notice of hearing date) is required, unless the court authorizes service by publication or mailing. RCW 26.50.070(4).

2. Service of final order

Personal service is required unless the order recites that the respondent appeared in person before the court or unless the court authorizes service by publication or mailing.

C. No Service Fees for Personal Service

The sheriff of the county or the peace officers of the municipality in which the respondent resides shall serve the respondent and is required to effectuate personal service *at no cost* to the petitioner unless the petitioner elects to have a private party effect service. RCW 26.50.040; RCW 26.50.090(2).

Cost of Service by Mail or Publication

Petitioner is responsible to pay the cost of publication or mailing unless the county legislative authority allocates funds for service for indigent petitioners. RCW 26.50.125.

X. Relief Available

Protection orders, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse.[6] Their utility may depend on whether they provide the requested relief in specific detail. Each type of relief provided must be fully explained in the order. Providing precise conditions of relief makes the offender aware of the specific behavior prohibited. A high degree of specificity also makes it easier for police officers and other judges to determine later whether the respondent has violated the order.[7]

A. Relief Available in a Final Order after Full Hearing

RCW 26.50.060(1) enumerates specific provisions for relief, which may be granted by the court in both ex parte and final orders.

1. Restrain the respondent from committing acts of domestic violence**.**

   Note: Some abusers are discouraged from battering by protection orders that forbid violence and state legal repercussions for failing to follow the order. Whether or not the order requires the abuser is ordered to vacate the joint premises, the order challenges the batterers' sense of entitlement to dominate their partner.[8]

2. Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the daycare or school of a child.

3. Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location.

4. On the same basis as is provided in Chapter 26.09 RCW, the court shall make residential provisions with regard to minor children of the parties. However, parenting plans as specified in Chapter 26.09 RCW *shall not be required*.

---

[6] T.K. Logan, Robert Walker, William Hoyt, Teri Faragher, "The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs," *Final report to the National Institute of Justice*, (2009): NCJ 228350.

[7] M. Sheeran & E.Meyer, *CIVIL PROTECTION ORDERS: A Guide for Improving Practice*, National Council of Juvenile and Family Court Judges, (2010).

[8] Jane K. Stoever, Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders 72 Ohio St. L.J., 303, 336 (2011) (discussing petitioners attempt to change the dynamic of the relationship by showing her ability to access the judicial system).

5. Duration of Order Regarding Custody of Children: RCW 26.50.060(2) provides that if the order prohibits a respondent from contacting his own child, the "restraint shall be for a fixed period, not exceeding one year." This limitation does not apply for orders issued under Chapters 26.09, 26.10 or 26.26 RCW. The order may be renewed.

6. Order supervised visitation for the respondent with the minor children of the parties. The supervision is to be performed by professionals or someone known to the parties.

   Effect on existing parenting plan or child support order: Although a court may make initial determinations of custody in a protection order proceeding, a protection order may not be used to effectuate a *permanent* modification of an existing parenting plan or other previously-entered court order. *In re Marriage of Barone*, 100 Wn. App. 241, 247, 996 P.2d 654 (2000). Thus, in *Barone*, the placement of the children with the mother in a protection order proceeding did not relieve her of a prior obligation to pay child support. *See also In re Marriage of Stewart*, 135 Wn. App. 535, 137 P.3d 25 (2006) (Provision of a domestic violence protection order that prohibited father from having any contact with children until further action in family court was not an impermissible *de facto* modification of the parenting plan).

7. Order a respondent to participate in a domestic violence perpetrator treatment program approved under RCW 26.50.150, or participate in testing, evaluation and/or treatment for substance abuse.

8. Order *other relief necessary for protection* of the petitioner and other family or household members sought to be protected. Order a peace officer to assist. [Although law enforcement can be ordered to provide a civil stand-by to allow the petitioner to recover her home, personal effects, or children, they may limit the time they will stand by to recover personal effects. Other arrangements should be made for recovering large amounts of property.]

9. Require respondent to pay the administrative court costs and service fees, as established by the county, and to reimburse petitioner for costs incurred in bringing the action and attorney fees.

   NOTE: No filing fees or service fees are collected from the petitioner.

10. Restrain a party from having any contact with the victim . . . or the victim's children or members of the victim's household. If the victim's children are also the respondent's children, this restraint shall not exceed one year (but the victim may apply for renewal).

NOTE: A protection order need not prohibit all contact. The court has discretion to craft an order appropriate to the circumstances. *See State v DeJarlais*, 136 Wn.2d 939, 969 P.2d 90 (1998) (protection order may allow some contact, such as by telephone; no requirement that all contact be prohibited. Order still enforceable.)

11. Require a respondent to submit to electronic monitoring.

12. Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication (including electronic communications) of a victim of domestic violence, the victim's children, or members of the victim's household.

13. Consider the provisions of RCW 9.41.800, regarding the surrender of weapons. See Chapter 3, III for further discussion**.**

14. Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity. Essential personal effects means those items necessary for a person's immediate health, welfare and livelihood and includes, but is not limited to, clothing, cribs, bedding, documents, medications and personal hygiene items. RCW 26.50.010(7).

15. Order use of a vehicle. RCW 26.50.060(m).

NOTE: Some members of law enforcement urge caution in awarding use of a vehicle titled solely in the abuser's name. If the vehicle is reported stolen, the victim may be subjected to a felony stop.

B. Relief Available in Ex Parte Order

RCW 26.50.070(1) enumerates the provisions available for relief in an ex parte proceeding where the court has concluded that

"[I]rreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent . . . including an order:

> Restraining any party from committing acts of domestic violence;
>
> Restraining any party from going onto the grounds of or entering the dwelling that the parties share, from the residence, workplace, or school of the other, or from the day care or school of a child until further order of the court;

Prohibiting any party from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;

Restraining any party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household; and

Considering the provisions of RCW 9.41.800 (regarding the surrender of firearms); and

Restraining the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. RCW 26.50.070(1)(a)-(g).

C. Use of "Catch-All" Provision to Provide Additional Relief

Both RCW 26.50.060 and RCW 26.50.070 contain general provisions authorizing other relief needed to protect the victim. As indicated in RCW 26.50.060(1)(f), the court is authorized to order relief that is "necessary for the protection of the petitioner and other family or household members." RCW 26.50.070(1) provides that the court may "grant relief as the court deems proper" including the specific provisions outlined above.

A court, in issuing a protection order, has substantial discretion in crafting provisions that will fully protect the petitioner and her family and household members. For instance, the court may, in a given case, deem it appropriate to order the respondent to relinquish control of the petitioner's pet or, where there is a specific concern that the respondent might destroy petitioner's property, order the respondent to maintain petitioner's property in good condition or to turn it over to the petitioner, even when such property is not an "essential personal effect." Or, if a victim is in hiding, the court might issue an order prohibiting the respondent from making attempts to find her.

Thus, in *Dickson v. Dickson*, 12 Wn. App. 183, 529 P.2d 476 (1974), a case involving an injunction issued in a dissolution proceeding, but presenting issues common in the protection order context, the court upheld a provision prohibiting further harassment. Among other things, the ex-husband was enjoined from accusing the ex-wife of being insane, from cursing at her, from writing her letters, and from representing that the two were still married. The case held that the injunction did not violate the ex-husband's first amendment rights. "[T]he First Amendment is not absolute . . . . The thrust of the injunction is the protection of [the] minor children . . . . There was sufficient evidence that [the ex-husband's] conduct interfered with the welfare of his minor children."

Dickson at 188-89. The court did, however, order that the injunction terminate upon the youngest child reaching majority and required that the phrase "from representing [the ex-wife] as his wife" be modified to reflect that the ex-husband was entitled to contend that according to the tenets of his religion the two were still married. *Dickson* at 191.

Furthermore, the protections available "shall not be denied or delayed on the grounds that the relief is available in another action" and "[a] petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties." RCW 26.50.025(2); RCW 26.50.030(2).

Although broad, the court's discretion is not unlimited. For example, a judge cannot effectuate a *permanent* modification of a parenting plan or support obligation through use of a protection order. *In re the Marriage of Barone,* 100 Wn. App. 241, 247, 996 P.2d 654 (2000). Furthermore, protection orders provisions restraining speech should be tailored to specific factual findings relating to a respondent's abusive or harassing behavior. *Marriage of Meredith,* 148 Wash. App. 887; 201 P.3d 1056 (2009).

D. Provisions Directed to Law Enforcement Officers

Law enforcement can be ordered to:

- Serve notices of hearing and orders;
- Assist in the removal of the perpetrator's weapons;
- Assist with vacate orders. This can include accompanying the abused party to the residence, serving the respondent, ensuring that respondent takes clothing, obtaining all keys to the home from the respondent, giving them to the petitioner, and standing by while the respondent leaves;
- Assist with retrieval of property by accompanying the party retrieving belongings and standing by while the items listed in the order are retrieved. This may include use of a vehicle. The order needs to be specific, since police officers will generally not resolve disputes over items not listed in the order. Some law enforcement agencies will place a short time limit on how long they will stand by. If there is extensive property, it may be necessary to make other arrangements; and
- Assist in recovery of children, although a writ of habeas corpus is necessary if the respondent is uncooperative.

Checklist of Relief Available

RELIEF AVAILABLE	STATUTORY AUTHORITY
NO FURTHER ABUSE • to petitioner • to children • to other household members	RCW 26.50.060(1)(a) RCW 26.50.070(1)(a)
STAY AWAY PROVISIONS • from residence • from school, daycare, work place • from other specified location	RCW 26.50.060(1)(b) and (c) RCW 26.50.070(1)(b) and (c)
NO-CONTACT ORDERS • with petitioner • with the children • with other household members • by third parties acting on behalf of respondent	RCW 26.50.060(1)(f) and (h) RCW 26.50.070(1)(e)
ORDERS TO VACATE • not re-enter • surrender keys • not damage premises or petitioner's property • not shut off utilities or discontinue mail delivery	RCW 26.50.060(1)(b) RCW 26.50.070(1)(b)
ORDERS CONCERNING WEAPONS 1. relinquish weapons 2. relinquish weapons license	RCW 9.41.800 RCW 26.50.060(1)(k) RCW 26.50.070(1)(f)
ORDERS PROHIBITING SURVEILLANCE • no harassing or following • no keeping under physical or electronic surveillance, • no cyberstalking • no monitoring—telephonic, audiovisual, or other electronic means of actions, location, or communication of a victim, victim's children, or members of the victim's household.	RCW 26.50.060(1)(i) RCW 26.50.070(1)(g)
ORDERS FOR ABUSER TO OBTAIN TREATMENT • batterer's counseling • substance abuse treatment and testing	RCW 26.50.060(1)(e)
ORDERS CONCERNING CUSTODY	RCW 26.50.060(1)(d) RCW 26.50.070(1)(d)

RELIEF AVAILABLE	STATUTORY AUTHORITY
ORDERS FOR POLICE ASSISTANCE • serve notice • arrest for violations • remove weapons • assist with vacate orders • civil standby procedure	RCW 26.50.060(1)(f) RCW 26.50.080
ORDER RESPONDENT TO PAY ATTORNEY FEE	RCW 26.50.060(1)(g)
ORDER RESPONDENT TO SUBMIT TO ELECTRONIC MONITORING	RCW 26.50.060(1)(j)
ORDER POSSESSION OF ESSENTIAL PERSONAL EFFECTS	RCW 26.50.060(1)(l)
ORDER USE OF VEHICLE	RCW 26.50.060(1)(m)

XI. Special Issues Regarding Ex Parte Orders

A. Authority to Issue Temporary Protection Order (TPO) Ex Parte

RCW 26.50.070(1) provides: "Where an application . . . alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing. . ."

B. Factors in Determining "Irreparable Injury"

RCW 26.50.070(2) states: "Irreparable injury under this section includes but is not limited to situations in which the respondent has recently threatened petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner."

Other considerations may include:

1. History of violence
2. Petitioner's injuries
3. Respondent's access to weapons
4. Threats to attack or abduct the children
5. Threats or attacks on family or household members
6. Threats of suicide[9]
7. Stalking behavior[10]

[9] The Washington State Domestic Violence Fatality Review found that 29 percent of the domestic violence homicides involved suicide. *Supra* note 4.

[10] T.K. Logan, Robert Walker, William Hoyt, Teri Faragher, "The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs," *Final*

8. Drug and alcohol abuse
9. History of mental disorder
10. History of sexual deviancy/convictions for sexual crimes

C. Telephonic Emergency Protection Orders

Emergency ex parte hearings may be held by telephone. RCW 26.50.070(3).

D. Timing of Hearing

The court must hold an ex parte hearing on a protection order petition in person or by telephone on the day the petition is filed or the next judicial day. RCW 26.50.070(3).

E. Recording Abused Party's Injuries

Where possible, the judge should record information regarding the petitioner's visible injuries in written findings on the petition or temporary order. Recording this information becomes important for use in the subsequent hearing on the permanent civil protection order since by that time the evidence of these injuries may have healed.

XII. Duration of Order

A. Ex Parte Orders

An order issued pursuant to RCW 26.50.070 is effective for a "fixed period not to exceed fourteen days or twenty-four days if the court has permitted service by publication . . ." RCW 26.50.070(4). Reissuance is permitted.

B. Final Orders

1. Provisions involving the respondent's children.

"If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year." The one-year period does not apply to orders for protection issued under Chapter 26.09, 26.10, or 26.26 RCW. RCW 26.50.060(2).

NOTE: The court is required to advise the petitioner that if the petitioner wishes to "continue protection for a period beyond one year," in cases involving children,

---

report to the National Institute of Justice, (2009): NCJ 228350. (finding as part of the main conclusion of the study that "stalking plays a significant yet unrecognized role in ongoing violence and protection order violations, fear of future harm, and distress due to the abuse."); Judith McFarlane, Jacquelyn Campbell, Carolyn Sachs ,Yvonne Ulrich, & Xiao Xu, "Stalking and Intimate Partner Femicide," *Homicide Studies* 3,No. 4, November 1999, 300-316.

the petitioner may either seek renewal of the protection order or may seek relief pursuant to Chapter 26.09 or 26.26 RCW. RCW 26.50.060(2).

2. **Provisions not affecting the respondent's minor children.**

If a respondent is not restrained from contacting respondent's children, the court may enter an order for either a fixed period of time or may enter a permanent order of protection if "the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires . . ." RCW 26.50.060(2).

3. **Practical considerations**

As a practical matter, law enforcement requires a determinate expiration date, i.e., September 21, 2054, in order to properly enter and track the orders in the law enforcement computer databases. The statewide mandatory Protection Order Form requires an expiration date on the first page. WPF DV3.015.

XIII. Findings Required if Protection Order Not Granted

Under both RCW 26.50.070(6) (ex parte orders) and RCW 26.50.060(7) (final orders), the court is required to make written findings explaining why the order was not granted.

XIV. Evidentiary Issues

A. Rules of Evidence Need Not Be Applied to Protection Order Hearings

The Rules of Evidence (ER) are permissive rather than mandatory in all protection order proceedings under RCW 26.50, RCW 7.90, RCW 7.92, RCW 10.14, or RCW 74.34.

ER 1101(c)(4) provides that the Rules of Evidence, except for the rules and statutes concerning privileges, need not be applied during hearings for various protective or anti-harassment orders. *See Gourley v. Gourley*, 158 Wn.2d. 460, 145 P.3d 11835 (2006) (Recognizing that ER 1101(c)(4) permits the admission of hearsay in hearings for protection orders).

In Gourley, the court concluded that there was no due process violation in not requiring testimony or cross-examination at the hearing for protection order, but stated that such might be "appropriate in other cases." *Cf., Scheib v. Crosby*, 160 Wash. App. 345, 249 P. 3d 184 (2011) (trial court retains the inherent authority and discretion to decide the nature and extent of any discovery because domestic violence protection orders are "special proceedings").

However, if a protection order is being requested as part of another type of proceeding, such as a dissolution action, it may be appropriate to apply the rules of evidence in making any final orders. The rationale for not mandating application of the rules of evidence in protection order hearings was to further public policy in creating a simple, pro se–friendly procedure. However, when the parties are afforded a full trial with sufficient time to call witnesses and engage in discovery, such as a dissolution trial, the rationale for dispensing with the rules of evidence are far less persuasive.

B. Use of Information in a Domestic Violence Database

The court is required to give notice and an opportunity to be heard with regards to any information it intends to consider from the domestic violence database.

> When a judge proposes to consider information from a domestic violence database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.
> ER 1101(c)(4).

This does not need to be an elaborate process; nor does the court need to disclose information irrelevant to its decision-making process. A sample colloquy might proceed something as follows: "*Our court records indicate, Mr. Jones, that you have a conviction for 4th degree assault against Ms. Jones. What would you like to say about that*?" Should they dispute the information, the hearing can be continued until the file can be ordered or a certified copy of the record obtained.

XV. Conducting the Hearing

In addition to the normal concerns that judges should have that the process appear fair and accessible to the parties, there are special concerns when domestic violence victims must appear in the same courtroom as their abuser, particularly when they may be appearing pro se.

The courtroom should be set up to ensure the parties and their witnesses do not have to have direct contact with the other party and his or her witnesses and that the parties are sufficiently kept separate so that one party is not able to talk or signal to the other party before or after the hearing. A support person such as domestic violence advocate should be allowed to stand with a party before the bench to provide physical separation between the parties and some sense of security.

NOTE: Domestic violence advocates can be encouraged to review orders with petitioner following hearings, as there are times that litigants are too fearful, upset, or reluctant to ask questions in court.

A. Non-English Speaking Parties and Recent Immigrants

Non-English speaking parties and those who have recently arrived in this country present special concerns regarding representation, as they may not understand court procedures due to language or cultural barriers.

The Administrative Office of the Courts has translated the Petition for Order for Protection, the Temporary Order for Protection, and Notice of Hearing and the Order for Protection instructions into languages spoken by the significant non-English speaking populations: Spanish, Russian, Cambodian, Vietnamese, Laotian, Korean, and Chinese. The instructions include a model form. An update of the informational brochure, and other translations, are pending. Copies of the translated instructions are available on paper and electronically in a PDF format. The PDF versions are posted on the Washington Courts Internet site.[11]

The United States Department of Justice has taken the position that state courts that fail to provide language access to non-English speaking litigants may be in violation of long-standing civil rights requirements.[12] The Department of Justice has developed a resource to help state and local courts assess and improve their language assistance services for limited English proficient (LEP) litigants, victims, and witnesses who need access to court services.[13]

An interpreter shall be appointed for any party who (a) cannot readily speak or understand the English language or (b) cannot readily understand or communicate in spoken language due to a hearing or speech impairment. RCW 26.50.055(1).[14]

B. Consolidation of Actions

If a party files an action under Chapter 26.09, 26.10, or 26.26 RCW, an order issued previously under Chapter 26.50 RCW may be consolidated under the new action. RCW 26.50.025(2).

In some cases it may be appropriate to consolidate or direct the court clerk to link all protection order and family law cases involving the same parties to reduce the likelihood of conflicting orders. In addition, in cases where the court finds it appropriate to issue a protection order with a duration of more than one year, it may be helpful to consolidate the cases to reduce the burden on the parties in having to return to court in multiple

---

[11] For further information contact AOC Legal Services, PO Box 41174, Olympia, WA 98504-1174. Temple Forms Line: 360-705-5328 or http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=16.

[12] Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq. (Title VI), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3 789d(c) (Safe Streets Act).

[13] http://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language _Access_ Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf

[14] Washington State has a statewide interpreter commission. For more information go to: http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=interpreterCommission

proceedings. In other instances, the Domestic Violence Database may be adequate for ascertaining relevant information such as the existence of other protection or criminal no-contact orders, custody or parenting plan orders, and any criminal actions involving domestic violence.

The standard Petition for an Order of Protection (DV-1.010 and DV-1.020) directs the petitioner to disclose any pending actions. RCW 26.50.030(1) requires the parties to disclose any other litigation concerning the children of the parties. RCW 26.50.030(2) also expressly provides that "[a] petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties . .."

C. Conflicting Court Orders

To assist the courts in avoiding conflicting orders, the Judicial Information System includes a database containing relevant information and has been available to the courts since July 1, 1997. RCW 26.50.160. RCW 26.50.135(1) further provides that courts shall consult with the Judicial Information System, if available, prior to granting an order directing residential placement of a child or restraining/limiting a party's contact with the child. A more detailed discussion of the scope of the Domestic Violence Database is contained in Chapter 9.

Nothing in Washington statutes prohibits a petitioner from seeking civil protection relief because the petitioner is protected under an order entered in a criminal proceeding under Chapter 10.99 RCW.

When conflicting orders are issued involving the same parties, which court order controls will depend on a number of variables including which case is being heard first, what laws are applied to each specific case, and the statutory purpose of the competing orders in light of the domestic violence statutes.

In 2010, the legislature directed the Administrative Office of the Courts to develop guidelines for courts to establish a process to reconcile duplicate or conflicting protection and no-contact orders in the state. RCW 2.56.240.[15] The guidelines are as follows:

a. Information systems are checked to determine if there is an existing order before another one is issued.

b. Within a county in which an order has been entered, a process is established to notify the originating court that another court in the same county has issued a new order involving the same parties and identifying any conflicts between the original order and the new order.

c. There is a process to reconcile conflicting and duplicative orders.

[15] The report to the legislature can be found at: http://www.courts.wa.gov/programs_orgs/gjc/documents/dv%20protocolsdraftfinalFINAL.pdf

d. The court, on its own initiative or through a motion of any party to the underlying no-contact or protection order, shall consider reconciling conflicting or duplicative orders.

e. There is a biennial review of the institution of and effectiveness of the policies.

D. Agreed Orders and Mediation

See also discussion of mediation in Parenting Plans in Chapter 10, IV.

In general, resolving protection order cases through mediation is inappropriate. Mediation is a process by which the parties voluntarily reach consensus agreement about the dispute at hand. Power imbalances in cases involving domestic violence between the parties may render mediation inherently unfair. A conciliatory approach that does not hold a domestic violence perpetrator accountable for the violence may also send the message that there are no adverse consequences to the violence.[16]

XVI. Mutual Protection Orders Disallowed

Unless done to realign the parties, the court may **not** enter an order for protection to a party who has not properly filed and served a petition. See Section XVII below. This section of the statute is a reflection that mutual protection orders can create the following problems[17]:

- Due process problems when issued without prior notice, written application, or finding of good cause.
- Significant problems of enforcement which render them ineffective in preventing further abuse. Police may have no way of determining whose conduct is enjoined. This may result in both parties being arrested or in no arrests being made.
- Signaling to the batterer that such behavior is excusable, was perhaps provoked, and that the batterer will not be held accountable for the violence, making future violence more likely.
- Allowing a manipulative abuser to entrap a victim in contact that may lead to an arrest.

---

[16] N. Thoennes , P. Salem & J. Pearson. *Mediation and domestic violence: Current policies and practices.* Family and Conciliation Courts Review, 33, 6-29 (1995).

[17] *See generally,* J. Zorza, *What is Wrong with Mutual Orders of Protection?,"* 1 Fam. And Intimate Partner Violence Q. 127, 2008.

XVII. Realignment of Parties and Consolidation of Actions

A. Realignment of Parties

The court may realign the parties where the court finds the original petitioner is the abuser and the original respondent is the victim, and may issue a temporary order for protection until the victim is able to prepare a petition. RCW 26.50.060(4) .

B. Consolidation of Actions

An order issued under RCW 26.50 may be consolidated with an action filed under RCW 26.09, 26.10, or 26.26. RCW 26.50.025(2). See Section XV, B.

XVIII. Renewal of Protection Orders

Where a protected party has an order for a fixed time period, the petitioner may apply to renew the order by filing a petition for renewal within three months prior to the expiration of the existing order along with a description of why the petitioner seeks to renew the protection order. RCW 26.50.060(3).

The court *shall* grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. RCW 26.50.060(3). The court may renew the protection order for another fixed time period or may enter a permanent order as provided in this section. RCW 26.50.060(3).

XIX. Modifications of Civil Protection Orders

A. Modification or Termination Generally

RCW 26.50.130(1) provides that the court may modify or terminate a protection order "upon application with notice to all parties and after a hearing."

Protection orders may be modified to include any remedy that could have been included in the initial order.

Judges hearing modification of protection order requests should be well acquainted with the history of the relationship between the parties before entering a modification.

B. Modification or Termination of Orders of Two Year Duration or More

In response to the Supreme Court's decision in *Freeman v. Freeman*, 164 Wn. 2d 664, 239 P.3d 557 (2010) (reliance on New Jersey caselaw for standards to modify or terminate a protection order), the legislature passed Laws of 2011, §137 (SHB 1565). To modify or terminate a protection order of a duration of two years or more, the restrained

party must demonstrate, by a preponderance of evidence, that there has been a substantial change in circumstances such that the perpetrator is not likely to resume acts of domestic violence against the protected party. RCW 26.50.130(3)(a).

The court shall deny the motion prior to setting a hearing unless it finds that adequate cause for hearing the motion is established by the declarations. RCW 26.50.130(2). There is no burden on the protected party to establish he or she is in current fear of imminent harm by the perpetrator. RCW 26.50.130(3)(a).

C. Factors to Consider in Determining a Substantial Change of Circumstances

The court may consider (but is not limited to) the following factors:

- whether the restrained party has committed or threatened domestic violence,
- whether the restrained party has violated the order for protection,
- whether the restrained party has exhibited suicidal ideation or attempts,
- whether the restrained party has committed criminal acts,
- whether the restrained party has entered into domestic violence treatment or counseling,
- whether the restrained party has sought treatment for drugs/alcohol (if applicable to the Order for Protection),
- whether the protected party consents to the modification/termination,
- the distance between the restrained and protected parties, or
- other factors relating to a substantial change of circumstances.

RCW 26.50.130(c).

In determining whether there has been a substantial change in circumstances, the court may not base its determination solely on: (i) The fact that time has passed without a violation of the order; or (ii) the fact that the respondent or petitioner has relocated to an area more distant from the other party. RCW 26.50.130(d). The court may also decline to terminate an order, notwithstanding a substantial change of circumstances, if the court finds that the underlying acts of domestic violence that were the basis for the order were sufficiently severe. RCW 26.50.130(e).

D. Modification or Termination Upon Request of the Petitioner

Upon a motion by a petitioner, the court may modify or terminate an existing order for protection. The court shall hear the motion without an adequate cause hearing. RCW 26.50.130(5).

Research indicates that domestic violence victims are reasonably accurate at predicting whether they will be endangered by future domestic violence, and that they know better than anyone else what will increase or decrease their safety.[18] In determining whether to modify or terminate an order upon the motion of the protected party, it is recommended that the court "offer the petitioner the opportunity to consult with an advocate to discuss safety issues and other alternatives. . .[and e]xplain to a petitioner who wishes to withdraw her petition that she is always welcome to seek a new order if the violence or threat of violence resumes after dismissal, modification or termination of the order."[19]

XX. Electronic Record Keeping

A. Domestic Violence Database

RCW 26.50.160 requires that the Judicial Information System be available to all district, municipal, and superior courts, with one of its purposes being to avoid the issuance of competing protective orders. The system contains the name and cause number for every protection order issued pursuant to RCW 26.50, every no-contact issued under RCW 10.99, every anti-harassment issued pursuant to RCW 10.14, every sexual assault protection order issued pursuant to RCW 7.90, every dissolution action issued pursuant to RCW 26.09, every third-party custody action issued pursuant to RCW 26.10, every parentage action issued pursuant to RCW 26.10, every restraining order obtained under RCW 26.44, all foreign protection orders filed pursuant to RCW 26.52, and every order for the protection of a vulnerable adult issued pursuant to RCW 74.34. The criminal history of all parties shall also be entered into the system along with "[o]ther relevant information necessary to assist courts in issuing orders under this chapter as determined by the judicial information system committee." RCW 26.50.160(3).

ER 1101(c)(4) provides that a court may refer to the Domestic Violence Database when ruling on a petition for a domestic violence protection order or an anti-harassment order. That section provides:

> When a judge proposes to consider information from a domestic violence database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.

The current version of the database is accessible through the Judicial Access Browser System (JABS). The Administrative Office of the Courts has prepared detailed

---

[18] L. Bennett Cattaneo, M.E. Bell, L.A. Goodwin, & M. Dutton, *Intimate Partner Violence Victims' Accuracy in Assessing Their Risk of Reabuse.* 22 J. Fam. Violence 429 (2007).

[19] M. Sheeran & E. Meyer, *Civil Protection Orders: A Guide for Improving Practice,* National Council of Juvenile and Family Court Judges, Reno, NV (2010), available online at: http://www.ncjfcj.org/images/stories/dept/fvd/pdf/cpo_guide.pdf.

instructions for accessing JABS. A detailed discussion of the domestic violence database is found in Chapter 9.

B. Computer-Based Intelligence Information System

Virtually all of the orders that are required to be entered into the domestic violence database are also to be entered into the computer-based intelligence information system. The clerk of the court is to forward a copy of the order on or before the next judicial day to the law enforcement agency specified in the order. That agency is to enter the order into a computer-based criminal intelligence system.[20] If the order is modified or terminated, the clerk is to forward a copy of the superseding document to the appropriate law enforcement agency.

Entry into the computer-based criminal intelligence information system constitutes notice that to all law enforcement of the existence of the order.

Presentation of an unexpired, certified copy of a protection order with proof of service is sufficient for a law enforcement officer to enforce the order regardless of the presence of the order in the law enforcement computer-based criminal intelligence information system. RCW 26.50.115(3).

Even though entry into electronic record-keeping systems is required, the protected party should be provided with a copy of the order and told to keep it with him or her at all times. In *Donaldson v. Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992), the order was not entered into the computer system and the petitioner did not have a copy of the order. The court said the police could not be expected to make an arrest under the circumstances.

XXI. Civil Enforcement of Protection Orders: Civil Contempt

The effectiveness of protection orders depends largely on how well they are enforced by both the judiciary and law enforcement. Even when a victim is able to accomplish obtaining a protection order, without enforcement the court order at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Offenders may be emboldened to routinely violate orders if they believe there is no real risk of being arrested.[21]

This situation, while lamentable, is not without remedy. Courts can develop, publicize, and monitor a clear, formal policy regarding violations in order to encourage respect for the court's order and to increase compliance.

---

[20] The system currently in use is the Washington Crime Information Center (WACIC), which is available to all law enforcement agencies in the State.

[21] T.K. Logan, Robert Walker, William Hoyt, Teri Faragher, "The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs," *Final report to the National Institute of Justice*, (2009)

This section outlines considerations for the court when using civil contempt powers to enforce court orders. It is meant to assist the court in improving the utility of court orders in domestic violence cases by establishing effective monitoring and enforcement mechanisms.

A. Violation of a Protection Order May Constitute Civil Contempt of Court, as well as Subjecting the Violator to Criminal Sanctions

In addition to applicable criminal penalties, "violation of an order issued under this chapter [RCW 26.50], chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law." RCW 26.50.110(3).

B. Available Sanctions

The court may impose two different types of sanctions depending upon the nature of the contempt and the procedure followed by the court in adjudicating the contempt.

1. Punitive sanctions

   Punitive sanctions are "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). These are only available either for a contempt occurring in the court's presence (direct contempt) or where criminal contempt proceedings are initiated by the prosecutor with the attendant due process protections.

2. Remedial sanctions

   Remedial sanctions are imposed to coerce "performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). These may be initiated by a party or on the court's own motion.

C. Procedure for Imposing Sanctions

1. Direct contempt may lead to summary imposition of either remedial or punitive sanctions

   Direct contempt is conduct that occurs in the direct presence of view of the court. The court may summarily sanction contemptuous behavior which occurs within the courtroom where heard or seen by the judge. The alleged contemnor does not have a constitutional right to a full hearing on the matter. RCW 7.21.050; *In re Willis*, 94 Wash. 180, 162 P. 38 (1917).

a. The court must impose the sanctions either immediately after the contempt occurs or at the end of the proceeding.

b. The sanction may be only for the purpose of preserving order in the court and protecting the authority and dignity of the court.

c. The person committing the contempt must be given an opportunity to speak in mitigation unless compelling circumstances are present. *Templeton v. Hurtado*, 92 Wn. App. 847, 965 P.2d 1131 (1998).

d. The sanction imposed may be remedial or punitive:

- A remedial sanction forfeiture may not exceed $500 for each day the contempt continues; and

- A punitive sanction sentence may not exceed a fine of $500 and imprisonment of 30 days, or both, for each act of contempt.

RCW 7.21.050.

A party's threats of physical violence while in the courtroom could serve as a basis for a finding of direct contempt. However, the same threats, if made outside the courtroom or outside of the court's presence, would be indirect contempt. Where collateral testimony is necessary to establish the contemptuous conduct, direct contempt proceedings are not appropriate. In *Templeton v. Hurtado*, *supra*, the court imposed a sanction for direct contempt when a criminal defendant refused to sign a no-contact order. The contempt finding was reversed for procedural irregularities, without discussion of whether such refusal is punishable as direct contempt.

A court is well-advised to use moderation in issuing punitive sanctions in a summary proceeding for direct contempt. Although RCW 7.21 allows for summary imposition of punitive sanctions, long jail sentences without full criminal proceeding are likely to be looked upon with disfavor by appellate courts. *State v. Jordan*, 146 Wn. App 395, 190 P.3d 516 (2008). Written findings are required. *State v. Hobble*, 126 Wn.2d 283, 892 P.2d 85 (1995); *Templeton v. Hurtado*, *supra*.

2. Indirect contempt – remedial sanctions

Indirect contempt of a court order may occur where the violation occurs outside of the court's presence and/or where collateral testimony is necessary to prove the contempt. This is the most common type of civil contempt.

Proceedings to impose remedial sanctions are initiated by either the court or a person aggrieved by a contempt of court.

3. The person accused of contempt is entitled to notice and hearing. RCW 7.21.030(1).

4. A person found to have committed contempt may be sanctioned as follows:

   (i) By imprisonment for so long as a coercive purpose is served, if the contempt is of one of the types defined in RCW 7.21.010(1)(b), 7.21.030(2)(a);

   (ii) By a forfeiture not to exceed $2,000 for each day the contempt continues (RCW 7.21.030(2)(b));

   (iii) By entry of an order designed to ensure compliance with a prior court order (RCW 7.21.030(2)(c));

   (iv) By an alternate remedial sanction if the court finds that the sanctions in RCW 7.21.030(2)(a) through (c) are ineffectual to terminate the contempt of court (RCW 7.21.030(2)(d));

   (v) The court may order the person in contempt to pay losses suffered by the aggrieved party as a result of the contempt and costs incurred with the contempt action, including reasonable attorney fees (RCW 7.21.030(3));

3. Punitive sanctions

   Proceedings to impose punitive sanctions are initiated by filing an information or complaint by the prosecuting or municipal attorney, either on the attorney's own initiative or at the request of a person aggrieved by the contempt. A fixed jail term cannot be imposed upon a contemnor for indirect contempt except in the context of a criminal proceeding, (i.e., prosecutor files charges, right to jury trial).. Although there is some suggestion in the case law that a court may exercise its "inherent powers" where it deems the statutory remedies inadequate, case law has emphasized that due process protections cannot be obviated in doing so. *In re M.B.*, 101 Wn. App. 425, 3 P.3d 780 (2000); *In re Dependency of A.K.*, 130 Wn. App. 862, 125 P. 3d 220 (2005).

   a. A judge presiding in an action or proceeding to which the contempt relates may request the prosecuting or municipal attorney to commence punitive proceedings. Such judge is disqualified from presiding at the trial.

b. An alleged contempt involving disrespect to or criticism of a judge disqualifies that judge from presiding at trial unless the person charged otherwise consents.

c. A motion for imposition of remedial sanctions may be held jointly with a trial on information or complaint seeking punitive sanctions.

d. A person found guilty of contempt may be punitively sanctioned as follows:

(i) By a fine of not more than $5,000 for each separate contempt;

(ii) By imprisonment for not more than one year for each separate contempt; or

(iii) By both fine and imprisonment.

RCW 7.21.040.

D. The Court Proactively Reviewing and Enforcing its Orders

Where compliance with the court order can be measured by an outside source, such as attendance at batterers' treatment classes, the information can be directly obtained by ordering the treatment provider to file regular reports with the court. The victim may not otherwise know whether the batterer is in compliance or may be afraid to complain about non-attendance. The court's *sua sponte* use of its review and enforcement mechanisms sends a powerful signal that domestic violence is not merely a private matter but one of concern to the public at large. *See, e.g., State v DeJarlais*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Given the legal difficulties in fashioning a remedy that is coercive rather than punitive in nature, however, civil review and enforcement remedies may be less powerful than the criminal processes for enforcement. A civil contemnor must be able to purge his contempt at all times and seek immediate release. Therefore, it may be difficult to order incarceration except for a very brief time. *See In Re Pers. Restraint of King*, 110 Wn. 2d 793, 756 P.2d 1303 (1988) (citing *State v Boatman*, 104 Wn.2d 44, 700 P.2d 1152 (1985)). If the alleged violation also constitutes a crime, for example, violation of the "no-contact" provisions of the order, it may be better to rely on criminal enforcement mechanisms.

In any contempt proceeding (except direct contempt occurring in the court's presence) that may result in incarceration, the alleged contemnor has the right to appointment of counsel at county expense if they cannot afford to hire one. *Tetro v Tetro*, 86 Wn.2d 252, 544 P.2d 17 (1975). A pro se victim may feel threatened by a proceeding in which the abuser has counsel even if it is only for the limited purpose of determining contempt.

To set up a contempt review calendar, the court should consider additional staffing and calendaring needs. There will need to be staff responsible for notifying the parties of the hearings and writing up the orders. In addition, additional hearings will need to be created, so the court will need to determine whether they can be accommodated on the existing calendar, or whether additional calendars will need to be created.

XXI. Criminal Enforcement of Protection Order Violations

Issues concerning criminal enforcement are discussed more fully in Chapters III, IV, V, and VII.

A. What Violations of Orders are Subject to Criminal Sanctions?

RCW 26.50.110(1)(a) provides:

Whenever an order is granted under this chapter [RCW 26.50], chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the following provisions is a gross misdemeanor:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
(ii) A provision excluding the person from a residence, workplace, school, or day care;
(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
(v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

B. Applicable Penalties

A criminal violation of a protection order is generally a gross misdemeanor. RCW 26.50.110(1). The violation is a felony, however, if:

1. The defendant has had two prior convictions for violating orders issued under any of the following provisions: RCW 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW, or there is a valid foreign protection order as defined

in RCW 26.52.020, The previous conviction need not involve the same person as the victim in the current offense; or

2. The act that violates the order is an assault (not amounting to an assault in the first or second degree) or is an act "that is reckless and creates a substantial risk of death or serious physical injury to another person."

   Felony violations of a protection order have been classified as seriousness level five offenses. RCW 9.94A.515. A felony violation of a protection order is included within the definition of "crime against person" and subject to the filing standards of RCW 9.94A.411.

XXII. Full Faith and Credit—Violence Against Women Act (VAWA)

RCW 26.52: The Foreign Protection Order Full Faith and Credit Act

In 1999, in compliance with the Violence Against Women Act (VAWA), the Legislature adopted RCW 26.52. In enacting RCW 26.52, the Legislature intended that "barriers faced by persons entitled to protection under a foreign protection order will be removed and that violations of foreign protection orders be criminally prosecuted in this state." RCW 26.52.005.

A. Definition

RCW 26.52.010(3) defines a foreign protection order as:

An injunction or other order related to domestic or family violence, harassment, sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person issued by a court of another state, territory, or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or any United States military tribunal, or a tribal court, in a civil or criminal action.

B. Formal Requirements of the Foreign Order: RCW 26.52.020.

A protection order is valid if the issuing court had jurisdiction over the parties and subject matter under its own laws.

A protection order is presumed to be valid where it "appears authentic on its face."

C. Due Process Requirements: RCW 26.52.020.

In order to be the subject of a Washington criminal prosecution, a foreign protection order must comply with due process. That is, the person restrained must have had notice and an opportunity to be heard or, in the case of an ex parte order, notice and an

opportunity to be heard must have been given "as soon as possible after the order was issued, consistent with due process."

D. What Violations of a Foreign Order Can Be the Subject of a Washington Criminal Prosecution?

As is true with Washington protection orders pursuant to RCW 26.50.110(1), a person who violates restraint, exclusion, and no-contact provisions of a foreign protection order is subject to criminal prosecution. In addition, "violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime" is punishable in Washington, even though violation of such provision contained in a Washington order would not be a crime. RCW 26.52.070; *State v. Esquivel*, 132 Wn. App 316, 132 P.3d 751 (2006) (defendant subject to state prosecution for violation of tribal protection order even though tribal order did not contain written notice of penalties as required in RCW 26.50.031(1)).

E. Child Custody Disputes: RCW 26.52.080.

By enacting RCW 26.52, the Legislature did not intend to change how jurisdiction is determined as to placement, custody, or visitation of children. Resolution of disputes regarding provisions in foreign protection orders dealing with custody placement or visitation of children "shall be resolved judicially."

Section 2266 of Title 18, U.S.C. provides that protection order includes provisions relating to child custody and visitation and must be afforded Full Faith and Credit to:

> (5) PROTECTION ORDER.—The term 'protection order' includes—
>
> (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

Courts will need to reconcile affording full faith and credit to foreign protection order provisions regarding child custody and visitation and determining what state has jurisdiction over placement of children pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), RCW 26.27, and in accordance with the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A. See Chapter 10, VII, and Appendix G for further information.

F. Filing of Foreign Protection Orders and Entry into Law Enforcement Information Systems

RCW 26.52.030 sets forth procedures for filing of a foreign protection order with the clerk of a Washington court. The order may be filed with the clerk of the court in the area in which the person seeking enforcement order resides or with the clerk of any Washington court "where the person entitled to protection believes enforcement may be necessary." The order may be filed by the person seeking protection or may be sent directly by the foreign court or agency.

The clerk of the court in which the foreign protection order is filed is required to enter it in the Domestic Violence Database. RCW 26.50.160(1).

The clerk of the court in which the foreign protection order is filed is also required to forward information to the sheriff for entry into the law enforcement information system.

NOTE: A foreign protection order must be filed with a Washington court in order to be entered into the Domestic Violence Database.

G. Enforcement

A foreign protection order is enforceable even if it has not been filed with a court of this state or entered into the law enforcement information system. RCW 26.52.030(2).

A knowing violation of a provision of a foreign protection order that prohibits the person restrained from "contacting or communicating with another person, or of a provision excluding the person under restraint from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime, is punishable under RCW 26.50.110." RCW 26.52.070(1).

H. Mandatory arrest

Pursuant to both RCW 26.52.070(2) and RCW 10.31.100(2)(b), a police officer with probable cause to believe a criminally enforceable provision of a foreign protection order has been violated must arrest such person.

XXIV. Electronic Access of Domestic Violence Protection Orders

GR 31 permits courts to make court records that are otherwise available to the public to be accessible remotely. As of April of 2014, several counties have made court records—or at least some subset of court records—available online. These include superior courts in Chelan, Kitsap, Pierce, and Thurston counties.

Courts considering making court records available remotely should consider the potential ramifications of § 106 of the Violence Against Women Act Court Training and Improvement Act of 2005, 109 P.L. 162; 119 Stat. 2960, codified 18 U.S.C. 2265(d)(3). This subsection of the Full Faith and Credit section is entitled "Limits on internet publication of registration" and provides:

> A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration or filing of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

The question of how GR 31 interacts with § 106 is somewhat unsettled. A note discussing some of the issues courts should consider when deciding whether to authorize remote access of court records—particularly of protection and restraining orders—is included at the in Appendix C: Federal Domestic Violence Laws.

CHAPTER 9
DOMESTIC VIOLENCE DATABASE

I. Scope of the Domestic Violence Database

The Judicial Information System (JIS) database was made available to the courts to ensure that information is available to the court, to assist the court in avoiding conflicting orders, and to assist the court in crafting parenting plans and visitation orders. Though the Judicial information System documents existing orders, this system does not include the specific conditions of each order. Therefore electronic court records should be accessed to view the specifics of any existing orders.

Furthermore, all courts that have parties in common should be informed of the conditions filed by their fellow judicial officers. This affords judicial officers the ability to make informed decisions by having more complete information and to take prior order conditions into account. In addition, notification about other orders allows for the revision of orders to eliminate conflicts.

Jurisdictions should determine how best for the notification to take place. For example, prosecutors could provide the notice in criminal cases, judicial officers or their staff could provide the notice, or clerks of the issuing court could provide notice.

RCW 26.50.160(1)-(3) provides the database shall include:

> (1) The names of the parties and the cause number for every order of protection issued under this title, every sexual assault protection order issued under chapter 7.90 RCW, every criminal no-contact order issued under chapters 9A.46 and 10.99 RCW, every anti-harassment order issued under chapter 10.14 RCW, every dissolution action under chapter 26.09 RCW, every third-party custody action under chapter 26.10 RCW, every parentage action under chapter 26.26 RCW, every restraining order issued on behalf of an abused child or adult dependent person under chapter 26.44 RCW, every foreign protection order filed under chapter 26.52 RCW, and every order for protection of a vulnerable adult under chapter 74.34 RCW. When a guardian or the department of social and health services has petitioned for relief on behalf of an abused child, adult dependent person, or vulnerable adult, the name of the person on whose behalf relief was sought shall be included in the database as a party rather than the guardian or department;

> (2) A criminal history of the parties; and
>
> (3) Other relevant information necessary to assist courts in issuing orders under this chapter as determined by the judicial information system committee.

Legislation provides that courts shall consult with the Judicial Information System, if available, prior to granting an order directing residential placement of a child or restraining/limiting a party's contact with the child. RCW 26.50.135(1).

II. Use of Database in Court

Information in the database is generally admissible. However, the court is required to give notice and an opportunity to be heard with regard to any information it intends to consider from the domestic violence database.

> When a judge proposes to consider information from a domestic violence database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider. ER 1101(c)(4).

ER 1101(c)(4) is discussed somewhat more fully in Chapter 6, Section I.

Courts should be aware that in reviewing records in the judicial database, such review must be authorized in law, such as by statute, court rule, or case law, in order to not run afoul of CJC 2.9(C), prohibiting judicial officers from investigating facts in pending or impending matters. Ethics Advisory Opinion 13-07 advises courts to follow the procedure outlined in ER 201(e) if the court has prior knowledge of material in judicial databases, and wishes to take judicial notice of such material in the case. In addition, the court should advise the parties to the case of the material the court has reviewed from JABS or other databases.

NOTE: The court should be aware that not every protection order may actually be entered into the law enforcement database. Washington State Agencies began entering Protection Orders into the National Crime Information Center (NCIC) using the NCIC Protection Order format in September 1999. When there are gaps in the mandatory information fields required for entry into NCIC, the order may not be recorded. Neither the courts nor the victim may be aware that the order was not entered. The court should make every effort to ensure the required information is included on every order.

Also note that foreign protection orders are not entered unless they have been filed with a Washington state court.

III. JABS Access: Current Version of the Database

The current version of the database is accessible to judicial officers through the Judicial Access Browser System (JABS) on the Washington State Courts Extranet at https://jabslink.courts.wa.gov/JabsWeb/pages/logon.jsp.

The Administrative Office of the Courts has prepared detailed instructions for accessing JABS and information on current updates at https://jabslink.courts.wa.gov/JabsWeb/helpPages/JABS.htm#Welcome~.htm.

CHAPTER 10
PARENTING PLANS

This chapter is intended to assist the court in crafting parenting plans and visitation orders in cases involving domestic violence. Parenting plans can be an extremely volatile area in the context of domestic violence and may invariably involve extensive and protracted litigation, even after final orders are entered, unless the court orders include the rights and obligations of both parents with sufficient specificity and explicit provisions to minimize the likelihood of recurring violence and manipulation.

Parenting plans that fail to account for how domestic violence affects children will subject the children, as well as the abused parent, to ongoing risks of harm. Even when children exposed to domestic violence are not the direct victims of physical abuse, the consequences of their exposure to violence can negatively impact their cognitive development as well as their emotional and physical health,[1] which is directly relevant to the "best interests of the child." RCW 26.09.002.

A detailed general discussion of the Parenting Act and Parenting Plans is beyond the scope of this chapter. *See* RCW 26.09.181-.210; Wechsler and Appelwick, *Parenting Plans*, Chapter 47, *Washington Family Law Deskbook*, Washington State Bar Association, 2nd ed. (2006) & Supp. 2012 (Wechsler and K. Goodrich); D. Lye, *Washington State Parenting Act Study* (1999).[2]

I. OVERVIEW OF THE PARENTING ACT

A. PURPOSE AND OBJECTIVES OF THE PARENTING PLAN

The legislative policy statement in RCW 26.09.002 provides that "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care."

Parenting plans must contain: 1) findings made by the court as to whether any factors exist that would require mandatory or discretionary restrictions, such as a history of domestic violence; 2) a detailed residential schedule for the children of the parties; 3) a delineation as to each parent's right to make decisions concerning the children, such as sole or joint decision-making; and 4) whether, in the event of future childrearing disputes, a parent is entitled to immediately proceed with court action or must first attempt alternative dispute resolution, such as mediation.
In 2007, the legislature amended RCW 26.09 to add a new section to "better implement the existing legislative intent" by increased focus on additional alternative dispute

[1] Children are 30-60% at greater risk of being abused when a mother is being abused, See J. Edleson, *The overlap between child maltreatment and woman battering*. Violence Against Women, 5(2), 134-154 (1999).
[2] Diane Lye, *Washington State Parenting Act Study* (Washington State Gender and Justice Commission, June 1999) (copy available through the Administrative Office of the Courts, 360-753-3365, or at http://www.courts.wa.gov/committee/pdf/parentingplanstudy.pdf;; Wechsler and Appelwick, "Parenting Plans" (Chapter 47), in *Washington Family Law Deskbook*, 2nd ed. ; Washington State Bar Association, (2nd. Ed. 2006) and Supp. 2012 (Wechsler and Goodrich).

resolution options and on domestic violence. RCW 26.09.003 states in part that "… the legislature finds that the identification of domestic violence as defined in RCW 26.50.010 and the treatment needs of the parties to dissolutions are necessary to improve outcomes for children." RCW 26.09.003.

1. Objectives

The objectives of the parenting plan are outlined in RCW 26.09.184(1) as follows:

- Provide for the child's physical care;
- Maintain the child's emotional stability;
- Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
- Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
- Minimize the child's exposure to harmful parental conflict;
- Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
- To otherwise protect the best interests of the child consistent with RCW 26.09.002.

While the Parenting Act in most cases favors both parents being involved in their children's lives, both in terms of the time spent with each parent and parents' rights to make decisions for their children, significant limitations exist when the court makes a finding of a mandatory restriction, such as domestic violence, as defined under RCW 26.09.191.

B. SCOPE OF THE PARENTING ACT – APPLICATION TO CASES INVOLVING CHILDREN

The definitions and standards, including domestic violence limitations, imposed by the Parenting Act for determining a residential schedule apply to most types of civil orders involving contact with a child. These include orders entered as part of a dissolution of marriage, third-party custody action, domestic violence protection order, or parentage action. RCW 26.09.191; RCW 26.10.160; RCW 26.50.060(d); RCW 26.26.130(7). *In re Marriage of Stewart,* 133 Wn. App 545 (2006) (residential provisions in domestic violence protection order do not serve to modify parenting plan). The definitions and standards of the Parenting Act are not explicitly made applicable to adoptions or juvenile court cases, such as dependency actions. *See In re Interest of J.,* 99 Wn. App. 473, 481, 994 P.2d 279 (2000) (in adoption cases, no ironclad rule against placing child in home with history of domestic violence).

II. DOMESTIC VIOLENCE AND THE PARENTING ACT

A. DOMESTIC VIOLENCE IS AN IMPORTANT CRITERION IN ESTABLISHING A TEMPORARY OR FINAL PARENTING PLAN

The Parenting Act requires parenting plans to be entered on the basis of the child's best interests. While there is a recognition of "the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered," a finding of domestic violence is a significant factor that the court must consider when entering a parenting plan. RCW 26.09.002,003. Although the general considerations in entering a parenting plan are set forth in RCW 26.09.184 and RCW 26.09.187, certain types of behavior on a parent's part will trigger either mandatory or discretionary restrictions on the use of joint decision-making, alternative dispute resolution, and contact between the parent and child. In parenting decisions, the **parents' interests are subsidiary** to the children's interests. *In re Marriage of Jacobson*, 90 Wn. App. 738, 954 P.2d 297, *review denied*, 136 Wn.2d 1023 (1998); *Rickard v. Rickard*, 7 Wn. App. 907, 503 P.2d 763 (1972), *review denied*, 81 Wn.2d 1012 (1973).

A history of acts of domestic violence, as defined by RCW 26.50.010(1), is one of the factors that will trigger a "mandatory restriction" in a parenting plan. RCW 26.09.191(1). In addition, "an assault or sexual assault which causes grievous bodily harm or the fear of such harm" is an alternative basis for a mandatory restriction. In re Marriage of C.M.C., 87 Wash. App. 84, 88-89, 940 P.2d 669 (1997); In re Marriage of Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998).

Furthermore, "abusive use of conflict," on the part of a parent, which may encompass certain coercive and controlling behaviors that do not rise to the level of "domestic violence" as defined in RCW 26.50.010(1), or "other factors or conduct…adverse to the best interest of the child" are factors that will trigger discretionary limits in a parenting plan. RCW 26.09.191(3)(e) and (g). Thus, even if the domestic violence between the parents does not rise to the level sufficient to trigger a mandatory restriction, it may still be a factor that the court may appropriately consider in crafting a parenting plan.

III. RESTRICTIONS IN PARENTING PLANS RELATED TO DOMESTIC VIOLENCE

A. MANDATORY RESTRICTIONS

When the court finds a "history of domestic violence," regardless of severity, restrictions are mandatory. In re Marriage of Caven, 136 Wn.2d 800, 966 P.2d 1247 (1998). However, not all forms or levels of domestic violence as defined in RCW 26.50.010 (e.g., individual assaults, threats where there is not a pattern or serious bodily harm or fear of such harm) will trigger application of the "mandatory restrictions" of the Parenting Act. The court must first find the existence of either "a history of acts of domestic violence as defined in RCW 26.50.010(1)" (which includes both causing harm and causing fear of

imminent harm as well as stalking), or "an assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.09.191(1).

Thus, it is possible that no mandatory restrictions will be required even if an assault has been committed or a protection order has been entered against a parent because the domestic violence was not sufficiently dangerous or threatening and also was not part of a history or pattern. RCW 26.09.191(2)(n).

Conversely, it is possible mandatory restrictions will be required even if the parent has not been convicted of assault or PO violation, because the other parent is able to demonstrate a pattern of abuse and stalking with other forms of evidence.

B. DISCRETIONARY RESTRICTIONS

Where the court does not make a finding of "domestic violence" as defined in RCW 26.50.010, sufficient to trigger mandatory application of restrictions, it still may look to other factors under the Parenting Act to fashion an appropriate parenting plan. For example, the RCW 26.50.010 definition of domestic violence may not encompass a pattern of abusive, coercive, and controlling behavior as recognized in the behavioral definition of domestic violence that may have a significant negative impact on children. Such behavior may trigger a discretionary restriction, such as "the abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development" may justify restrictions under RCW 26.09.191(3)(e).

Such conflict may include behavior that includes ongoing harassment through repeated filings in court that have the effect of disrupting the other parent's economic or emotional well-being, without benefitting the children. In re *Marriage of Giordano*, 57 Wn. App. 74, 77-78, 787 P.2d 51 (1990), the court recognized the obligation of the court in restricting access to the court because of repeated and frivolous filings of motions. See Appendix H for a more complete discussion of abusive litigation.

In addition, RCW 26.09.191(3)(g) allows the trial court to limit the terms of the parenting plan if it finds a parent's conduct is "adverse to the best interests of the child." Imposing such restrictions "require[s] more than the normal. . . hardships which predictably result from a dissolution of marriage." *In re Marriage of Littlefield*, 133 Wn .2d 39, 55, 940 P.2d 1362 (1997).

C. A THREAT OF HARM IS SUFFICIENT TO LIMIT PARENTING TIME

The court need not wait for actual harm to occur before imposing restrictions on parenting time. *In re Marriage of Katare [III]*, 175 Wn.2d 23, 36, 283 P.3d 546 (2012); *In re Marriage of Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002). "Rather, the required showing is that a danger of. . . damage exists." *Burrill,* 113 Wn. App at 872.

[D]eciding whether to impose restrictions based on a threat of future harm necessarily involves consideration of the parties' past actions. By its terms, RCW 26.09.191(3)

obligates a trial court to consider whether '[a] parent's involvement or conduct may have an adverse effect on the child[ren]'s best interests.' *Katare [III]*, 175 Wn.2d at 36.

D. COURT MUST MAKE EXPRESS FINDINGS TO IMPOSE LIMITATIONS

However, the court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. In addition, any limitations or restrictions that the court imposes must address the identified harm. *In re Marriage of Katare [I]*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004).

Nonetheless, a provision that RCW 26.09.191 "does not apply" is not the same as a finding that no grounds for 191 restrictions apply because an absence of findings is not equivalent to a negative finding. *In re Marriage of Katare [I]*, 125 Wn. App. 813, 831, 105 P.3d 44 (2004).
RCW 26.09.191(3)(g) requires a particularized finding of a specific level of harm, and the restrictions must be reasonably calculated to prevent physical, mental, or emotional harm to a child. ***Marriage of Chandola,*** 180 Wn.2d 632, 327 P.3d 644 (2014).

IV. EVIDENTIARY ISSUES ARISING IN DOMESTIC VIOLENCE PARENTING CASES

A civil standard of review applies for determining whether domestic violence has occurred and if so what restrictions should be ordered.

RCW 26.09.191(6)) provides that the court shall apply the civil rules of evidence, proof, and procedure in determining whether restrictions should be imposed.

The weight given to the existence of a protection order issued under Chapter 26.50 RCW as to domestic violence is within the discretion of the court. (Note that under ER 1101(c), the court is not required to apply the rules of evidence in a protection order hearing under RCW 26.50.) Therefore, the issuance of a protection order is not determinative as to whether domestic violence has occurred or whether it rises to the level necessary to trigger a mandatory restriction under the Parenting Act. RCW 26.09.191(2)(n). Similarly, a parent's history of protection orders entered against her or him would strongly suggest a pattern of unchanging abusive behavior.

Acceptable methods of establishing a history of domestic violence may include recordings of 911 calls, medical histories, and witness statements. Because intimate partner abuse is a pattern of coercive behavior, it includes both criminally actionable and non-criminally actionable behavior. For this reason a criminal history is not required to establish a history of domestic violence.

For additional discussion of common evidentiary issues, *see* Chapter 6.

V. INVESTIGATIONS AND RECOMMENDATIONS AS TO DOMESTIC VIOLENCE AND PARENTING PLANS

A. SCREENING

Washington judges have the authority to ensure that domestic violence will be properly investigated, assessed, and presented in parenting cases to safeguard the interests of the child. Under the Parenting Act, in cases where there are allegations of limiting factors as a result of physical, sexual, or a pattern of emotional abuse of a child, or a history of domestic violence or a serious assault or sexual assault, both parties are to be screened to "determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties." RCW 26.09.191(4). The statute does not specify what constitutes "screening," (e.g., what is adequate screening, or how to determine the competency of any professionals conducting screening or assessment.) In referring parties for screening, judges should first consider whether there are individuals in the community who are qualified to conduct screening and assessment for domestic violence and have the requisite cultural and linguistic competency to work with parties, or whether it should be simply be incorporated into a comprehensive parenting plan evaluation.

As part of a domestic violence screening protocol for parenting evaluators, domestic violence experts recommend that each parent is asked to describe their own behavior as well as the behavior of the other parent, in a structured interview process. It may also be necessary to seek to understand the impact of the behaviors. Domestic violence survivors may strike back, or even strike first, but this does not mean that their partner is fearful or controlled by this behavior, or that it constitutes a pattern. It is the evaluator, not the parent, who determines whether or not the described conduct fits the behavioral definition of domestic violence. The evaluator also gathers information from the review of all case materials and from designated collateral interviews. The evaluator screens for conduct that is particularly salient to parenting and parenting plans, rather than screening to corroborate allegations made by the parents.[3]

Another model of screening proposes that three basic factors be considered: 1) the level of severity or dangerousness of the domestic violence, 2) the extent to which the violence is part of a pattern of coercive control, as opposed to an isolated incident, and 3) whether there is a primary perpetrator of the violence, rather than violence being mutually initiated or instigated by one party or the other on different occasions. This model of screening provides the court with a general framework regarding the type of violence involved in the case.[4]

In deciding whether the parties should be referred for screening, the court should consider whether allegations are sufficiently corroborated with other evidence, thus averting the

[3] Anne Ganley, Domestic Violence, *Parenting Evaluations and Parenting Plans: Practice Guide for Parenting Evaluators in Family Court Proceedings,* King County Coalition Against Domestic Violence (2009), available at: http://www.kccadv.org/wp-content/uploads/2010/09/PE-practice-Guide-final-08-13-09-compressed1.pdf.
[4] Peter Jaffe, Janet Johnston, Claire Crooks, & Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans,* Family Court Review 46, 3, July 2008, 500-522.

need for further screening. For example, screening may be redundant or unnecessary in instances where allegations are sufficiently corroborated with other evidence, for example, where there is a criminal conviction or CPS findings.

In addition, the court should consider the ability of the parties to pay, if screening will impose costs on the litigants. Judges also may wish to consider if professionals exist who can conduct the screening in a linguistically and culturally competent manner.

B. ADVICE OF PROFESSIONALS

RCW 26.09.210 enables the court to "seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination any professional personnel consulted by the court." Professional personnel should be well qualified to provide an opinion. Qualifications may include, but not be limited to:

- Expertise in the area of domestic violence;
- Common victim and perpetrator modes of behavior and coping mechanisms;
- Expertise in the impact of exposure to domestic violence on children (including developmental implications and individual resiliency); and
- Children's common responses being exposed to one parent who chooses to abuse another.

Some courts require specialized training, and maintain a list of professionals with specific expertise about domestic violence, sexual abuse, mental health issues, and/or chemical dependency.

When seeking the advice of professional personnel, courts should provide clear direction to professionals regarding the scope of their written reports, and what questions they should help answer. For example, the National Council of Juvenile and Family Court Judges recommends that the court:[5]

1. Be Specific about the Information the Court Needs

a. **Exposure of Children to Domestic Violence.** The court should consider seeking information about the extent of exposure of the children to domestic violence. Often parents will minimize and/or be unaware of the extent to which the children have heard or seen domestic violence behaviors. This would also include whether or not there is a climate of fear, threat, or coercion in the household.

[5] Clare Dalton, LLM, Leslie Drozd, Ph.D. and Judge Frances Wong, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (Reno, NV: NCJFCJ, 2004, revised 2006).

b. **Impact of the Domestic Violence.** In addition, the court should consider seeking information to determine the impact that abusive behaviors have on each parent, each child, and each parent/child relationship. The trauma of exposure to domestic violence has the potential of interfering with children's emotional and cognitive development, their physical health, and their school performance and can impact their relationships with their siblings, peers and adults.[6] Children's relationships with both their abusive parent and their non-abusive parent are also impacted by the violence and should be thoughtfully considered. In particular, abusive parents often seek to undermine the children's relationships with the other parent in order to undercut that parent's authority, and to maintain control.[7] Additionally, children who have seen one parent seriously harm or injure the other parent, a sibling, or a pet may be significantly traumatized and feel unsafe, anxious, or insecure when left in the care of that parent.

c. **Short-Term and Long-Term Safety.** The court can further seek to learn the safety concerns for the children and/or a parent, both for the short and long term. Some of this information can be obtained through interviews with the parties, helpful collateral sources such as family members, friends, neighbors, and professionals with whom the family has associated, teachers, physicians, and in some instances, from the children. In addition, relevant records from law enforcement, child protective services, healthcare providers, schools and teachers, and other court cases may provide helpful information.

---

[6] There is significant amount of research showing that children frequently witness and get involved in a the abuse that takes place in their homes, and this takes a toll. Biological fathers who abuse mothers in the presence of children appear to have the most negative impact. Thus the choice to perpetrate abuse is a parenting choice, and one that is damaging to children, impacting their social, emotional and educational development. Multiple studies conducted over the past 30 years with varied methods for recruiting subjects have identified a significant and consistent correlation between domestic abuse and child maltreatment, indicating domestic violence and child abuse co-occurred between 30-60% of the time. Jeffrey Edleson & Oliver Williams, *Parenting By Men Who Batter,* Oxford University Press, 2007.

[7] The domestic violence abuser as a parent is more likely to be controlling and authoritarian, less consistent, and more likely to manipulate the children and undermine the victim's parenting than nonviolent parents. L. Bancroft and J. Silverman, *The Batterer as Parent* (Thousand Oaks, CA: Sage Publications, 2002).

2. Parenting Investigators and Guardians Ad Litem

RCW 26.09.220(1) provides:

> (a) The court may order an investigation and report concerning parenting arrangements for the child, or may appoint a guardian ad litem pursuant to RCW 26.12.175, or both. The investigation and report may be made by the guardian ad litem, court-appointed special advocate, the staff of the juvenile court, or other professional social service organization experienced in counseling children and families.
>
> (b) An investigator is a person appointed as an investigator under RCW 26.12.050(1)(b) or any other third-party professional ordered or appointed by the court to provide an opinion, assessment, or evaluation regarding the creation or modification of a parenting plan.

The role of a guardian ad litem is to represent the best interests of the person for whom he or she is appointed. GALR 2. In contrast, a parenting evaluator is not a designated representative of the child or the child's best interests. Psychologists who serve as parenting evaluators are governed by WAC 246-924-467.

The statutes which authorize the appointment of the guardian ad litem authorize the family courts to hear the opinions of a witness who would not be a traditional expert under ER 702. Although a guardian ad litem is not a traditional expert, the court may admit the opinion of the guardian as to what arrangements would be best for the child. In effect, the guardians ad litem acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a common sense impression to the court. Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380, review denied, 133 Wn.2d 1014 (1997). See also, In re Guardianship of Stamm, 121 Wn. App. 830; 91 P.3d 126 (2004).

The court, however, is not bound by such opinion and may ignore the guardian ad litem's opinion if "if they are not supported by other evidence" or if it finds other testimony more convincing. Fernando, 87 Wn. App. at 107.

3. Guardian Ad Litem Training and Qualifications

Generally, all guardians ad litem appointed in cases under RCW Title 26 must complete the guardian ad litem training developed by the Administrative Office of the Courts under RCW 2.56.030(15) prior to being appointed. In cases involving allegations of limiting factors, under RCW 26.09.191, such as domestic violence, the guardians ad litem appointed under this title must have ***additional relevant training*** under RCW 2.56.030(15). The training curriculum is available at Appendix E.

In determining whether an individual has sufficient training and competence in issues related to domestic violence, the court should consider evaluating:[8]

- What courses or training, over a particular period of time, the individual had focused on domestic violence.
- Whether the individual has been certified as competent or as an expert in issues of domestic violence by a professional organization, if such a certification is available, and whether such certification involves a bona fide course of study or practice.
- The number of cases involving domestic violence the individuals has handled, or to which he or she has been appointed.
- The number of cases in which the individual has been qualified as an expert in domestic violence.

4. Weight of Guardian Ad Litem Recommendations

The court has the discretion and authority to disregard the guardian ad litem's report. *In re Marriage of Magnuson*, 141 Wn. App. 347, 350-51, 170 P.3d 65 (2007); *In re Guardianship of Stamm*, 121 Wn. App. 830; 91 P.3d 126 (2004); *Fernando v. Nieswandt*, 87 Wn. App. 103, 108, 940 P.2d 1380; *McDaniels v. Carlson*, 108 Wn. 2d, 299, 312, 738 P.2d 254 (1987). "Judges understand that the GAL presents one source of information among many, that credibility is the province of the judge, and can without difficulty separate and differentiate the evidence they hear. In other words, the judge can cast a skeptical eye when called for." *Guardianship of Stamm*, 121 Wn. App at 841.

VI. ENTERING PARENTING PLANS WHERE FINDING OF DOMESTIC VIOLENCE MADE

In drafting parenting plan orders, the court must determine how to best protect the child and adult victim from any further violence, and the amount and nature of contact between domestically abusive parents and their children. The pattern of abuse does not stop simply because the parties stop residing together.[9] Abusers may change tactics after separation as they seek new ways to exercise control or "punish" their partner for leaving them. Even where the risk of physical harm to the child is slight, the exchange of the child between parents is an all too common opportunity for violence or harassment against the adult victim. Parenting plans that require ongoing negotiations between the parents, either because they specify joint decision-making or do not have a sufficiently detailed residential schedule, may subject not only the

---

[8] C. Dalton, et al, *supra* at note 5.

[9] Peter G. Jaffe, Claire V. Crooks and Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54(4) JUV. & FAM. CT. J. (National Council of Juvenile and Family Court Judges, Fall 2003) [hereinafter NCJFCJ

parents but also the child to tremendous emotional stress where there is a history of domestic violence.[10] The court's orders should reflect the best interests of the child and protect both the child and the abused parent from further violence.

Where a court has found that a parent "engaged in physical abuse, it must not require mutual decision-making and it must limit the abusive parent's residential time with the child. If the court is concerned about the harshness of the limitations required by RCW 26.09.191(2)(a) and their effect on the best interest of the child, in an appropriate case it may apply subsections (2)(m) and (n) to temper the limitations. But the court must first conclude that RCW 26.09.191(2) applies, and then make specific findings that justify any modification of the limitations." *In re Marriage of Mansour*, 126 Wn. App. 1, 10, 106 P.3d 768 (2004).

A. WASHINGTON PROHIBITS JOINT DECISION-MAKING AND MAY LIMIT MANDATORY ALTERNATIVE DISPUTE RESOLUTION IN DOMESTIC VIOLENCE CASES.

Where a finding of "domestic violence" as defined under RCW 26.09.191 is made, joint decision-making shall not be ordered. "[U]nder RCW 26.09.187(2)(b)(i), the court shall order sole decision-making authority to one parent when it limits the other parent's authority under RCW 26.09.191." *Mansour*, 126 Wn. App at 11.

The court also may not order alternative dispute resolution, such as mediation, except in cases pursuant to RCW 26.09.016,which states that in cases where a victim requests mediation, the court may make exceptions and permit mediation, so long as the court makes a finding that mediation is appropriate under the circumstances and the victim is permitted to have a supporting person present during the mediation proceedings.[11] See, In re Marriage of Caven, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998), aff'g In re Marriage of C.M.C., 87 Wn. App. 84, 940 P.2d 669 (1997). In such cases, the court may consider specifying particular mediators who have specialized training in working with parties who have experienced domestic violence or other safety concerns.

Moreover, RCW 26.09.187(2)(b) requires that the court shall order sole decision-making to one parent when it finds that (i) [a] limitation on the other parent's decision-making authority is mandated by RCW 26.09.191; such as a finding of either "a history of acts of domestic violence (including stalking). . . or an assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.09.191(1).

Agreement of the parties does not defeat the mandatory prohibition on joint decision-making where domestic violence is found. RCW 26.09.187(2)(a) provides that the court shall approve agreements of the parties allocating decision-making authority, or specifying rules regarding the children's education, health care, and religious upbringing, only when the court finds that the agreement is consistent with any limitations on a

---

[10] M. Kernic, D. Monary-Ernsdorf, J. Koepsell, and V. Holt (University of Washington), "Children in the Crossfire," *Violence Against Women* 11, no. 8 (Sage Publications, August, 2005): 991-1021.

[11] Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence,* 9 Wm.&Mary J. Women & l. 145, 198-202 (2003).

parent's decision-making authority mandated by RCW 26.09.191, and the agreement is knowing and voluntary.

In particular, the court should be certain the victim was not intimidated to agree, or encouraged to agree in an effort to appease the other parent, independent of their sincere belief that alternative dispute resolution could be helpful.

The court may condition sole decision-making, for example, with a requirement that a parent not commit the child to extracurricular activities that would interfere with the other parent's residential time. *Mansour*, 126 Wn. App. at 10-11. In *Mansour* the court found it was an abuse of discretion to order that the mother could not incur additional expenses chargeable to the father, including non-emergency health care, absent agreement of the parties. "The father's financial veto substantially diminishes the mother's decision-making authority in violation of RCW 26.09.187(2)(b)(i), converting her authority to decide into an authority to propose. The father argues that if there is a conflict, the mother simply needs to go to court. But it is not her burden to justify her decisions by seeking court approval… if the parent who has committed abuse wants to challenge a decision, it is his responsibility to go to court." *Id.*

B. RESTRICTIONS ON RESIDENTIAL SCHEDULE FOR CHILD REQUIRED WHERE THE COURT HAS FOUND DOMESTIC VIOLENCE

The parent's residential time with the child shall be limited if the requisite finding of "domestic violence" as defined under RCW 26.09.191(2)(a)(iii) is made. The court may not, for example, order a residential schedule that requires a child to frequently alternate his or her residence between the households of the parents for "brief and substantially equal intervals of time" if a limitation, such as domestic violence, exists. RCW 26.09.187(3)(b).

RCW 26.09.191(2)(m)(i) has been amended to allow the court to also consider the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parenting requesting residential time with the child. The court may require supervised contact, the completion of relevant counseling or treatment, and impose other limitations.

In most cases, the statute does not mandate the specific types of restrictions on contact with the child which will be required but leaves such determinations to the discretion of the court.

Restrictions or limitations that a court could include in a parenting plan are: (1) ordering contact with the child to be supervised by a qualified supervisor; (2) requiring as a condition of contact that the parent complete perpetrator treatment satisfactorily—with an emphasis on change, not only on compliance; (3) requiring the visitation exchanges be at a supervised exchange center, or at a public place; or (4) limiting the amount of time with the child, perhaps even limited to telephonic or video contact. The court must fashion its residential schedule in a manner, however, reasonably calculated to protect the child, as

well as the parent, from physical, sexual, or emotional abuse or harm that could result from contact with the other parent. RCW 26.09.191(2)(m)(i).

Because children's resilience and well-being are so closely tied to the physical and emotional safety of their primary caretakers (typically the non-offending parent), the legislature has recognized that ensuring this safety is consistent with children's best interests. Thus it is possible that even if a domestic violence perpetrator has never physically hurt his or her child or demonstrated poor parenting judgment by abusing his or her child's other parent in front of the child, restrictions might be placed upon this person if they continue to be committed to engaging in stalking, harassing or abusing, or impoverishing their former intimate partner.[12]

C. THE COURT MUST RESTRAIN THE ABUSER FROM ALL CONTACT WITH THE CHILD IF THE RESIDENTIAL LIMITATIONS ARE NOT ADEQUATE TO PROTECT THE CHILD.

RCW 26.09.191(2)(m)(i) provides that the limitations imposed by the court under RCW 26.09.191(2)(a) or (b) shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. If the court expressly finds, based on the evidence, that limitations on the residential time with the child will not adequately protect the child from harm or abuse that could result if the child has contact with the parent requesting residential time, **the court shall restrain the parent requesting residential time from all contact with the child.** (*Emphasis added.*)

D. OTHER RESTRICTIONS ON RESIDENTIAL TIME BASED ON THE BEST INTEREST OF THE CHILD

RCW 26.09.184(1)(b) and (e) specifically provide that the purpose of the parenting plan is to "maintain the child's emotional stability" and to "minimize the child's exposure to harmful parental conflict." The court generally has the discretion to craft a parenting plan consistent with the child's best interests.

Lack of a demonstrated ability to cooperate and to jointly parent in the child's best interests may militate **against** requiring the parents to make joint decisions, use alternative dispute resolution or to "frequently alternate . . . for brief and substantially equal intervals of time" the residence of the child between the parents' households. RCW 26.09.187(1)(a); (2)(c); and (3)(b). *See In re Marriage of Jensen-Branch,* 78 Wn. App. 482, 899 P.2d 803 (1995) (court has ability to weigh stability of parents and vulnerability of child in evaluating whether to order joint decision-making; must give weight to parents' right to expose children to their religious beliefs).

[12] Lundy Bancroft & Jay Silverman, *The Batterer as Parent,* Sage Publications (2002).

Court orders requiring parents to negotiate delicate issues related to raising children, particularly immediately after a separation, may be very stressful for both the parents, and, indirectly the children, and especially so when one parent has a history of threatening, abusive, and controlling behavior. The Parenting Act's policy of not requiring joint decision-making or residential schedules that require a high degree of cooperation where the parents have a history of conflict reflects research. "Most parents do not adhere to the joint decision-making provisions in their plans and most professionals believe these provisions promote conflict . . . . Current restrictions limiting shared parenting arrangements to low-conflict, high-cooperation families are appropriate and should be adhered to."[13] A significant majority of parents who can functionally handle joint decision-making never enter a courtroom, having jointly agreed upon a parenting plan without assistance or need for a referee. Thus, the greater portion of that group effectively screens itself out of contact with the court.

Other factors may trigger mandatory or discretionary restrictions even where the domestic violence does not rise to the level of frequency or seriousness required by RCW 26.09.191. For example, "[t]he abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development" is specifically listed as a discretionary limitation. RCW 26.09.191(3)(e). Where the domestic violence has resulted in a "pattern of emotional abuse of a child," restrictions on joint decision-making and the residential schedule are mandatory. RCW 26.09.191(1)(b).

E. THE REQUIREMENT OF MANDATORY RESTRICTIONS ON RESIDENTIAL TIME IN DOMESTIC VIOLENCE CASES IS REBUTTABLE.

Once a finding of domestic violence has been made, the court is freed from placing mandatory restrictions on a parent's contact with the child only under the following conditions:

- the court expressly finds that contact between the abusive parent and the child will ***not cause*** physical, sexual, or emotional abuse or harm to the child,
- **and** that the probability that the parent's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply these limitations
- **or** if the court expressly finds that the parent's conduct did not have an impact on the child. RCW 26.09.191(2)(n). Impact includes not just the danger of physical abuse but the emotional abuse or harm that may result to the child. *See also, In re Marriage of Mansour*, 126 Wn. App. 1, 10, 106 P.3d 768 (2004).

[13] Diane Lye, *supra* note 2, at 4-21. *See also,* Peter Jaffe, Janet Johnston, Claire Crooks, & Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans,* Family Court Review 46, 3, July 2008, 500-522.

F. SUPERVISED VISITATION

As recognized in RCW 26.09.191(m)(1), supervised visitation may be ordered to protect children from physical, sexual or emotional harm during residential time. Structured and supervised visitation can provide domestic violence abusers a means through which they can continue to engage in threatening, controlling, or abusive behavior, even to the point of using the court-ordered contact point to carry out the ultimate act of domestic violence.[14] Across the country, and in Washington, domestic violence homicides have taken place at supervised visitation or exchange centers.[15]

Because there are no statutory or regulatory qualifications required for visitation supervisors, courts should take care to require that the supervisor understand the dynamics of domestic violence.

In addition, the court should exercise caution in using family members and friends (particularly those of the domestic violence abuser), since those parties can unwittingly participate and maintain the domestic violence abuser's patterns of power and control in the family. The court may permit a family or household member to act as a supervisor, so long as the court establishes the conditions to be followed during the residential time. If the court orders contact to be supervised, the court may not approve of a supervisor unless that supervisor accepts that the harmful conduct occurred and is willing and capable of protecting the child from harm. RCW 26.09.191(2)(m)(iii). This can be demonstrated by testimony of the supervisor or a professional (e.g., a parenting evaluator), an affidavit, or in response to questions from the court.

The court should also review the Judicial Information System to determine whether the supervisor has engaged in a history of domestic violence or child abuse, or other history that make the person an inappropriate supervisor. The supervisor is also to be a neutral and independent adult with an adequate plan for supervision of such residential time. The court may revoke approval of the supervisor if the court determines after a hearing that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child. RCW 26.09.191(2)(m)(iii).

Courts should learn about the safety measures and protocols, training, and expertise of supervised visitation providers in their communities to determine whether or not they will provide supervision sufficient to "protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." RCW 26.09.191(m)(1). Promising practices for supervised visitation include:

1. Clear, consistent, and documented communication from the beginning of contact with all parties and throughout the time service is provided.

---

[14] Tracee Parker, Kellie Rogers, Meghan Collins, & Jeff Edleson, "Danger Zone: Battered Mothers and Their Families in Supervised Visitation", *Violence Against Women* 2008, 14; 1313-1325.

[15] *See, e.g.,* Kim Barker, *Killer "Breathed" Wife's Terror-Edwards Was Tyrant, Observers Say,* Seattle Times, December 23, 1998, available at: *http://community.seattletimes.nwsource.com/archive/?date=19981223&slug=2790520*

2. Well-trained and skillful monitors who are extremely sensitive to the issues of domestic violence and strategies of perpetrators.
3. Participation of the supervised visitation provider as part of a larger, coordinated community response to domestic violence that allows domestic violence victims, their children, and violent perpetrators to access the array of services and interventions necessary to achieve safe families.[16]

G. OTHER RESTRICTIONS

Geographical restrictions on a parent's residential time with a child require findings supporting RCW 26.09.191 restrictions. *In re Marriage of Katare [I]*, 125 Wn. App 813, 830-31, 105 P.3d 44 (2004).

Orders restraining parents from making **derogatory comments** about the other parent are not barred by the First Amendment. [**NOTE**: due to the heightened scrutiny afforded Constitutional rights, courts must review the facts and restrictions of these cases and tailor restrictions carefully based on specific findings before applying to a particular case.] *In re Marriage of Adler*, 131 Wn. App. 717, 727-28, 129 P.3d 293 (2006); *In re Marriage of Olson*, 69 Wn. App. 621, 850 P.2d 527 (1993).

Though not a restriction, a court may retain jurisdiction for review of the parenting plan post-degree to determine compliance with the court's orders. *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003); *In re Marriage of True*, 104 Wn. App. 291, 16 P.3d 646 (2000).

VII. DRAFTING CONSIDERATIONS FOR PARENTING PLAN ORDERS

Although domestic violence is a critical factor to consider in making parenting plans, the individual capacities of victims and perpetrators to effectively parent are likely to vary greatly depending on the nature of the violence.[17] Experts recommend a differentiated approach to developing parenting plans, after assessing the impact of the domestic violence on the children, the adult victim, and the domestic violence perpetrator, as referenced in Section IV.A., *supra.*

A. ADDRESSING THE DOMESTIC VIOLENCE PERPETRATOR'S ABILITY TO UNDERMINE THE OTHER PARENT'S STABILITY AND WELL-BEING

[16] Tracee Parker, *supra,* note 14. *See also, Guiding Principles, Safe Havens: Supervised Visitation and Safe Exchange Grant Program,* US. Department of Justice Office on Violence Against Women, 2007, available at: http://www.ovw.usdoj.gov/docs/guiding-principles032608.pdf
[17] Anne Ganley, *supra,* note 3, at 108-113.

1. Specificity

Parenting Plans in domestic violence cases are most effective at reducing conflict and opportunities for the domestic violence abuser to continue to exercise control over the other parent when they contain very specific language regarding conditions of the order, make clear the consequences for not adhering to the order, and how future disputes between the parties will be resolved.

Furthermore, law enforcement officers report that they have difficulty enforcing orders with ambiguous or general conditions. Specific language allows the court to provide effectively for the safety of the abused party, as well as for ease of enforcement of the order by law enforcement.

Specific language also prevents the perpetrator from taking advantage of any loopholes or ambiguities (e.g., "reasonable visitation") resulting from general words or phrases in order to manipulate or undermine the other parent.

One example demonstrating the importance of specificity relates to supervised access to the children. Such an order should include:

- The specific supervised visitation services to be provided;
- Qualifications and expertise of the supervisor;
- Duration and frequency of the contact;
- Who will have contact with the children (this refers not only to the parent, but also relatives and friends, along with the visitation supervisor);
- What will happen if the supervisor is unavailable; and
- What will happen if the parent fails to follow through on or show up for visits, (e.g., after 3 missed visits, visits will be suspended for at least 2 months. To resume, the parent must request to reinitiate visits in writing.)

Another example demonstrating the importance of specificity relates to requiring that a domestic violence abuser have limited contact, contingent on successful engagement in services. Such an order should include:

- The specific services that the abusive parent should be enrolled in, including the duration and frequency, and purpose of the services;
- Who will pay for the services;
- Type and frequency of reporting back to the court about the progress in services; and
- That the party ordered to engage in services be required to provide proof of compliance to the visitation supervisor, the court, and/or the other party, and if proof is not provided, then the contact should be suspended until adequate compliance is verified.

2. Reducing opportunities for the Perpetrator to Negatively Impacting the Other Parent's Decisions, Plans, and Parenting

Abusive and controlling parties frequently seek any opportunity to "punish" their former partner for refusing to be controlled, or for leaving. Particular scrutiny

should be given to provisions for making changes in the visitation plan, consequences of missed visits, lateness, and children's communication with the other parent during visits. The same conditions should not be imposed on both parents to the same degree when there is evidence that one parent has a history of willingness to be abusive and violent in order to gain coercive control.

Therefore, parenting plans should work to reduce the abuser's capacity and opportunity to undermine the stability, plans, and well-being of the former victim. Parenting plans should also increase the victim's ability to plan and make decisions free from the concern that the abuser could undermine these with impunity. This might include prohibitions from speaking poorly about the other parent in the children's presence, ensuring unrestricted, unmonitored telephone contact between the child and victim parent when the child is with the abusive parent, and have specific guidelines that provide consistent and appropriate structure for safety, meals, and bedtimes at each household.[18]

3. Progression to Increased or Decreased Restrictions

Often, when courts order restrictions in parenting time with a parent who has been found to be abusive, the restrictions are set based on a defined period of time, (i.e., months or weeks), rather than appropriately based on the parent's behavior and the child's behavior. The progression from restricted parenting time to fewer restrictions should not take place until there are defined, observable changes in the abuser's behavior. Some examples might include:[19]

- Successful completion of a certified perpetrator treatment program.
- A determination that there has been no evidence within a specified (meaningful) time period of:
    - Direct abuse or irresponsible behavior toward children, including boundary violations toward the children.
    - Direct or indirect physical abuse (including sexual assault) and/or psychological cruelty toward the other parent.
    - Expressed or subtle expression of willingness to hurt the children as an extension of hurting the other parent.
    - Substance abuse.
    - Refusal to accept the end of the relationship.
    - Threats to abduct or injure the children.
    - Refusal to accept responsibility for past abusiveness.
- Evidence that the abuser has taken responsibility for past abusive behavior.
- Evidence that the abuser has acknowledged to the children, in developmentally appropriate ways, the harmful effect of the abusive behavior on the children, and has sought to repair trust.

---

[18] Lavita Nadkarni & Barbara Zeek Shaw, *Making a Difference: Tools to Help Judges Support the Healing of Children Exposed to Domestic Violence,* 39 Court Review, Issue 2, 24-30, (2002)
[19] *Id.*

4. Noncompliance or Ongoing Abuse in the Implementation of the Parenting Plan

Domestic violence perpetrators will often take any opportunity to push the limits of a court order, and continue to manipulate or harass the other parent, unless there are swift and certain consequences when the order is violated. When the court builds a mechanism for review at a specified intervals, the burden is placed on the perpetrator to change his or her behavior. The court may wish to consider requiring future domestic violence assessments, or building in periodic court reviews to assess progress or lack, thereof, provided that the review is time-limited. *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003).

B. EXAMPLES OF SPECIFICALLY WORDED CONDITIONS

Parenting plans should contain specifically worded residential schedule. Be aware that what works in a high-cooperation, low-conflict family will not work in a high-conflict case or one with a history of domestic violence. Such an order can cause significant disruption to the lives of the abused parent and children for the duration of the plan. It can also cause significant financial burden to the victim parent because it places the onus on to the abused parent to seek relief from manipulation and violation of the court orders from the court. Rather, the burden should be placed on the parent causing the restrictive conditions to be imposed in the first place

For example, a typical visitation order in a case involving low-conflict case, where domestic violence has not been found may read as follows:

Visitation shall take place every first and third Saturday from 10 a.m. to 3 p.m., at the home of and in the presence of Mary Smith, mother's aunt, at 123 Main St., City. The mother is responsible for dropping off the child by 9:45 a.m. and picking up the child at 3:15 p.m. In the event that visitation cannot take place, the notifying party must telephone Mary Smith at (800)123-4567 by 8:30 a.m., and visitation shall then take place the following Saturday with the same provisions.

The language in this paragraph provides multiple opportunities for an abusive parent to disrupt the victim's planning and decision making regarding the mother's and her children's schedules, social and familial contacts. For example, in the event that the abusive parent wants to undermine the other parent's planning and even finances, the ability of the abuser to demand a visit the "following Saturday" (which, under this plan would usually be the mother's weekend) if she or he cannot exercise the usual visitation, gives the abusive parent the ability to regularly disrupt the mother's weekend plans. For example, if the abuser resents the child's time spent with mother's parents and knows that on the 4th weekend, plans are in place for a maternal family reunion, the abuser can prevent the mother and children from attending this gathering by claiming she or he cannot make it to the visit on the third weekend of the month. The language above gives the abusive parent the right to demand a visit the following weekend, without regard to preexisting plans, investment in travel arrangements, or promises to the children, and

provides the abusive parent the power to cause significant financial loss, undermining of relationships and emotional distress for the other parent and the children for the duration of the parenting plan.

In a parenting plan that recognizes the potential for abuser manipulation, the language could specify that if the abusive parent could not make the visit, then she or he could request to schedule a make-up visit at mother's convenience, no more than three times in a year, and would forfeit that particular visitation. This would provide more predictability and allow the other parent to plan without fear of their plans being undermined, thus increasing stability for the children.

Other provisions might include:

> *Father shall consume no alcohol or illegal drugs during the 12 hours prior to and during visitation. If he appears to have violated this provision, Mary Smith is authorized to deny him visitation that week and the next scheduled visitation as well.*
>
> *Visitation is conditioned upon father attending the perpetrator treatment program at (insert name) organization, for a certain period of time, (e.g., every week for one year) and making reasonable progress. Father shall provide proof of his attendance to the court and to mother on a monthly basis via fax or mail. If father fails to attend, or to provide proof of his attendance to the court for more than two weeks, then father will forfeit visits until he has attended 3 treatment sessions and provided proof of this attendance. Father will pay the perpetrator treatment provider for the time to write a report at the halfway mark and endpoint of the treatment program. This report will specifically address father's ability to place children's need ahead of his own, the level of danger the father may pose to the other parent and the children, and any other concerns the treatment provider may have with regard to the father's propensity to seek coercive control over or otherwise threaten or harm the children or their mother. Father will ensure that the treatment provider provides this report to both the court and the mother in writing, via U.S. mail.*
>
> *Visitation may be denied if the father is more than 30 minutes late and does not call by 8 a.m. to alert mother of the delay* (to prevent custodial parent and child spending all day waiting for the other parent, who never comes). *If father is late two weeks in a row, mother may deny that day's visit and the next scheduled visit.*
>
> *For pick-up and drop-off for supervised visitation, the visiting parent must arrive at the drop-off location 30 minutes before the primary residential parent and remain inside the building. If the visiting parent does not arrive within 15 minutes of the appointed time, the visitation supervisor shall call the primary residential parent to inform him or her of the delay. The primary residential parent shall have the option to cancel the visitation and the visiting parent will forfeit his or her visitation. At the end of visitation, the visiting parent must remain at the location for 30 minutes while the primary residential parent leaves with the children. To minimize contact between the visiting parent and the primary residential parent, the visiting parent should stay*

inside while the supervisor brings the children inside OR the supervisor may present an alternative plan for keeping parties separate that makes sense given the physical environment where exchanges occur. (This prevents respondent following petitioner to harass, or to ascertain the location of petitioner's new residence.)

If there is no third party available for exchange of the children, some plans have called for drop-off of the children at a local police station. Each parent leaves the children in police custody for a brief period (such as 20 minutes) to avoid contact between parents. This provision is not recommended, and should be used only as a last resort since the police are unlikely to be properly equipped to supervise the children for the interim period. Most importantly, it may give the children a sense that they have done something wrong to require them to wait at a police station. If your jurisdiction does not have a visitation exchange service, consider using a public place such as a book store or library with hours that fit the exchange schedule. Such arrangements must be developmentally appropriate and feel and be safe for the children in the interim period while they wait for their parent.

VIII. INTERSTATE CUSTODY, PARENTAL KIDNAPPING, AND INTERNATIONAL CHILD ABDUCTION

A. JURISDICTION

Domestic violence victims may move across state lines to leave abusive relationships and to seek safety or support of friends and family. Domestic violence perpetrators may also move across state lines to control or manipulate the other parent.[20] Courts hearing interstate **custody** cases will need **to** consider several state and federal laws governing jurisdictional issues, including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in Washington at Chapter 26.27 RCW.[21]

The UCCJEA was adopted in Washington State in 2001, repealing the Uniform Child Custody Jurisdiction Act (UCCJA). As of May 2014, forty-nine states, the Virgin Islands, and the District of Columbia had adopted the UCCJEA. As of the date of this publication, only Massachusetts has not adopted the UCCJEA.

The UCCJEA applies to most child custody proceedings including domestic violence protection orders, dependency, guardianship, termination of parental rights, dissolution of marriage, legal separation, paternity, and third-party custody orders. Excluded are juvenile delinquency, emancipation, adoption, and emergency medical care proceedings as well as any custody proceeding pertaining to an Indian child to the extent it is governed by the Indian Child Welfare Act. RCW 26.27.021(4); RCW 26.27.031; RCW

[20] D. Goelman & D. Mitchell, "Protecting Victims of Domestic Violence Under the UCCJEA," Juvenile and Family Court Journal 61, 1-15 (2010).
[21] For a more general overview of the UCCJEA, see H. Donigan, "Custody Proceedings: Jurisdiction and Full Faith And Credit," *Washington Family Law Deskbook 2006 Supplement and 2012 Cumulative Supplement,* Chapter 46, (2012).

26.27. 041. For the purposes of Washington's UCCJEA, domestic violence protection orders which affect a parent's contact with a child are "competing visitation orders." RCW 26.52.080; RCW 26.27.021(4), and thus fall under the UCCJEA.

Under the UCCJEA, foreign marriages, divorce, or custody orders are entitled to full faith and credit. RCW 26.27.051; *In re Marriage of Tostado*, 137 Wn. App. 136, 151 P.3d 1060 (2007). For purposes of Washington's UCCJEA and the Parental Kidnapping Prevention Act, Pub.L. 96–611, 94 Stat. 3573 (Dec. 28, 1980), *codified at* 28 U.S.C. § 1738A, ("PKPA), the term "state" includes Native American tribal courts. RCW 26.27.041; *In re Marriage of Susan C. and Sam E.*, 114 Wn. App. 766, 60 P.3d 644 (2002).

Highlights of the UCCJEA relevant to cases involving domestic violence include:

1. Confidentiality and Privacy of Victims

If a party alleges under oath that a party involving domestic violence include:" care proceedings as well as any custody proceeding pertaining to an Indian child to be sealed and may not be disclosed to the other party or the public, unless the court determines after hearing that disclosure is in the interest of justice, taking into consideration the health, safety, and liberty of the party and the child. RCW 26.27.281(5).

2. Bases for Jurisdiction Over the Child Custody Matter

a. Home state as the basis for jurisdiction has priority over all other bases for jurisdiction. RCW 26.27.201.

"Home state" is defined as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. RCW 26.27.021(7).

If a child has a home state, "[t]he UCCJEA does not permit Washington unilaterally to declare itself a more convenient forum and wrest jurisdiction from the home state." Jurisdiction must first be declined by the home state. *In re Parentage of A.R.K.-K.*, 142 Wn. App. 297, 307, 174 P.3d 160 (2007).

For purposes of Washington's UCCJEA, "jurisdiction is determined at the time the custody petition is filed, so [the child's contacts with a state] after the proceedings commenced are not relevant. RCW 26.27.201." *In re the Custody of A.C.*, 137 Wn. App. 245, 255, 153 P.3d 203 (2007). The term "home state" does *not* include a) a state in which the child lived for less than 6 months before moving to Washington or b) a state in which neither of the parents nor the child resided at the time of filing. In such

circumstances, the child has no home state and the jurisdiction is decided on significant contacts, convenient forum, or other grounds. A claim of temporary residence cannot be supported by an original reluctance to leave the prior state or the motives for doing so. *Parentage of A.R.K.-K.*, 142 Wn. App. at 303; *In re the Custody of A.C.*, 137 Wn. App. 245, 254-55, 153 P.3d 203 (2007); *In re Marriage of Hamilton*, 120 Wn. App. 147, 154, 84 P.3d 259 (2004).

b. Significant connection

If a child does not have a home state as defined in the UCCJEA and PKPA, a court may assume jurisdiction based on significant connections of the child or parent with Washington (other than mere physical presence) and substantial evidence is available in Washington concerning the child's care, protection, training, and relationships. All of the child's connections with Washington may be considered, even those generated after removal from the child's home state. RCW 26.27.201(1)(b). *See also, In re Marriage of Hamilton*, 120 Wn. App. 147, 157, 84 P.3d 259 (2004); *In re Marriage of Payne*, 79 Wn. App. 43, 899 P.2d 1318 (1995).

The state issuing a custody determination complying with the jurisdictional priorities retains exclusive jurisdiction to modify the custody determination unless that court determines that there is no longer any significant connection with that state or all the parties have left that state or another state would be a more convenient forum. RCW 26.27.211; RCW 26.27.221. Washington has continuing jurisdiction to modify its parenting determinations where the child has since moved to another state but retains connections with Washington that are "more than slight," which may be established by ongoing residential time in Washington. *In re Marriage of Greenlaw*, 123 Wn.2d 593, 869 P.2d 1024, *cert. denied*, 513 U.S. 935 (1994).

c. "More appropriate forum" jurisdiction

If a party has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless the parties have acquiesced in the exercise of jurisdiction, a court determines that this state is a more appropriate forum, or no other state would have jurisdiction. The court may fashion a remedy to ensure the child's safety and prevent repetition of the unjustifiable conduct. If the court dismisses a petition or stays a proceeding, it shall assess costs and expenses against the party seeking to invoke its jurisdiction, unless that would be clearly inappropriate. RCW 26.27.271.

The comments following Section 208 of the federal model UCCJEA state:

> Domestic violence victims shouldn't be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence even if the conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. Inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has committed unjustifiable conduct and the new state must decline to exercise jurisdiction under this section. (UCCJEA, 1997.)

d. "No other state jurisdiction"

RCW 26.27.201(1)(d) provides that Washington has jurisdiction over an initial child custody determination if no other court can assert jurisdiction based on home state jurisdiction, or is a more appropriate forum than Washington because of a significant connection to that state, or has more appropriate forum jurisdiction due to a party's conduct.

3. Temporary emergency jurisdiction

A court may assume temporary emergency jurisdiction if the child is present in the state and has been abandoned or it is necessary in an emergency where the child, a sibling, or a parent is threatened with abuse. The UCCJEA explicitly recognizes domestic violence as "an emergency" which may justify the exercise of temporary jurisdiction even if the court is not in the child's home state. And in a departure from the UCCJA, the UCCJEA sets forth a specific procedure for determining the length of time jurisdiction will continue. RCW 26.27.231(1).

If there is a prior custody order or a proceeding that has been commenced in another state with jurisdiction, an order issued in this state must specify a period the court considers adequate to obtain an order from the state with jurisdiction. The temporary order remains in effect until a state having jurisdiction enters a custody determination within the specified time or until the specified time expires. RCW 26.27.231(3).

If there is no prior custody determination and no proceeding is commenced in another state, the emergency order remains in effect until another state with jurisdiction enters a custody determination. If a proceeding is not commenced in another state, the emergency order may become a final custody determination if it so provides and if this state becomes the child's home state. RCW 26.27.231(2).

Upon being informed that a custody proceeding is commenced in another state or a custody determination has been made in another state, the court must immediately communicate with the other court to resolve the emergency, protect the safety of the parties and the child, and determine the duration of the temporary order. RCW 26.27.231(4).

The court may enforce an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. RCW 26.27.411. *See* Appendix G for further information.

4. Inconvenient Forum

The issue of inconvenient forum may be raised by request of another court, a party, or on the court's own motion. RCW 26.27.261(1). Before determining whether it is an inconvenient forum, the court shall consider whether another state exercising jurisdiction is appropriate.

The court shall allow the parties to submit information and shall consider all relevant factors, including:

- Whether domestic violence has occurred and is likely to continue and which state could best protect the parties and the child;
- How long the child resided outside this state;
- The distance between the courts;
- The parties' relative financial circumstances;
- Any agreement between the parties;
- The nature and location of evidence;
- Each court's ability to decide expeditiously; and
- Each court's familiarity with the facts and issues. RCW 26.27.261(2)(a)-(h).

5. Enforcement

The court must recognize and enforce a custody determination of another state if the other state's court exercised jurisdiction in substantial conformity with the UCCJEA, and may use any remedy available under the law of this state. RCW 26.27.421.

A court without jurisdiction to modify a custody determination may issue a temporary order enforcing a visitation schedule (or visitation provisions in a determination that does not provide specific visitation schedule, in which case the court shall specify a time period it considers adequate for the petitioner to obtain a custody determination from a court with jurisdiction). RCW 26.27.431.

Expedited enforcement is available, RCW 26.27.471 on verified petition which must state:

a. Whether the court issuing the determination identified the jurisdictional basis on which it relied;
b. Whether the determination has been vacated, stayed, or modified by a court whose decision must be enforced;
c. Whether any other proceeding has been commenced that could affect the proceeding;
d. Present physical address of the child and respondent, if known;
e. Whether relief in addition to immediate physical custody and attorney fees is sought; and
f. If the custody determination has been registered and confirmed, the date and place of registration.

Upon a petition being filed, the court shall issue an order directing the respondent to appear in person, with or without the child. The hearing must be held on the next judicial day after service or the first judicial day possible after service. The order must state the time and place of hearing and advise the respondent that at the hearing the petitioner may take immediate custody of the child unless the respondent appears and establishes that either:

a. The custody determination has not been registered and confirmed under RCW 26.27.441 and that:

   i. The issuing court did not have jurisdiction;
   ii. The custody determination has been vacated, stayed, or modified by a court with jurisdiction;
   iii. The respondent was entitled to but did not receive notice in the court which issued the determination; or

b. The determination was registered and confirmed, but it has been vacated, stayed, or modified.

RCW 26.27.471; RCW 26.27.491

An order requiring law enforcement to take physical custody of a child requires a writ of habeas corpus under RCW Chapter 7.36. RCW 26.27.501.

The court shall award the prevailing party necessary and reasonable expenses unless the award would be clearly inappropriate. RCW 26.27.511.

The court must give full faith and credit to an order issued by another state enforcing a custody determination issued by another state. RCW 26.27.521.

Unless the court enters a temporary emergency order, the enforcing court may not stay enforcement pending appeal. RCW 26.27.531.

A prosecutor or attorney general may act to locate or return a child or enforce a custody determination if there is an existing custody determination, a request from a court in a pending custody proceeding, a reasonable belief that a criminal statute has been violated, or a reasonable belief that a child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction. RCW 26.27.541.

On the request of a prosecutor or attorney general, a law enforcement officer may take any lawful action reasonably necessary to locate the child or party and assist a prosecutor or attorney general with locating or returning a child or enforcing a custody determination. RCW 26.27.551.

If the prosecutor or attorney general must take action and the respondent is not the prevailing party, the court may assess all direct costs incurred by the prosecutor or attorney general and law enforcement against the respondent. RCW 26.27.561.

B. CUSTODIAL INTERFERENCE AND KIDNAPPING

A national study of state and federal laws reported that there are over 200,000 cases of child abduction by a family member per year.[22] When parents take their children in domestic violence cases, the abductions generally occur in one of two contexts: abusers take the children in order to harm victims further, or victims flee with their children in an effort to protect themselves and their children from the batterers' violence. One action is vindictive while the other is protective.[23]

Some abusers use the courts to extend their harassment through lengthy custody fights, threats of abduction, and actual abductions of their children across international borders. The abused parent left behind in the United States has few options for obtaining justice in these cases. Parents seeking to protect their children and who take them across international borders have even fewer.[24]

In many states, when parents cross jurisdictional lines to protect themselves or their children, it can be grounds for a finding of custodial interference. However, courts should proceed with extreme caution in modifying primary residential time in favor of a parent

---

[22] D. Finkelhor, H. Hammer and A. Sedlak, "Children Abducted by Family Members: National Estimate and Characteristics," *National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMART)* (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (OJJDP), October 2002), NCJ 196466

[23] Ibid.

[24] Carol S. Bruch, The Unmet Needs of Domestic Violence Victims and Their Children in Hague Abduction Cases, 38 FAM. L.Q. 529 (2004).

who may be, or has been shown to be an abuser, particularly if the other parent is not in front of the court, and there is evidence to show that he or she left the state to escape abuse or protect a child. In considering the child's best interests, restricting the residential time of a fleeing parent may significantly reduce a child's ability to overcome a history of exposure to domestic violence, by disrupting consistency and routines, and depriving a child contact with a nurturing parent.[25]

1. Parental Kidnapping Prevention Act ("PKPA") (28 U.S.C.§ 1738A)

The Parental Kidnapping Prevention Act (PKPA), as a federal statute, preempts state law in the event of a conflict. The UCCJEA was designed to reconcile differences between the UCCJA and PKPA, and as a result, reliance on the PKPA will be less significant.

The PKPA applies only to the enforcement or modification of an existing order or when a custody action is pending. *In re the Custody of A.C.*, 137 Wn. App. 245, 255, 153 P.3d 203 (2007); *In re Marriage of Murphy*, 90 Wn. App. 488, 952 P.2d 624 (1998); *Thompson v. Thompson*, 484 U.S. 174, 181-83, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).

A foreign custody decree is entitled to full faith and credit only if it was entered in compliance with the Parental Kidnapping Prevention Act (28 U.S.C. §1738A). To the extent they conflict, the PKPA preempts the UCCJA. Under the PKPA, home state jurisdiction is superior to significant connections jurisdiction. *In re Marriage of Murphy*, 90 Wn. App. 488, 952 P.2d 624 (1998).

2. Uniform Child Custody Jurisdiction Act (UCCJA) (RCW 26.27)

Although the UCCJEA repealed the UCCJA in Washington, effective July 1, 2001, Washington courts have read into the UCCJA similar requirements to those of the UCCJEA. UCCJA decisions may still be instructive to the extent that Courts have not yet construed the UCCJEA. The only reported UCCJA Washington State decision directly involving domestic violence gave great deference to the trial court's concern for protection of the adult victim and her child. *In re Thorensen*, 46 Wn. App. 493, 501, 730 P.2d 1380 (1987) (Washington court did not err in entertaining mother's petition to modify Florida order, when father was awarded temporary custody without notice to mother, who then fled the state. Washington court found that mother had left Florida to protect herself and her child from physical and mental abuse by the father.) However, under the UCCJA, assumption of emergency jurisdiction is to be taken only under extraordinary circumstances, such as where child would be placed in imminent danger if jurisdiction not exercised. *In re Marriage of Greenlaw*, 67 Wn. App. 755, 840 P.2d 223 (1992), *rev'd on other grounds*, 123 Wn.2d 593, 869 P.2d 1024 (1994), *writ of cert. denied*, 513 U.S. 935, 115 S. Ct. 333 (1994), *rehearing denied*, 513 U.S. 1066, 115 S. Ct. 686 (1994)

[25] Peter G. Jaffe, Claire V. Crooks and Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54(4) JUV. & FAM. CT. J,, at 27.

3. Custodial Interference (RCW 9A.40.060, 9A.40.070, 9A.40.080)

a. Lawful Right to Time With Child Pursuant to a Court Ordered Parenting Plan

"[T]he term 'court-ordered parenting plan' used in RCW 9A.40.060(2) is a term of art, and a domestic violence protection order that provides for residential placement and/or visitation, is not a "court ordered parenting plan." However, a parent can be charged for custodial interference under RCW 9A.40.060(1). *State v. Veliz*, 176 Wn.2d 849, 298 P.3d 75 (2013).

However, a temporary parenting plan is a "court-ordered parenting plan," even if it does not include each and every provision required for a permanent parenting plan. *State v. Pesta,* 87 Wn. App 515, 942 P. 2d 1013 (1997).

b. Lawful Right to Physical Custody

For the purposes of RCW 9A.40.060(1), "lawful right to physical custody," refers to the "court-designated custodian of a child when a parenting plan has been entered," as opposed to merely "a lawful right to time," (i.e., visitation), under a court-ordered parenting plan. *State v. Kirwin,* 166 Wn. App 659, 271 P.3d 310(2012) (Mother charged with custodial interference after taking the children on a six-week road trip, during which the father brought a contempt motion when he could not exercise court-ordered visitation, and the court modified the parenting plan, awarding primary residential time to the father). "[A]n implied element of the offense of custodial interference in the first degree is her knowledge of the (child welfare) agency's 'lawful right to physical custody' of her child." *State v Boss*, 144 Wn. App. 878, 893, 184 P.3d 1264 (2008).

c. When There is No Parenting Plan or Other Court Order

Even when there is no court-ordered parenting plan or other order designating residential placement, both parents have an equal right to physical custody of the child until that right is abridged by a court order. *State v. Ohrt,* 71 Wn. App 721, 862 P.2d 140 (1993) (Custodial interference conviction upheld where mother obtained temporary parenting plan that was not served on the father, and the father had taken the child and left the state).

d. Dueling Orders

When there are conflicting orders, a defendant can still be convicted of custodial interference where she or he knows that there is an order prohibiting the parent from taking the child out of state. *State v. Carver*, 113 Wn.2d 591, 781 P.2d 1308 (1989), *modified on other grounds*, 789 P.2d 306 (1990) (Applying custodial interference to father who took custody of his child in violation of a Washington court decree did not violate the full faith and credit clause, even though prior California dissolution default decree gave him custody of the child).

e. Removing the Child From the State to Protect the Child or Parent from Imminent Physical Harm

Under RCW 9A.40.080(2)(a), in a prosecution for custodial interference, it is a complete defense, that the "defendant's purpose was to protect the child, incompetent person, or himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was reasonable, and that the defendant sought the assistance of the police, sheriff's office, protective agencies, or the court of any state before committing the acts giving rise to the charges or within a reasonable time thereafter."

C. INTERNATIONAL CHILD ABDUCTION

In cases of international child abduction, a particular problem arises when domestic violence victims flee with their children over international borders.[26] The court should recognize the available options for these situations and the limitations of those options.

See Appendix G: The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence, for an overview of how the Hague Convention has been applied in courts in Washington and around the country, and the complex issues courts face when an abducting parent is also a victim of domestic violence.

1. Statutes and treaties.

International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§11601 *et seq*., and Hague Convention on the Civil Aspects of International Child Abduction (to which the U.S. is a signatory), 22 C.F.R. Part 94, 53 FR 23608, June 23, 1988. These provide for the immediate return of children abducted from and to countries which have signed the Convention.

[26] Carol Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases,* 38 Fam. L.Q. 529 (2004); Merle Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593 (2000).

The court may want to consider allegations of domestic violence in interpreting the following exception, found in Article 13(b) of the Convention:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . . [emphasis added.]
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

The court may want to consider domestic violence as relevant to an inquiry under Articles 14-19, which discuss how a court is to determine whether the removal or retention of the child was "wrongful" under the law of the child's habitual residence, and related issues. An analysis similar to the "unclean hands" section of the UCCJA and cases cited supra could be employed.

Article 20 states "the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Again, these provisions could be applied to a domestic violence case where custody is at issue.

2. Avoiding international child-snatching before it occurs

Where international child-snatching appears to be a possibility, the court may want to include provisions in custody agreements which minimize chances for this, such as supervised visitation and getting both parents to sign a stipulation saying the child cannot be removed from the United States without a court order. Such stipulations help prevent issuance of the child's passport (see 22 C.F.R. 51.27, 61 Fed. Reg. 6505 (Feb. 21, 1996)). Some foreign countries give more weight to the father's signature on such a stipulation than to the signature of the mother or judge.

The stipulation/order should be sent to the Office of Citizenship Appeals and Legal Assistance, State Department. For the State Department to enforce the order, the court order must be issued by the court in the state where the child resides or place of habitual residence and it must:

- Grant sole custody to the objecting parent, or
- Establish joint legal custody, or

- Prohibit the child's travel without the permission of both parents or the court, or
- Require the permission of both parents or the court for important decisions unless permission is granted in writing.

If a passport already exists, the non-custodial parent can be ordered to relinquish it to the custodial parent or have it placed in escrow. Performance bonds to guarantee the child's return from abroad can help deter abductions and provide cash for the left-behind parent to travel to the foreign country and hire counsel.[27]

IX. RELOCATION (RCW 26.09.405)

A custodial parent wanting to relocate must give prior notice of intended relocation to all persons with custodial or visitation rights under a court order. This applies to all court orders entered after June 8, 2000 and all orders entered before June 8, 2000 if the court order does not expressly govern relocation. RCW 26.09.405. The Child Relocation Act addressed the constitutional concerns regarding the rights of fit parents raised in *Troxel* and does not violate the Equal Protection Clause, the Due Process Clause, the Commerce Clause, the fundamental rights to privacy in family matters, or the freedom to travel. *In re Marriage of Momb*, 132 Wn. App. 70, 130 P.3d 406 (2006); *In re Custody of Osborne*, 119 Wn. App. 133, 142-147, 79 P.3d 465 (2003).

The State's authority to permit or restrain relocation is based on its "*parens patriae* right and responsibility to intervene to protect the child when parental actions or decisions seriously conflict with the physical or mental health of a child." *In re Parentage of R.F.R.*, 122 Wn. App. 324, 333, 93 P.3d 951 (2004); *Accord, In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21 (1998).

A. NOTICE FOR RELOCATION OF A CHILD

Notice must be provided by personal service or mail requiring a return receipt, RCW 26.09.440(1)(a), and it must be provided 60 days before the intended relocation of the child. RCW 26.09.440(1)(b)(i). If the person did not know in time to provide 60 days' notice, the notice must be provided no more than five days after the person knows the information. RCW 26.09.440(1)(a)(ii).
The notice requirement of RCW 26.09.430 only applies in cases where an existing parenting plan or custody order, either permanent or temporary, is in effect. But the Child Relocation Act as a whole applies to all cases in which relocation of a child is contested, even in cases in which court action was first undertaken after a notice of relocation had been given. RCW 26.09.405; *In re Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002)

[27] *See,* http://travel.state.gov/content/childabduction/english.html

1. Prior notice of relocating to a domestic violence shelter

If the person intending to relocate is entering a domestic violence shelter or is relocating to avoid a "clear, immediate, and unreasonable risk to the health or safety of a person or the child," the notice may be delayed for 21 days. RCW 26.09.460.

2. Contents of notice, RCW 26.09.440(2)(a)

The relocating person must provide and promptly update the content of the notice, which must include:

- Address for service of process during the objection period.
- Brief statement of reasons for relocation.
- This statement:
  "The relocation of the child will be permitted and the proposed revised residential schedule may be confirmed unless, within thirty days, you file a petition and motion with the court to block the relocation or object to the proposed revised residential schedule and serve the petition and motion on the person proposing relocation and all other persons entitled by court order to residential time or visitation with the child." RCW 26.09.440(2)(a)(iii).
- Specific street address of the intended new residence.
- New mailing address, if different from the street address.
- New home telephone number.
- Name and address of the child's new school and, if applicable, day care facility.
- Date of intended relocation.
- Proposed parenting plan for a revised schedule, if any.

3. Notice where parent is participant in Address Confidentiality Program

If the person intending to relocate participates in the address confidentiality program or has a court order permitting withholding some or all of the information, the information is not required to be given with the notice. RCW 26.09.460(2)

4. Notice where there is a risk to the parent or the child's health or safety

A person intending to relocate who believes his or her or the child's health or safety would be unreasonably put at risk by notice or disclosure of certain information may request an ex parte hearing to have all or part of the notice requirements waived. The court may provide relief necessary to facilitate the legitimate needs of the parties and the best interests of the child, including ordering that notice requirements be abridged or waived. RCW 26.09.460(4)

B. TEMPORARY ORDERS, RCW 26.09.510

The court may restrain relocation or order the child's return if it finds:

- the required notice was not provided in a timely manner and the other party was prejudiced;
- the relocation occurred without agreement, court order, or the required notice; or
- after hearing with adequate notice, it is likely that on final hearing the court will not approve the relocation or the circumstances do not warrant relocation before the final determination at trial.

The court may allow the relocation pending final hearing if it finds:

- timely notice was provided or the circumstances otherwise warrant a temporary order; and
- after hearing with adequate notice, it is likely that on final hearing the court will approve the intended relocation.

C. BASIS FOR THE COURT'S DETERMINATION, RCW 26.09.520.

There is a rebuttable presumption that the relocation will be permitted. The presumption favoring relocation under RCW 26.09.520 does not violate a parent's due process rights or fundamental liberty interest in the care and custody of a child. *In re Parentage of R.F.R.*, 122 Wn. App. 324, 93 P.3d 951 (2004) (Though no parenting plan as in place, the trial court did not abuse its discretion in determining that the mother was the parent entitled to a statutory presumption in favor of relocation because the child received the majority of its care from her).

The Child Relocation Act does not apply a "best interest of the child" standard; instead, it applies 11 specific factors for the court to consider. *In re Marriage of Momb*, 132 Wn. App. 70, 79, 130 P.3d 406 (2006); *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004). A person entitled to object may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors, which are not weighted:

1. The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
2. Prior agreements of the parties;
3. Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
4. Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
5. The reasons of each person seeking or opposing relocation and the good faith of each;

6. The age, developmental stage, and needs of the child and the likely impact of relocation or its prevention on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
7. The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
8. The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
9. The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
10. The financial impact and logistics of the relocation or its prevention; and
11. For a temporary order, the amount of time before a final decision can be made at trial.

In relocation cases the trial court must consider each of the factors in RCW 26.09.520 and document its findings in the findings of fact or, failing that, the record must reflect that substantial evidence was entered on each factor and the court's oral ruling must reflect that the court considered each factor. *Bay v. Jensen*, 147 Wn. App. 641, 654-56, 196 P.3d 753 (2008); *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004).

To rebut the statutory presumption favoring a primary residential parent's relocation decision, the court must consider the factors applying a preponderance of the evidence standard. *In re Marriage of Wehr*, 165 Wn. App. 610, 615, 267 P.3d 1045 (2011).

"Relocation factor RCW 26.09.520(6) suggests that the trial court is required to review the parenting abilities of each parent. . . .Implicit to relocation factor RCW 26.09.520(6) is an analysis of each parent's ability to parent and care for his/her children based on their age, developmental stage, and needs in each of the new and current geographic settings." *In re Marriage of Fahey*, 164 Wn. App. 422, 64, 62 P.3d 128 (2011).

The court may not admit evidence on whether the person seeking to relocate will forego relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted. RCW 26.09.530.

D. SANCTIONS, RCW 26.09.550

The court may sanction a party if it finds the party's proposal to relocate or objection to relocation was made to harass a person, interfere in bad faith with the relationship between the child and another person entitled to residential time or visitation, or to unnecessarily delay or increase the cost of litigation.

X. PARENTAGE

The requirements and standards set forth in the Parenting Act apply to parentage actions except that a full parenting plan is not required except at the request of a parent; a paternity order need merely set forth residential provisions for the child and does not need to include decision-making or alternative dispute resolution provisions. RCW 26.26.130(7).

In cases where the biological mother is the respondent and may be resistant to the petitioner being declared the other parent, the court should inquire whether domestic violence has taken place. If there are allegations of domestic violence, the court may wish to check the judicial databases, and impose limitations on residential time, including supervised visitation or exchange, until the parentage issue is resolved.

In cases where the resistant parent receives Temporary Assistance to Needy Families (TANF, formerly AFDC) and is a statutory party to the State's paternity action, the court after inquiry may wish to refer the mother to the Department of Social and Health Services (DSHS) for an administrative determination of a good cause exception to the state's proceeding with an action to establish paternity for child support purposes.

XI. TEMPORARY ASSISTANCE TO NEEDY FAMILIES (TANF, FORMERLY AFDC) GOOD CAUSE

Persons applying for Temporary Assistance to Needy Families (TANF) assign recovery rights to child support to the state unless there is a "good cause" waiver or exception to cooperating with the state to enforce this requirement.

A. STATUTES AND REGULATIONS

Domestic violence can be the basis for a "good cause" exception to assignment of rights to state. See 42 U.S.C. § 602(a)(7)(A)(iii); WAC 388-422-0010; WAC 388-14A-2045

1. Federal statutes: 42 U.S.C. § 602(a)(7)(A)(iii):

> . . .waive, pursuant to a determination of good cause, other program requirements such as time limits (for so long as necessary) for individuals receiving assistance, residency requirements, child support cooperation requirements, and family cap provisions, in cases where compliance with such requirements would make it more difficult for individuals receiving assistance under this part to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence.

2. Washington regulations: WAC 388-14A-2045.

> If a custodial parent ("CP") fears that the establishment or enforcement of support may result in harm to the CP or the children, the CP may be excused from the cooperation requirements in establishing and enforcing a child support order.

Good cause not to cooperate can be claimed under WAC 388-422-0020. If cooperation with the division of child support would result in serious physical or emotional harm to the child or custodial parent; a child born outside marriage was conceived as a result of incest or rape; or is the subject of pending adoption proceedings. The standard for good

cause for medical assistance is broader and may consider the best interests of the person who is being asked to cooperate.

XII. NAME CHANGES OF CHILD (RCW 4.24.130, 26.26.130(2))

The court must enter findings establishing best interests of the child when changing a child's name. In considering the child's best interests, the trial court should take account of (1) the child's preference; (2) the effect of the name change on the preservation and the development of the child's relationship with each parent; (3) the length of time the child had a given name; (4) the degree of community respect associated with the present and the proposed surname; and (5) the harassment, embarrassment, or difficulties the child might experience with the present or proposed surname. *See also, In re Marriage of Hurta*, 25 Wn. App. 95, 96, 605 P.2d 1278 (1979).

If the child's name is in dispute, the court should consider the appointment of a guardian ad litem or attorney to protect the child's best interests. RCW 26.25.555(2).

CHAPTER 11
CHILD ABUSE AND NEGLECT CASES
WHERE DOMESTIC VIOLENCE IS A FACTOR

This chapter is intended to alert the reader to the impact of domestic violence in child maltreatment (e.g. RCW 26.34, RCW 26.44, and RCW 13) cases and emphasize that judicial officers should determine if domestic violence exists in the families involved in every child abuse and/or neglect proceeding, even if social workers have not made note of it.

Over the last decade, communities across Washington State have begun work to create a more coordinated response to cases where both child maltreatment and domestic violence exist. Some communities have followed a model protocol template developed in 2005 by state leaders in the fields of child welfare, domestic violence, and the courts. It is based in part on national efforts through the "Greenbook" initiative.[1] The goals of such a response include (1) increased safety for children, (2) support for parents who are victims of domestic violence, and (3) accountability for perpetrators of domestic violence.[2]

In addition, Washington State's Department of Social and Health Services (DSHS) has developed internal policies to improve its response to cases in which domestic violence is a primary concern or a complicating factor.[3] Courts should familiarize themselves with DSHS' policies and protocols relating to child welfare cases involving domestic violence, to determine whether appropriate assessments have been conducted and relevant services have been provided as a part of permanency planning, and make informed decisions about the placement of children.

This chapter is not intended to serve as a manual for abuse and neglect proceedings, but it is intended to provide guidance on dependency cases in which domestic violence is a factor.

I. THE EFFECTS OF DOMESTIC VIOLENCE ON CHILDREN

Many studies have identified the potential negative impact of exposure to domestic violence on children. In Chapter 2, VI, Dr. Anne Ganley, PhD, describes how domestic violence puts children at risk for physical, psychological, developmental, and emotional damage. Department of Justice research indicates that 43 percent of the time in which women were victims of intimate

---

[1] The statewide model template can be found at: http://www.courts.wa.gov/committee/docs/protocolTemplate.doc. This template was developed following the model promoted by the National Council of Juvenile and Family Court Judges. *See,* Susan Schechter & Jeffrey Edleson *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice*, National Council of Juvenile and Family Court Judges (1999).

[2] The *Coordinated Response to Child Maltreatment and Domestic Violence Guidelines* is posted at http://www.kingcounty.gov/kcsc, and the document is entitled DV response guidelines.

[3] A. Ganley & M. Hobart, *Social Workers' Practice Guide to Domestic Violence,* Washington State Department of Social and Health Services, Children's Administration (2010 and revised in 2016), available at: *https://www.dshs.wa.gov/sites/default/files/SESA/publications/documents/22-1314.pdf.* A summary of this guide is available in Appendix A.

partner violence, children were residents of the household. [4] Other research suggests that in an estimated 30 to 60 percent of the families where either domestic violence or child maltreatment is identified, it is likely that both forms of abuse exist.[5] A Washington State study of child maltreatment reports made to Child Protective Services (CPS) revealed that domestic violence was present in 20 percent of referred cases. And, 47 percent of the cases were assessed as having a moderate to high risk.[6]

In 2006, the National Council of Juvenile and Family Court Judges and the Office of Juvenile Justice and Delinquency Programs published a comprehensive report, *Children's Exposure to Domestic Violence: A Guide to Research and Resources*, providing an overview of existing research and model practices in providing services for children.[7] Studies indicate that exposure to domestic violence itself may not cause physical injury to a child, yet statistically it increases the probability that the child will become a victim of child abuse or neglect.[8]

Between 1997 and 2013 in Washington State, of the 485 domestic violence victims killed by abusers or their associates, at least 36 percent of the victims had children living in the home with them at the time they were murdered. The majority of the victims' children were present at the time of the homicide and 30 percent witnessed the murder. Abusers killed 54 children alongside their mothers.[9]

The studies that generated these statistics and many similar studies and statistics emphasize the exposure large numbers of children have to domestic violence. When the child is the direct victim of an assault or battery by a family member, the physical harm to the child is obvious; however, when the child is exposed to domestic violence, the ramifications often are undetected. For example, child welfare agencies maintain child abuse statistics in general categories or referral types such as parental drug/alcohol abuse; sexual abuse; and neglect (which in Washington is taken to include physical abuse, medical neglect, and chronic neglect).

---

[4] S. Catalano, Ph.D., *Intimate Partner Violence in the United States*, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/intimate/ipv.htm (December 2006).

[5] H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, Child Abuse and Neglect User Manual Series, U.S. Department of Health and Human Services (2003). To obtain a copy of this manual, contact 800-393-3366 or order on-line at the Child Welfare Information Gateway, http://www.childwelfare.gov/pubs/usermanual.cfm.

[6] English, D.J., Edleson, J.L. & Herrick, M.E., Domestic violence in one state's child protective caseload: A study of differential case dispositions and outcomes. *Children and Youth Services Review, 27*, 1183-1201. (November 2005).

[7] A. Summers, *Children's' Exposure to Domestic Violence: A Guide to Research and Resources*, The National Council of Juvenile and Family Court Judge's Permanency Planning for Children Department (PPCD), in collaboration with the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) Safe Start Demonstration Project, (2006). See, http://www.ncjfcj.org/sites/default/files/Childrens%20Exposure%20to%20Violence.pdf

[8] D. J. English, D. B. Marshall, and A .J. Stewart, "Effects of family violence on child behavior and health during early childhood," Journal of Family Violence, 18(1), special Issue: LONGSCAN and family violence, 43-57 (2003); For resources on Adverse Childhood Experiences and trauma, see, http://www.nctsn.org/sites/default/files/assets/pdfs/judge_bench_cards_final.pdf

[9] Jake Fawcett, *2013 Domestic Violence Fatalities in Washington State*, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, 2014, available at http://dvfatalityreview.org/2014/03/17/2013-domestic-violence-fatalities/

Exposure to trauma, including domestic violence, has short- and long-term consequences. Factors, depending on the child's age, gender, stage of development, and role in the family, may exacerbate or ameliorate the effects of domestic violence on children. Pre-school children exposed to domestic violence may suffer from nightmares, inability to control bladder and/or bowel movements, excessive clinging, and fear of abandonment, all, in turn, affecting the child's mental health, adjustment, and ability to learn. At this stage, many of the symptomatic behaviors will be seen only within the immediate family and reporting to the legal system would thus be minimal. The consequences of early exposure may subsequently be noticed in testing and developmental assessments, but the causes may not be so obvious.[10]

Exposure to domestic violence can be extremely traumatic for children. [11] Some of the more subtle effects, which will not be apparent in testing and assessment, include the belief that violence is an appropriate method of trying to resolve conflict, especially in the context of an intimate relationship, or viewing physical aggression as an acceptable way to get respect or control. Children may tend to feel responsible for family violence, and take upon themselves the role of protector. Again, this type of behavior may inhibit academic performance, social adjustment, and self-esteem.

Research also shows that some children do not demonstrate negative effects when exposed to domestic violence. Several reasons might factor into the lives of children who show great resiliency in the face of exposure to violence, including secure attachment with a caregiver, or strong connection to an extended family network.[12]

A. CHILD MALTREATMENT AND DOMESTIC VIOLENCE

Historically, the reasons for court involvement in the parent-child relationship have been based on the legal concepts of abandonment, or abuse and neglect. Earlier definitions of abandonment encompassed circumstances that showed a "willful substantial lack of regard for parental obligations." *In re Adoption of Lybbert,* 75 Wn.2d 671, 453 P.2d 650 (1969). Parental obligations include: (1) expressions of love and affection for the child; (2) expressions of personal concern over the health, education, and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance. *Id.*

---

[10] See S. Hill "Through the Eyes of the Infant," in *Child Neglect and Infant Mental Health*, program materials from the Superior Court Judges' Association 2007 Spring Conference at http://inside.courts.wa.gov/index.cfm?fa=controller.showBceConferences.

[11] In 1988, in Snohomish County, seventeen-year-old Andrew Janes murdered his stepfather after years of exposure to domestic violence, direct and indirect. The case is cited for its rulings on the battered child syndrome, and also provides a real and graphic portrait of the effects of domestic violence on children and the failure of the system to intervene. *State v Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993).

[12] C. Dalton, L.M. Drozd, & F.Q.Wong, *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide.* National Council of Juvenile and Family Court Judges (2004); M.K. Alvord & J.J Grados, *Enhancing Resilience in Children: A Proactive Approach,* Professional Psychology; Research and Practice, 36(3), 238-245 (2005).

The parent-child relationship is so significant that it is protected in terms of fundamental rights and constitutional due process and "[i]t is the general rule that courts zealously guard the integrity of the natural relation of parent and child." *Lybbert*, at 674. However, when the rights of the parents and the rights of the child come into conflict, there is a clear and emphatic requirement that the rights and safety of the child prevail. *In re Matter of Allen*, 139 Wash. 130, 245 P. 919 (1926); RCW 13.34.020.

With early refinements of the child welfare statutes, the advent of mandated reports, and heightened public awareness of the effects of domestic violence on children, complaints of domestic violence concerns to Child Protective Services (CPS) were likely to be unaddressed. It is now understood that child maltreatment encompasses exposure to domestic violence, where a child's health, welfare, or safety are harmed. RCW. 26.44.020(1).[13]

II. JUDICIAL DECISIONS: CHILD WELFARE PROCEEDINGS WITH DOMESTIC VIOLENCE FACTORS

Child abuse and neglect proceedings in the State of Washington are governed by RCW 13.34 *et seq*. The juvenile court has ***exclusive, original jurisdiction*** over the child once an RCW 13.34 petition has been filed. RCW 13.04.030. This means the placement, parental contact, visitation, and services for the child cannot be addressed in another court including proceedings for parenting plan orders or protective orders. *In re Marriage of Perry*, 31 Wn. App. 604, 644 P.2d 142 (1982). The juvenile court may, and in appropriate circumstances should, grant concurrent jurisdiction with another court.

The juvenile courts are empowered to issue orders for:

- Emergency removal
- Temporary shelter care
- Dependency fact finding and disposition
- Permanency planning
- Return home
- Termination of parental rights
- Adoption
- Court-approved placement, guardianship; third party custody,

Any of these proceedings might involve placement or visitation. The court may be called upon to make or approve a change of placement between or among relatives, foster care, group care, or

[13] In the landmark case of *In re Nicholson*, the New York Administration for Children Services' (ACS) practice of removing children from parents solely because they were victims of domestic violence was found unconstitutional. While this case is specific to New York law, the case has implications for states that treat children's exposure to domestic violence, without more, as a form of child neglect warranting removal. *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. Jan 3, 2002) (NO. CV 00-2229) opinion supplemented by *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. Mar. 18, 2002); question certified by *Nicholson v. Scoppetta*, 344 F. 3d 154 (2d Cir. 2003); certified question accepted by *Nicholson v. Scoppetta*, 807 N.E. 2d 283 (2d Cir 2003); certified question answered by *Nicholson v. Schoppetta*, 820 N.E. 2d 840 (2004).

independent living. The success of a placement depends on the fit of the placement and the child. Accordingly, the court should strive to understand the child's background and circumstances, as well as the safety and suitability of the placement resource.

A. Definitions of Dependency

RCW 13.34.030(6)(a)-(c) provides:

"Dependent child" means any child who:

(a) Has been abandoned;

(b) Is abused or neglected as defined in Chapter 26.44 RCW by a person legally responsible for the care of the child;

(c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or

(d) is receiving extended foster care services, as authorized by RCW 74.13.031.

The cross-referenced definition of abuse and neglect in RCW 26.44.020(1) states:

"(1) 'Abuse or neglect' means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section." RCW 26.44.020.

Further, RCW 26.44.020(16) provides that negligent treatment or maltreatment includes acts or omissions, which "evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, or safety…. ***Poverty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself."*** (Emphasis added). The intent of this 2007 amendment is to ensure that courts did not remove children from the non-abusive parent solely because she/he was a victim of domestic violence.

B. Emergency Removal

RCW 13.34.050(1)(a), (b) provides that the court may order law enforcement, CPS, or a probation counselor to take a child into custody when a dependency petition has been filed alleging that the child is dependent and that "the child's health, safety, and welfare will be seriously endangered" if not taken into custody and one of the supporting allegations "demonstrates a risk of **imminent** harm to the child." *(Emphasis added.)*

Thus, in an ex parte pick up order, some more immediate and pressing risk than the secondary or developmental effects discussed above seems to be required. (Obviously, if the child is alleged to be the direct victim of an assault, this is established.)

C. Shelter Care

A child picked up pursuant to a court order must be placed in shelter care and a hearing held within seventy-two hours, excluding weekends and holidays. The shelter care hearing, conducted pursuant to RCW 13.34.060, addresses whether there is reasonable cause to believe the child's health, safety, or welfare is in jeopardy. "Jeopardy" might reasonably be construed as danger or risk. All child welfare proceedings are concerned with risk to some degree, but pick-up requests and shelter care hearings especially are concerned with imminent risk.

1. Domestic Violence Identification and Risk Assessment at Intake

Washington CPS policies direct intake workers to screen every child abuse or neglect report for domestic violence, inquiring whether or not any adult in the household has been violent or threatening to any other adult. If the answer is yes, then CPS policies direct intake workers to conduct specialized domestic violence assessments[14] at intake interviews and during service planning, monitoring, and review to determine the risk that domestic violence poses to the child. In determining whether to "screen in" a case for further investigation, the Department considers "domestic violence which physically harms a child or puts a child in clear and present danger" to constitute child abuse. If an intake involves domestic violence but there is no indication of direct child abuse and or neglect or that there is no clear and present danger of harm, intake will document the domestic violence information and "screen out" the intake.[15]

2. "Screened In" Domestic Violence Cases

Because domestic violence may pose a significant risk to both a child's physical and mental health, the Department must does not have to "stay its hand until actual damage to the endangered child has resulted." In re Welfare of Frederiksen, 25 Wn. App. 726, 733, 610 P.2d 371, 375 (1979). When the danger of serious damage is evident, the Department may properly intervene to protect a child's "right to conditions of minimal nurture, health and safety." Frederiksen at 733.

Failure to provide an emotionally nurturing, stable home can be considered neglect, particularly if the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, or safety, RCW

---

[14] A. Ganley & M. Hobart, *Social Workers' Practice Guide to Domestic Violence,* Washington State Department of Social and Health Services, Children's Administration (2010 and revised in 2016), available at: *https://www.dshs.wa.gov/sites/default/files/SESA/publications/documents/22-1314.pdf*; A summary of CPS practice guide for social workers is provided in Attachment 1 of this chapter as a reference for the court to assist in determining whether the Department has fulfilled its obligation in providing services. *See also,* Appendix A for more detailed information relating to domestic violence assessment.

[15] Washington State Children's Administration, *Practices and Procedures Guide*, Chapter 2000, section 2220, available at https://www.dshs.wa.gov/ca/publications/practices-and-procedures-guide.

26.44.020(14); *In re Welfare of Dodge*, 29 Wn. App 486, 628 P.2d 1343 (1981). It is the perpetrator of domestic violence who should be held accountable for the behavior that causes emotional harm to the child, not the adult victim/survivor.

At the shelter care stage hearing, the court will typically have little information beyond the facts alleged in the verified petition and the testimony of those witnesses available on short notice. Social history will not have been collected, assessments have not been yet ordered, let alone completed, and a Court Appointed Special Advocate (CASA) has not been appointed. Whatever placement is being considered, if there is a hint of domestic violence concern, a domestic violence database screen should be required. (See Chapter 9 for instructions on using the Judicial Access Browser (JABS)). Shelter care placement can be with the parents with court-imposed conditions including ordering the perpetrator to leave the home, mandating that the adult victim-parent-custodian enter a shelter approved by the CPS worker, or requiring a suitable relative to move into the home.

If the perpetrator is incarcerated, and there appears time to accomplish it before release, the juvenile court can grant the non-abusing parent an order excluding the perpetrator from their shared residence in order to protect the children from further harm or coercion. Child welfare workers may also request a protective order requiring the perpetrator to leave the home in the context of a shelter care hearing. The non-abusive parent may be encouraged to obtain a domestic violence protection order. The court may also restrict the perpetrator's access to the child when "it is alleged that a child has been subjected to sexual or physical abuse." RCW 26.44.063. A concurrent jurisdiction order should also be entered if the perpetrator has any legal rights with respect to the child.

D. Dependency, Fact Finding, and Disposition or Termination

Shelter care is a legal status as well as a physical placement. It lasts until the dependency petition is granted or dismissed. If granted, pursuant to stipulation or fact-finding, the court is required to enter a disposition order. RCW 13.34.130. The purpose of the disposition is to address parental deficiencies to reunite the family. Compliance of the parent and the social service agency with court ordered service plans is monitored through the permanency planning process. If the reunification appears unlikely, an alternative permanent plan including termination of parental rights is developed. RCW 13.34.145.

In order to terminate parental rights, the court must follow a three-step process. First, the court must determine whether the child is dependent. RCW 13.34.030(6)). Second, the State must hold a review hearing every six months to review the progress of the parties and determine whether court supervision should continue, and allow parents to remedy their deficits. RCW 13.34.138. Third, the State must prove six factors by clear, cogent, and convincing evidence. RCW 13.34.180, RCW 13.34.190. These factors are:

(a) That the child has been found to be a dependent child;
(b) That the court has entered a dispositional order pursuant to RCW 13.34.130;

(c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency;
(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the future. . . ; and
(f) That the continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

If these steps have been followed, and the court continues to find the child dependent, the court focuses on the best interests of the child, which must be proven by a preponderance of the evidence. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011).

It should be noted that Washington law allows the state to terminate the parental rights of one parent while the other parent's rights remain intact. "The rights of one parent may be terminated without affecting the rights of the other parent and the order shall so state." RCW 13.34.200. This may be of particular interest in cases involving domestic violence, as one parent may be capable of parenting while the other may be unfit to parent.

1. Current Unfitness Must Be Shown

In order to determine whether a child is dependent under RCW 13.34.030(6), the trial court must make an explicit finding that the parent is currently unfit. In *In re Dependency of B.R.*, 157 Wn. App 853, 239 P.3d 1120 (2010). In *B.R.*, the mother appealed the trial court's decision to terminate her parental rights after one of her children had been taken to the hospital for a head injury, which the doctor said was consistent with the type of injury caused by being shaken. The trial court identified the parental deficiency as the mother's relationship with abusive partners (her inability to set limits with abusive partners) and her failure to substantially improve the deficiencies within twelve months following the entry of the dispositional order. However, the mother completed all of the court-ordered services. The Court of Appeals reversed the order terminating the mother's rights, finding that DSHS had not met its burden of establishing current parental unfitness by clear, cogent, and convincing evidence.

See also, In re Welfare of A.G., 160 Wn. App. 841, 248 P.3d 611 (2011), where the trial court terminated the mother's parental rights, the Court of Appeals affirmed, and the Supreme Court remanded to Court of Appeals for reconsideration. On remand the Court of Appeals held the trial court's findings were insufficient to support an implied finding of current unfitness. Trial court's findings were insufficient to support an implied finding that mother was presently unfit to parent, as required for termination of mother's parental rights absent an express finding of unfitness; although trial court found that it was unlikely that conditions of child neglect, drug

abuse, domestic violence, and mental illness would be remedied so that children could be returned in the near future, trial court did not find that mother currently neglected children, found that mother was nurturing and had healthy interactions with children, and that mother's chemical dependency was apparently in remission and it was not clear from trial court's findings that mother's domestic violence and mental illness deficiencies were relevant to her ability to parent.

In *In re Welfare of A.B.*, 168 Wn.2d 908, 232 P.3d 1104 (2010), the father was not found to be unfit when he had a history of drug abuse and domestic violence and there was evidence that he was a drug dealer at one point. He was not unfit because he had completed drug treatment, had been clean and sober for four years, was willing to continue counseling and treatment, and had been engaged in the child's life.

But see, In re Dependency of S.M.H., 128 Wn. App 45, 115 P.3d 990 (2005) the mother was unwilling to appreciate the risk her relationship with the children's father posed to the children. Both children's fathers were known to engage in sexually deviant behavior and the mother chose to maintain a relationship with one of the fathers. The mother's parental rights were terminated for the children's best interests.

a. History of Domestic Violence

At any stage of proceedings, a history of domestic violence is as important as a current act of domestic violence for two reasons. First, in child welfare cases the entire history of parenting is before the court, not just the specific acts that are alleged in the petition**.** *In re Ross*, 45 Wn.2d 654, 277 P.2d 335 (1954). Second, past history is a factor to be considered in assessing current parental fitness. *In re Dependency of J.C.*, 130 Wn.2d 418, 924 P.2d 21 (1996) (case involving a history of substance abuse). In the context of domestic violence, it is important to understand the history of domestic violence because it provides information about the likelihood that the perpetrator will continue to use violence in the future. Research indicates that though many perpetrators understand that their abusive behavior has negative impacts on their children, and express concern about the effects on their children, such statements of concern are poor indicators of their intentions to refrain from abusive behavior.[16] In addition, children who have been exposed to domestic violence may be afraid of the domestic violence perpetrator, and understanding the history of domestic violence may indicate what steps, if any, should be taken to mend the relationship between the children and the domestic violence perpetrator.

However, the state cannot solely rely on a history of domestic violence to demonstrate current unfitness. *In re Welfare of C.B.* 134 Wn. App. 942, 143 P.3d 846 (2008) (State cannot rely solely on past substance abuse to prove current unfitness when the evidence shows the parent is responding to treatment). In the

[16] E.F. Rothman, D.G. Mandel, & J.G. Silverman, "Abusers' Perceptions of the Effect of Their Intimate Partner Violence on Children," *Violence Against Women,* Nov. 13 (11): 1179-91 (2007).

context of domestic violence victimization, research indicates that many domestic violence survivors parent as effectively as possible in difficult contexts, and their children feel attached to, and safe and supported with their non-abusing parents, even in the context of the abuse.[17] Understanding the history of domestic violence is important to place parenting challenges in context, and to understand what the parent has done to protect the children.

2. Disposition

Shelter care is a legal status as well as a physical placement. It lasts until the dependency petition is granted or dismissed. If granted, pursuant to stipulation or fact-finding, the court is required to enter a disposition order. RCW 13.34.130. The purpose of the disposition order is to address parental deficiencies to reunite the child with one or more parents who can care for that child. Compliance of each parent and the social service agency with court ordered service plans is monitored through the permanency planning process. If the reunification with one or both parents appears unlikely, an alternative permanency plan including termination of one or more parent's parental rights is developed. RCW 13.34.145.

Washington law allows the state to sever one parent's rights while maintaining the other parent's. RCW 13.34.200. Thus, if a victim of domestic violence is able to parent, and the primary disruption to the children's safety and stability is the continued presence of another parental figure committed to engaging in violent behavior, the state can move to sever the abuser's parental rights while maintaining the parental rights of the abused parent.

3. Services

Dependency dispositions and permanency plans emphasizing reunification should be tailored to address domestic violence concerns. The specialized domestic violence assessment adopted by DSHS is intended to provide social workers and courts with specific information on the nature and the impact of the abuse, so that the court may understand not only the risk each adult poses to the child, but also the way in which the history and pattern of domestic violence may negatively impact the adult victim's ability to remediate other concerns. DSHS policy requires social workers to conduct separate specialized domestic violence assessments.[18] It is appropriate for the court to order that DSHS provide tailored services to each caregiver based on the findings from the specialized assessments. For example, DSHS should provide different reconciliation services for each parent, such as trauma-informed mental health counseling for the non-abusing parent, and separate home-based services that serve to strengthen the attachment between the children and non-abusive parent. In addition,

[17] C. Sullivan, et. al, "Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women are Nurturing Parents" *Journal of Emotional Abuse* Vol. 2, Issue 1, pp. 51-71, (2001).
[18] See Appendix A regarding assessment of risk posed to children by domestic violence

domestic violence perpetrator treatment, as well as parenting classes for parents who have used violence against their partners, might be included as part of a plan for the abusive parent.[19]

Furthermore, referral to services to assist abused parents in addressing their concrete needs such as legal representation in child custody matters, housing, or childcare supports may help alleviate some of the "life-generated risks" facing abused parents (e.g., housing instability, need for child support, lack of income), in addition to the potential risks posed by an abusive partner.[20]

4. Termination

If the three steps have been followed, and the court continues to find the child dependent, the court focuses on the best interests of the child, which must be proven by a preponderance of the evidence. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 257 P.3d 522 (2011).

5. Aggravated Circumstances to Terminate Parental Rights

Reasonable efforts to reunify the family may be forgone where there is clear, cogent, and convincing evidence that aggravated circumstances exist. RCW 13.34.132(4) identifies several such circumstances without mention of domestic violence. The court may order DSHS to file a termination petition when any aggravating circumstances make it unlikely that the provision of services to the parent would lead to the family's reunification. *In re Dependency of J.W.*, 90 Wn. App. 417, 953 P.2d 650 (1969).

Furthermore, aggravated circumstances to expedite termination of parental rights are not limited to those enumerated in RCW 13.34. Any aggravating circumstances that make it unlikely that the provision of services to the parent would lead to the family's reunification may be used. *In re Dependency of J.W.*, 90 Wn. App. 417, 953 P.2d 104 (1998). Findings of aggravated circumstances must be based on clear, cogent, and convincing evidence. RCW 13.34.132(4).

In *In re Dependency of C.B.*, 79 Wn. App. 686, 904 P.2d 1171 (1995), the father was imprisoned for domestic violence manslaughter of the mother, and his parental rights

---

[19] F. Mederos, *Accountability and Connection with Abusive Men-A New Child Protection Response to Increasing Family Safety*, Family Violence Prevention Fund, (2004), available at: http://www.thegreenbook.info/documents/Accountability.pdf

[20] However, the trial court lacks authority to order State to provide housing funds. *In re Welfare of J.H.*, 75 Wn. App. 887, 880 P.2d 1030 (1994). The court should be aware of separation of power *issues* between the executive and judiciary if considering ordering DSHS to perform specific actions in abuse and neglect cases. *E.g., In re Welfare of Lowe*, 89 Wn.2d 824, 576 P.2d 65 (1978); *In re Detention of W.*, 70 Wn. App 279, 852 P.2d 1134 (1993).

were terminated after his release from prison. The trial court used the aggravating factor "murder or manslaughter of the parent's spouse." Father claimed this amounted to an "automatic" termination in violation of his due process rights. The Court of Appeals held that it is not the fact of the aggravating circumstance that compelled the termination; rather, the aggravating circumstance triggers application of a more stringent standard of proof on the key issue of whether the parental deficiencies could be remedied in "the near future."

E. Practice Tips[21]

The two most important things a judge can do in a child abuse or neglect case are to ask questions and craft appropriate orders.

1. Ask questions

a. For the agency social worker:

Is there domestic violence in this case? Were family members interviewed separately? Did you conduct a domestic violence assessment? If so, who is the domestic violence perpetrator? Who is the adult victim?

What was the nature of the child's exposure to domestic violence? Was there physical or emotional abuse by the alleged abusive parent? Was there physical or emotional abuse by the adult victim of domestic violence?

Does the domestic violence perpetrator's abusive behavior toward the adult domestic violence victim place the child at imminent risk of serious harm?

Did you or your agency consider the risks to the child of removal, such as separation anxiety, sibling loss or school change? In what ways did the risk of harm outweigh the trauma of removal?

Is the alleged perpetrator of domestic violence also the alleged primary perpetrator of abuse or neglect? If the victim parent is not the primary perpetrator of abuse or neglect, can it be made safe for the child to return home with the victim parent?

How does the domestic violence perpetrator's abusive behavior toward the adult victim impact the ability of the family to address issues of concern for the child?

How have you worked with the family to minimize the domestic violence perpetrator's ability to control and abuse his or her intimate partner, and therefore, the child?

---

[21] An excellent resource to consult in cases involving domestic violence and dependency is: L. Goodmark, *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*, National Council of Juvenile and Family Court Judges (2008), available on at: http://www.ncjfcj.org/sites/default/files/reasonable efforts checklist_web2010.pdf

How have you worked to increase the capacity of the adult domestic violence victim to create safety for herself or himself and the child?

b. For the parent:

What is the last thing you did to get your child back?

c. For both:

Inquire about other adults and children that may be in the child's environment.

Use the domestic violence database in the Judicial Access Browser (JABS) for placement resources that are not known to the DSHS. DSHS does not have access to this database and requires several days at best to get a criminal history report.

2. Craft appropriate orders

Where there is domestic violence in child protection cases, judges should make orders which include:

a) Keeping the child and parent victim safe;

b) Keeping the non-abusive parent and child together whenever possible;

c) Holding the perpetrator accountable;

d) Identifying the service needs of all family members, including all forms of assistance and help for the child; safety, support, and economic stability for the victim; and rehabilitation and accountability for the perpetrator;

e) Creating clear, detailed visitation guidelines which focus upon safe exchanges and safe environments for visits;[22, 23] and,

f) Being consistent with other orders involving the parties and involved persons.

---

[22] Recommendation No. 57, *Effective Intervention in Domestic Violence & Child Maltreatment Cases,* (National Council of Juvenile & Family Court Judges, 1999).

[23] Courts should consider whether supervision is warranted for visitation, where the parent has not abused or neglected the children, but rather the risk is posed by the domestic violence perpetrator.

ATTACHMENT 1

PROMISING JUDICIAL PRACTICES IN DEPENDENCY AND DOMESTIC VIOLENCE CASES

Recommended practices during child dependency court hearings (shelter care, probable cause, disposition, and review) when domestic violence may be present.

1. Identify whether or not domestic violence is an issue in each case.
2. Within the resources of your court, establish a one judge-one family rule.
3. Provide competent and trained public defense counsel.
4. Recognize the tribe as a key partner in Indian Child Welfare Act cases.
5. Encourage cultural awareness among court personnel and culturally appropriate access throughout the dependency process.
6. Create a secure and safe environment in the court.
7. Establish court procedures that increase the likelihood that all relevant information is before the court in timely manner.
   (Enforce statutory deadlines for filing reports to the court. Continue the matter if the caseworker assigned to the case is not in court. Continue hearings if appropriate domestic violence screening and /or assessment information is not included in the reports.)
8. When domestic violence is identified in a dependency case, evaluate/assess the specific risk posed by the domestic violence to the child and the adult victim.
9. Determine if reasonable efforts have been made in both assessments and services that increase the safety of the child and adult victim and that hold the domestic violence perpetrator accountable.
10. Create court orders in dependency cases that increase safety of both adult victim and child and that hold the domestic violence perpetrator accountable.
11. Consider setting 60- or 90-day reviews in certain cases rather than the statutory six-month review process.
12. Encourage cross training on domestic violence for all dependency court professionals.
13. Increase collaboration with all dependency court professionals, community-based resources, and domestic violence advocates.

List compiled by the faculty for the *Promising Judicial Practices in Dependency and Domestic Violence Cases* training. See *Chapter 5: Courts, Effective Intervention in Domestic Violence and Child Maltreatment Cases* in Guidelines for Policy and Practice, Recommendations from the National Council of Juvenile and Family Court Judges, *(The Greenbook)* http://www.ncjfcj.org/, 1-775-784-6012

CHAPTER 12
DISSOLUTION OF MARRIAGE

Judges play a vital role in settling conflicts associated with separation and the dissolution of marriages. Research shows that approximately half of couples who are separating or divorcing include a party reporting having been a target of physical violence by their partner at least once during the time they lived together, and in over 75% of couples a party reports having been emotionally abused.[1] In addition, the risk of domestic violence may increase when victims take steps to end a marriage. Many studies have documented that physical violence either started, continued, or escalated after separation.[2]

Courts can play an important and effective role in preventing and reducing domestic violence during and following the termination of marriages by structuring processes and orders that recognize the dynamics of domestic violence. Families in the court system in which domestic violence has taken place who are terminating marriages present special issues and concerns.

> When the issue of family violence is found to exist in the context of a dissolution of marriage, domestic relations case of any kind, or in a juvenile court case[,] . . . [j]udges should be aware that there may be an unequal balance of power or bargaining capability between the parties which calls for more careful review of the custody and financial agreements before they are approved by the court.[3]

Effective intervention by the court can promote the abused party's safety, independence, and freedom of decision-making, and the accountability of the abusive party by working to ensure that orders for support, property distribution, and child custody are equitable. Many abusive partners are skilled at exercising control by threatening the victim's financial independence and financial security.[4] For example, an abusive partner may control all of the money in the household, no matter who earns it. The abuser may give his or her partner a certain allowance to purchase food and household goods that must be accounted for to the dollar. An abuser may stop making house payments or paying the rent and threaten to leave the victim and the children without a home. In addition, abusive partners often engage in economic sabotage, including interfering in victims' ability to maintain employment or housing, or ruining their credit ratings.[5] Courts can play a

---

[1] D. Ellis, *Divorce And The Family Court: What Can Be Done About Domestic Violence?,* Family Court Review 46 , 531-536 (2008)
[2] R. Walker, T. Logan, C. Jordan & J. Campbell, *An Integrative Review of Separation in the Context of Victimization: Consequences and Implications for Women.* Trauma, Violence & Abuse, 5, 143-193 (2004).
[3] *Family Violence: Improving Court Practice* (National Council of Juvenile and Family Court Judges, 12.
[4] J. Postmus, S.B. Plummer, S. McMahon, N.S. Murshid, & M. Kim, *Understanding Economic Abuse in the Lives of Survivors,* Journal of Interpersonal Violence, 27, 411-430 (2012).
[5] A. Adams, C. Sullivan, D. Bybee, & M. Greeson *Development of the Scale of Economic Abuse,* Violence Against Women 14, 563-588 (2008).

significant role in reducing the power and control a domestic violence abuser has by providing for an equitable distribution of assets and orders for support. Specifically, the existence of domestic violence may need to be a factor to consider in determining:

1. Length of time an abused party may require financial support for self and children;
2. Job training or reeducation costs for an abused spouse who is not able to work due to the effect of abuse and/or isolation;
3. Length of time before an abused party may be capable of or able to work;
4. Allocation of debts and expenses incurred related to domestic violence, such as intentional waste by one party as a means to manipulate the other;
5. Relocation or security related costs;
6. Fees for a third party to provide supervised visitation for the children;
7. Whether healthcare expenses such as counseling and/or other forms of intervention will be required for a party or for children who may have been traumatized by observing or sustaining injuries at the hands of the abusive parent; or
8. Allocation of attorney fees, in particular where an abusive party attempts to assert control in the form of protracted litigation.

To achieve the goals of RCW 26.09.080 and .090, providing for a just and equitable distribution of property, liabilities, and maintenance, the court must craft orders that address the safety needs of the battered party and the children and that take into account the unequal power balance between the abused party and the perpetrator.[6]

I. Washington Dissolution Statute and Domestic Violence

A. No Fault Grounds - Statutory Authority

No grounds for dissolution are required. An allegation that the marriage or domestic partnership is irretrievably broken is sufficient under RCW 26.09.030(1) unless the other party contests. If there is a contest, the court "shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation." The court must then find that the marriage or domestic partnership is irretrievably broken and enter the decree or transfer the matter for reconciliation counseling. (See Section VII, C, Motions for Reconciliation.)

B. Evidentiary Issues: Admissibility of Evidence of Abuse

Allowing testimony of abuse during premarital relationship was upheld as related to issue of coercion in signing a prenuptial agreement. *In re Marriage of Foran*, 67 Wn. App. 242, 259, 834 P.2d 1081 (1992).

[6] For more information, see A. Farney and R. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT J. 35 (NCJFCJ, Fall 2003).

Evidence of physical and psychological abuse was admissible on issue of post-traumatic stress disorder from abuse, present employability, and prospective earning capacity. Spouse who is physically abused during marriage is not limited to tort claim for damages resulting from abuse; trial court could consider all factors relevant to economic circumstances of the parties in making its disposition of property and maintenance. *In re Marriage of Foran*, *Supra*.

See also In re Marriage of Steadman, 63 Wn. App. 523, 528 n.8, 821 P.2d 59 (1991) (marital misconduct that court may not consider in dividing property refers to immoral or physically abusive conduct within the marital relationship; this is not to say that court may not consider abuse by one spouse where that abuse has affected economic circumstances of abused spouse).

II. DOMESTIC VIOLENCE AS A FACTOR TO CONSIDER IN PROPERTY DISTRIBUTION

A. Special Considerations

Domestic violence is a pattern of controlling behavior that often includes control over marital property and financial matters. As a result, the abused party may know little about the family business, the abuser's salary, or the marital assets and debts. Courts assessing credibility should consider the strong possibility that the abused party may have been denied, and therefore lacks, basic financial information about household income, assets, and liabilities.

Equitable property distribution, which takes into account the effect of the abuse on the victim, can promote the independence of that party, and thus achieve the goals of effective court intervention.

B. Fault and Property Distribution

1. Washington precludes consideration of marital fault but domestic violence may be relevant to economic circumstances.

RCW 26.09.080 provides:

> [T]he court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) the nature and extent of the community property;
(2) the nature and extent of the separate property;
(3) the duration of the marriage; and
(4) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

Washington allows consideration of fault if it causes dissipation of assets. *See In re Marriage of Williams*, 84 Wn. App. 263, 271, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025, 937 P.2d 1102 (1997); *In Re Marriage of Clark*, 13 Wn. App. 805, 809, 538 P.2d 145, *review denied*, 86 Wn.2d 1001 (1975). Although fault may not be considered when disposing of property in a dissolution, conduct (e.g., husband's drinking, wife's gambling) that had a dissipative effect on the marital property may be considered to arrive at a fair and equitable distribution.

However, negatively productive conduct may be balanced against economically productive conduct such as working extra jobs to bring in extra income. Conduct of concealment of assets by husband may also be considered in making disproportionate award to wife. *In re Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). *See also In re Marriage of Steadman*, 63 Wn. App. 523, 528 n.8, 821 P.2d 59 (1991). Though the court may lack the authority to set aside a spouse's fraudulent transfer of marital property to a third party, the court, using its equitable powers, may allocate the remaining separate and community property or enter judgment against the spouse to account for the wrongful transfer. *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008).

Although fault is not a ground, domestic violence may still play a part in considering the economic circumstances of the abused party.

As a result of the abuse, the abused party may be isolated, and physically or emotionally incapacitated so as to be unable to support himself or herself and the children. Wife's needs due to a chronic health problem caused by husband's abuse during the marriage may be considered. Court may consider domestic violence as it bears on present employability and prospective earning capacity for purpose of determining maintenance. *In re Marriage of Foran*, 67 Wn. App. 242, 259, 834 P.2d 1081 (1992).

The court may not economically punish one spouse for obtaining a protection order. *In re Marriage of Muhammed*, 153 Wn.2d 795, 108 P.3d 779 (2005) (Trial court improperly considered wife's decision to obtain a protection order as marital fault).

Court may also determine property division in the context of the amount of maintenance it intends to grant. *In re Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977). For further discussion, see Chapter 2.

2. **Debt distribution**

a. Debts incurred during marriage are presumed community and subject to equitable distribution. RCW 26.09.080.

b. Sole benefit rule

Debts may be assessed to the spouse who incurred debt without the other spouse's knowledge. A wife was held solely responsible for debts incurred without knowledge of husband during marriage. Although she claimed community purpose, she refused to provide documentation, uniquely in her control. *In re Marriage of Manry*, 60 Wn. App. 146, 150-1, 803 P.2d 8 (1991). Application of the sole benefit rule in a domestic violence case may lead to inequitable results when the debt is incurred due to the acts of the abusive partner.

c. The abused party may have had little or no control over what debts were being incurred.

It may be very difficult for a victim of domestic violence to enforce a court order requiring the abuser to pay debts. In these cases, the court may want to include language in court orders that holds the abused party harmless from claims ordered paid by the perpetrator. (See also Section VI, Bankruptcy Issues.)

C. **Unmarried Cohabitants**

Where the court finds parties engaged in a long-term pseudo-marital relationship, an equitable division of jointly held property may be made using similar factors as applied to married partners. *Foster v. Thilges*, 61 Wn. App. 880, 812 P.2d 523 (1991); *In re Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984); *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995); *In re Pennington*, 142 Wn.2d 592, 602, 14

P 3d 752 (2000). However, a meretricious relationship is not the same as marriage and laws involving distribution of marital property do not directly apply, nor may separate property or maintenance be awarded. *In re Sutton and Widner*, 85 Wn. App. 487, 492, 933 P.2d 1069 (1997). *But see, Koher v. Morgan*, 93 Wn. App 398, 968 P.2d 920 (1998) (assets purchased with commingled separate and community-owned property were subject to equitable distribution.) In *Gormley v. Robertson*, 120, Wn. App. 31, 38, 83 P.3d 1042 (2004), the Court held that the meretricious relations doctrine should be extended to same-sex couples.

III. MAINTENANCE/SPOUSAL SUPPORT

A. The Economic Consequences of Marital Dissolution

The economic consequences of marital dissolution can be more detrimental to women than men. Women still have not achieved economic equality in the paid labor market and, in 2012, women were 32 percent more likely to be poor than men in the United States. The U.S. Department of Labor reports overall women's earnings were 80 percent of men's earnings.[7] The foregoing realities apply to all women regardless of whether they have been subject to domestic violence or not. When domestic violence is superimposed onto the economic realities, the need for spousal maintenance is even more apparent.

B. Due to Long-Term Physical, Psychological, and Economic Effects of Domestic Violence, the Abused Party May Require Long-Term Rehabilitation in Order to Become Fully Self-Supporting.

RCW 26.09.090 provides that a court shall award maintenance "such amounts and for such periods of time as the court deems just, without regard to marital misconduct." Nonetheless, issues of domestic violence may be relevant in determining whether the statutory factors of RCW 26.09.090(1)(a)-(f) have been satisfied.

1. The abused party's diminished earning capacity due to any permanent or temporary physical injury caused by the violence. RCW 26.09.090(1)(e). *See, e.g., In re Marriage of Foran*, 67 Wn. App. 242, 258, 834 P.2d 1099 (1992) (Court properly considered evidence of abuse in assessing wife's present employability and prospective earning capacity in light of the post-traumatic stress disorder from

[7] U.S. Department of Labor, Bureau of Labor Statistics, "Highlights of Women's Earnings in 2012," (October 2013), http://www.bls.gov/cps/cpswom2012.pdf; T. Casey, "Women's poverty in the United States, 2012-Poverty Rates Remains High, Gender Poverty Gap Exists," (September 2013), Legal Momentum at http://www.legalmomentum.org/resources/womens-poverty-united-states-2012.

which she suffered as a result of the abuse.). *See also, Brossman v. Brossman*, 32 Wn. App. 851, 650 P. 2d 246 (1982).

2. The abused party's lost career opportunities as a result of the perpetrator preventing the other spouse from working outside the home, or from obtaining education or training enabling employment. RCW 26.09.090(1)(b).

3. The abused party's diminished earning capacity because the perpetrator's harassment at the abused spouse's job harmed work record or caused a loss of job.

4. The fact that the violence may have caused psychological harm to the abused party, resulting in counseling costs, loss of confidence, and/or loss of ability to work. RCW 26.09.090(1)(e).

5. Costs associated with the abused party's need to stay in hiding for safety reasons. RCW 26.09.090(1)(e).

6. Desirability of making maintenance award in lump sum to minimize contact, enforcement costs, and vindictive non-payment.

C. Mandatory Assignments

Where there has been domestic violence the court should provide that periodic payments for maintenance be paid by a wage assignment or direct payment from public retirement pursuant to the authority of RCW 26.09.138 and RCW 41.50.560, so that the abusive party does not have to increased opportunity to manipulate the abused party through inconsistent payment of maintenance.

IV. PAYMENT OF ATTORNEY FEES AND COSTS

Payment of costs and attorney fees may be awarded considering the respective needs and ability to pay of both parties (including appellate costs) pursuant to RCW 26.09.140. That statute allows payment directly to an attorney for a party and allows the attorney to enforce in his or her own name. Use of this provision may insulate a battered spouse from enforcement proceedings as to such fees. Equitable factors such as intransigence may also support an award of attorney fees without balancing the parties' financial resources. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

In addition, RCW 4.84.185 provides for orders in cases where a party has abused the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite." *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). The court may consider "the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services." *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). *See also, In re Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003); *Schumacher v. Watson*, 100 Wn. App.208, 212, 997 P.2d 399 (2000). Intransigence includes the abusive use of discovery, including four days of deposition of the opposing party. *In re Marriage of Cooke*, 93 Wn. App. 526, 528, 969 P.2d 127 (1999.)

In addition, intransigence does not have to be within the current litigation; it can be found for failing to follow a final order, thereby forcing an unnecessary return to court. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992); *In re Marriage of Fleckenstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961).

Intransigence includes "litigious behavior, bringing excessive motions, or discovery abuses," or pursuing meritless appeals for the purpose of delay and expense. *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989); *In re Matter of Kelley*, 170 Wn. App. 722, 740, 287 P.3d 12 (2012); *review denied*, 148 Wn.2d 1011 (2003); *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965). Intransigence also includes repeatedly filing unnecessary motions. *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985).

Intransigence includes making "unsubstantiated, false, and exaggerated allegations against [the other parent] concerning his fitness as a parent, which caused him to incur unnecessary and significant attorney fees." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003).

V. CHILD SUPPORT

A. Overview

Child support plays a crucial role in enabling an abused parent to live and raise children in a nonviolent home. The lack of adequate, enforced child support may force an abused parent to return to or remain in a violent situation in order to provide for the children. In addition, the payment or non-payment of child support may serve as another vehicle for the abusive parent to control or manipulate the abused parent. While federal legislation has improved the level and enforcement of child support, unpaid child support and inadequate awards still pose a major problem in domestic violence cases.

Although this chapter deals primarily with dissolution, child support issues arise in a number of legal contexts including dissolution, temporary support in dissolution, temporary support in restraining order statutes, support in unmarried parents' custody situations, modification of child support, and enforcement of child support orders through contempt motions. Most of the general issues regarding domestic violence and child support apply to all of these situations.[8]

B. Federal Statutes

1. Federal statutes require states to improve levels and enforcement of child support orders.

See Child Support Enforcement Amendments of 1984 (42 U.S.C. § 651 et seq.); Family Support Act of 1988: Pub. L. 100-485; 45 C.F.R. § 301 et seq., implementing Family Support Act of 1988; Full Faith and Credit for Child Support Orders Act; Uniform Interstate Family Support Act (UIFSA) adopted in Washington at Chapter 26.21 RCW; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) Pub. L. 104-193, 110 Stat. 2105, Pub. L. 104-208, 110 Stat. 3009, Pub. L. 104-327, 110 Stat. 4002, 4003, Pub. L. 105-18, 111 Stat. 191, Pub. L. 105-33, 111 Stat. 595, 597-602, 618-621, 623, 637-642, Pub. L. 105-185, 112 Stat. 578-580, Pub. L. 105-200, 112 Stat. 657, Pub. L. 105-277, 112 Stat. 2681-337, 2681-419, 2681-429, Pub. L. 105-306, 112 Stat. 2926, 2927, Pub. L. 105-336, 112 Stat. 3149, Pub. L. 106-78, 113 Stat. 1169, Pub. L. 106-169. *See* http://www.gpoaccess.gov/plaws/index.html

2. Persons applying for Temporary Assistance for Needy Families (TANF, formerly AFDC) assign rights to child support to state. *See* 42 USC § 602(a)(2): 45 C.F.R. § 232.11; WAC 388-422-0005 and 388-422-0010.

Violence can be the basis for a "good cause" exception to assignment of rights to state. (*See also* Chapter 10, Section XI.)

a. *See* 42 U.S.C. § 654(26) (proof of physical or emotional harm to child or harm to parent which compromises ability to care for child, or child conceived by incest or forcible rape is "good cause"); 45 C.F.R. § 232.42.

[8] For further information, see M. R. Henry and V. S. Schwartz, *A Guide for Judges in Child Support Enforcement*, 2d ed. (U.S. Dept. of Health and Human Services, Office of Child Support Enforcement, Child Support Technology Transfer Project, NCJFCJ).

b. *See* WAC 388-422-0020 (if cooperation is against the best interest of the child), which states:

(1) You can be excused from cooperating with DCS when you have a good reason. A good reason not to cooperate is also called good cause. You have a good reason when you can prove that:

(a) Cooperating with DCS would result in serious physical or emotional harm to you or the child in your care.

(b) Establishing paternity or getting support would be harmful to the child who:

(i) Was conceived as a result of incest or rape; or

(ii) Is the subject of legal adoption proceedings pending before a superior court; or

(iii) Is the subject of ongoing discussions between you and a public or licensed child placement agency to decide whether you will keep the child or put the child up for adoption. The discussions cannot have gone on for more than three months.

The standard for good cause for medical assistance is broader and may consider the best interests of the person who is being asked to cooperate.

3. **Child support guidelines as rebuttable presumption**

Federal legislation requires states to apply child support guidelines as a rebuttable presumption in determining the amount of child support, 42 U.S.C. § 667. Washington State's are found at RCW 26.19.

4. **Confidentiality**

Federal and state law strictly limit the disclosure of any information except for criminal enforcement or cooperation with other entitlement programs. Disclosure of information about an abused parent is not authorized, including her or his address. RCW 26.23.120, 45 C.F.R. § 303.21.

5. **Tax exemptions for dependents**

Federal tax exemptions for dependents: *See* 26 U.S.C. § 152 (support test in case of child of divorced parents).

The custodial parent (parent with the longer residential time annually) gets the dependency exemption unless that parent signs a waiver allowing the non-custodial parent the exemption. Care should be taken to minimize the need for interaction on a regular basis over such

details as tax exemptions where there is domestic violence.

C. State Statutes

1. No fault support

RCW 26.09.100(1) provides that in any proceeding where child support is sought "after considering all relevant factors but without regard to marital misconduct," the court shall order support paid by either or both parents, in accordance with the child support schedule (Chapter 26.19 RCW). Such support awarded may be subject to automatic periodic adjustment or, upon a showing of substantial change of circumstances, modification as to amounts to be paid. RCW 26.09.100(2).

2. Reasons for deviation

As noted above, the needs of children who have lived in a household where domestic violence has been present may be greater. Special assessment, medical, counseling, schooling, tutoring, or self-esteem building activities may be especially important for children who have witnessed domestic violence.[9] RCW 26.19.075(1)(c).

An abusive parent may argue that the cost of supervised visitation due to battering should be a reason for deviation downward. This justification should be examined carefully to assure the child is assured adequate support.

3. Future support orders

Where there has been domestic violence, the court should strive to craft an order of support that will minimize the need for ongoing contact between the parents over support issues in the future.

4. Mandatory assignments

Washington has wage assignment provisions found at RCW 26.18.070, (as mandated by 42 U.S.C. § 666) to prevent nonpayment or late payment of support. These should be incorporated in the support order. A provision for payment of attorney fees to the spouse required to seek assignment should also be made to provide access to

[9] P. Van Horn and B. McAlister Groves, *Children Exposed to Domestic Violence: Making Trauma-Informed Custody and Visitation Decisions*, 57 JUV. & FAM. CT. J. 51 (NCJFCJ, Winter 2006); A. Summers, *Children's Exposure to Domestic Violence: A Guide to Research and Resources* (NCJFCJ and Office of Juvenile Justice and Delinquency Programs, 2006).

the court for the spouse owed support that is not timely paid.

D. Medical insurance

The court should require that the custodial parent have direct access to the insurer. An abusive non-custodial parent may not cooperate with making insurance claims and reimbursement payments.

As the impact of violence by one parent against another can have long-range and devastating effects on children, orders regarding unreimbursed medical costs should include the cost of psychological counseling and/or treatment.

The order establishing the medical insurance obligation should also provide for attorney fees to the obligee spouse if such spouse has to resort to enforcement proceedings for health insurance as provided in RCW 26.18.170.

VI. BANKRUPTCY ISSUES

The court, in making custody, support, and property distribution orders, attempts to achieve what it believes is a just and equitable resolution. Some parties may defeat the goals of the judgment by filing petitions for bankruptcy. In particular, domestic violence abusers may attempt to sabotage their ex-partner's economic stability by attempting to discharge their obligations under family court orders. Because many types of debts are dischargeable in bankruptcy court, parties ordered to pay certain debts can avoid financial responsibility for them. Because the debts arose during the marriage, creditors may seek payment from the party not declaring bankruptcy.

Courts can take actions that reduce the likelihood of such results.

A. Debts Dischargeable in Bankruptcy

Lien for payment of debt is dischargeable in bankruptcy. *See, e.g., In re Stone*, 119 B.R. 222, 228 (Bankr. E.D. Wash. 1990). *See also In re Cloud*, 215 B.R. 870, 873 (Bankr. E.D. Ark. 1997), and *In re Husky*, 183 B.R. 218, 224 (Bankr. S.D. Cal. 1995).

A property division in a decree of dissolution without a monetary award "does not establish a creditor/debtor relationship" between the parties, and the party who is not awarded the property cannot subject the property to later bankruptcy proceedings. *In re Marriage of Penry*, 119 Wn. App. 799, 803, 82 P.3d 1231 (2004).

Under the Bankruptcy Reform Act of 1994, judgments received in a family law decree are non-dischargeable, but not automatically. 11 U.S.C. § 523(a)(15) (discharge does not apply to debt to a "spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit"). The creditor spouse must file an adversary complaint in the bankruptcy action within 60 days of the creditors meeting.

B. Not Dischargeable in Bankruptcy

1. Maintenance and Support

As provided in 11 U.S.C. § 523(a)(5), alimony, maintenance and child support payable to a spouse, former spouse or child are not dischargeable in bankruptcy. The assignment of a support obligation makes it dischargeable unless the assignment is to the government for entitlement to public assistance. Amounts, which are not clearly labeled as support such as a parent's obligation for a portion of schooling, day care, medical or other expenses, may be discharged unless established as support. The establishment must be done in the bankruptcy court within 60 days and cannot be extended.

An amount paid as spousal maintenance in a lump sum may be subject to challenge in bankruptcy court. The mere label may not be sufficient. If the maintenance is awarded in a lump sum due to domestic violence, a finding to that effect may help insure against discharge.

2. Marital Liens

See, e.g., Farrey v. Sanderfoot, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991) (11 U.S.C.A. § 522(f)(1) is not intended to thwart creditors who, sensing a bankruptcy, rush to file liens. A lien on real estate awarded to a divorcing spouse to equalize the distribution of assets cannot be avoided by filing for bankruptcy. *See also In re Marshall*, 300 B.R. 507 (Bankr. C.D. Cal. 2003).

C. Court Practices Which May Reduce Chances of Debt Discharge

1. Make sure all parties are familiar with bankruptcy lien laws.

2. Clearly indicate what is truly an order for support or maintenance.

3. Do not accept stipulated orders that label debts as orders for support or maintenance without making appropriate finding as to the need for support.

4. Where bankruptcy may be considered, avoid issuing liens to an abused spouse. Rather, order assets be liquidated and cash paid to the abused spouse who would otherwise be given the lien.

5. Make a written finding that the debtor spouse is able to pay the debts he or she is obligated to pay under the decree and that it is fair to require the debtor spouse to pay those debts.

E. **Automatic Stay**

Pursuant to 11 USC 362(a), most civil litigation is automatically stayed when a party has filed for bankruptcy. The automatic stay provision, however, is inapplicable to most aspects of a dissolution proceeding: Section (b)(2)(A) of the §362 provides that the stay provisions do not apply to:

> the commencement or continuation of a civil action or proceeding:
>
> (i) for the establishment of paternity;
> (ii) for the establishment or modification of an order for domestic support obligations;
> (iii) concerning child custody or visitation;
> (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
> (v) regarding **domestic violence** [emphasis added]**;**
>
> (B) of the collection of a domestic support obligation from property that is not property of the estate;

Washington law generally requires that ancillary matters (such as residential schedule of children, child support, and property and debt distribution) be decided at the time of the entry of a decree of dissolution. *In re Marriage of Little,* 96 Wn.2d 183, 634 P.2d 498 (1981). *Little* involved a consolidated appeal. In one case, the Supreme Court concluded that the trial court appropriately entered temporary child custody orders in conjunction with a decree of dissolution because bifurcation was in the best interest of the child. However, in the other consolidated matter, the Court was satisfied that the trial court abused its discretion in entering a decree and reserving issues of distribution of assets and liabilities until a future date, when no children were involved. *Accord*, *In re Marriage of Sedlock*, 69 Wn. App. 484, 84 P.2d 1243 (1993). The failure to address

issues of property and debt distribution in the decree, however, does not deprive the court of the jurisdiction to address the issues at a future time. *In re Marriage of Possinger*, 105 Wn. App. 105 Wn. App. 326, 332, 19 P.3d 1109, *review denied*, 145 Wn.2d 1008 (2001) (Quoting *Little)*

Although there are no cases directly on point, it would appear that at least where the parties so stipulate, it would be appropriate to enter a decree of dissolution addressing all issues other than property and debt distribution while a bankruptcy proceeding is pending.

VII. TEMPORARY ORDERS, PENDENTE LITE ORDERS

A. Order for Exclusive Use of Marital Premises

Under RCW 26.09.060, it can be argued that the court can award exclusive use of the family home or vehicle pending further litigation to either of the parties without regard to the respective interests of the parties in the home or vehicle.

B. Order for Temporary Spousal Maintenance or Child Support

1. Temporary support can play a critical role in protecting the abused party and the children by freeing the abused party from the financial control of the perpetrator.

   RCW 26.09.060 allows the court to provide for temporary child support and maintenance. An award of attorney's fees during the pendency of a dissolution is authorized by RCW 26.09.140.

2. Injunctive Relief Available Under RCW 26.09.060

   a. The court may enjoin disposition of property or liabilities except in the ordinary course of business or for necessities of life and require notification to the moving party of proposed extraordinary expenditures after the order is issued.

      The notice provision should require notice to be made to the attorney for the moving party where a no-contact order exists.

   b. The court may enjoin disturbing the peace of the other party or child.

   c. Upon a finding that a party's possession of a dangerous weapon presents a serious and imminent threat to public safety

or to an individual's health or safety, the party may be required to surrender any deadly weapon in his or her immediate control to the sheriff, counsel, or another person designated by the court. RCW 9.41.800(4).

Such an order may be entered without notice to the party only upon a finding that irreparable injury could result. Violation of such restraining order with knowledge of the content **is a criminal offense** under this statute and subjects the violator to arrest. Orders issued under RCW 26.09.060 do not require any additional warning of possible criminal penalties, unlike orders under RCW 26.50. *State v. Turner*, 118 Wn. App. 135, 141, 74 P.3d 1215 (2003).

C. Motions for Reconciliation

1. The court may want to evaluate whether a motion for conciliation or reconciliation in a domestic violence case will compromise the abused party's safety.

   These motions can force the abused party to meet with the perpetrator, and may be used by the perpetrator to delay a divorce, force an attempt at reconciliation, or force the abused party to attend marital counseling.

2. RCW 26.09.030(3) provides that:

   If the other party denies that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

   (a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or

   (b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing.

   Although counsel may argue that the word "shall" requires the court to make a transfer for reconciliation services on demand, it is clear from RCW 26.09.030(1) and (a) that the court may conclude that the marriage is irretrievably broken without such a transfer.

CHAPTER 13
DOMESTIC VIOLENCE AND TRIBAL COURTS[1]

INTRODUCTION

In recent years there has been improvement in enforcement of domestic violence protection orders across tribal and state jurisdictions. However, for many judges, contact with tribal courts or tribal court–issued protection orders may be rare. This chapter is designed to provide general information about Native American communities and tribal courts located in Washington.

I. Native American Communities in Washington State

A. Native Americans in Washington State

There are twenty-nine federally recognized Indian tribes located in Washington.[2] Each tribe is a sovereign entity with a governing body that is responsible for the administration of justice, promulgation of laws, and law enforcement for the tribe. The twenty-nine tribal communities vary in geographic size, economic resources, customs and traditions, population, and natural resources.

Indian tribes are defined by 25 U.S.C. § 1301, as any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government. Powers of self-government include executive, legislative, and judicial functions.

In 2010, the U.S. Census Bureau counted over half of Native Americans and Alaska Natives as living in ten states.[3] Washington State ranked ninth with a population of

---

[1] This Chapter was updated in 2014 by Randy Doucet, Chief Judge of the Lummi Nation Tribal Court, and Mark Pouley, Chief Judge of the Swinomish Tribal Court with input from Tom Tremaine, Presiding Judge at the Kalispel Tribal Court. The original chapter, written in 2001, was completed with input from a Reviewing Committee consisting of former Chief Judge Mary Wynne, Colville Federated Tribes; Judge Julian Pinkham, Children's Court of the Yakima Nation; Commissioner Katherine Eldemar, Whatcom County Superior Court; Judge Susan Owens, Lower Elwha Tribal Court and Clallam County District Court; Dan Kamkoff, Director of the Lummi Victims of Crime; Dr. Anne Ganley, Domestic Violence Expert; Gloria Hemmen, Office of the Administrator for the Courts; and Margaret Fisher, Project Director, Office of the Administrator for the Courts, and updated in 2005 by Randy Doucet.

[2] See Attachment 1 of this chapter for a list of federally recognized Indian tribes in Washington State.

[3] T. Norris, P.Vines, & E. Hoeffel, *The American Indian and Alaska Native Population: 2010* (Washington, DC: U.S. Census Bureau, January 2012) (Census 2010 Brief), available at: http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

103,869 Native Americans and Alaska Natives.[4] In 2010, the U.S. Census Bureau reported 2,932,248 Native Americans and Alaska Natives residing in the United States.[5]

B. Tribal Governments

Generally, modern tribal governments are structured in such a way that the voting membership of each tribe, known as the general council, elects a tribal council that then represents the interests of the general council. The tribal council elects from among its membership an executive committee, which usually consists of a chairperson, vice-chairperson, secretary, and treasurer. The executive committee has the power to act on behalf of the tribal council in certain matters and possesses important appointive powers.[6]

An example of a tribe that has combined traditional and modern organizational practices in governing is the Yakama Nation located in Toppenish, Washington. The Yakama government is divided into three levels, each with its own functions. The tribal council establishes policy and preserves treaty rights. The administrative level supervises the administration and planning of the government. The operations level directs programs designed to meet the needs of the community. Finally, the general council oversees the entire government structure through regular meetings.[7]

C. Tribal Law

Tribal governments have the authority to adopt laws to govern activity within the jurisdiction of the tribe. This authority includes establishing legal structures and judicial forums for administration of justice. Tribes exercise personal jurisdiction over member and non-member Indians. Tribes may exercise subject matter jurisdiction over areas such as criminal, juvenile, and civil actions.[8]

It is not uncommon for tribes to adopt legal codes from other tribes and jurisdictions. Some tribes hire legal professionals as code writers to assist in drafting codes that better suit the particular needs and circumstances of each tribal community. Each tribe may have different areas of law over which it exercises jurisdiction. However, most tribes have adopted codes for criminal and civil procedure, natural resources protection, juvenile delinquency and dependency actions, and domestic relations. Some tribes may allow for the use of federal law, state law, or common law when there are gaps in their own tribal codes. In complex cases, some tribal courts may allow parties to stipulate to the use of state or federal rules of evidence or civil procedure.

Usually, tribal criminal laws are similar to criminal laws adopted by the state, although there may be differences in the penalties due to the limitations placed on tribes by the

---

[4] *Id.*
[5] *Id.*
[6] Sharon O'Brien, *American Indian Tribal Governments* (University of Oklahoma Press, 1989), 190.
[7] *Id.*
[8] *Id.*

Indian Civil Rights Act. In criminal matters tribes tend to place an emphasis on rehabilitation over punishment. Tribal court procedures tend to be streamlined to provide easy access to justice for pro se litigants. Finally, parties are encouraged to resolve civil disputes in a non-adversarial manner whenever possible.

The majority of tribes have constitutions, which establish the basic framework of the tribal government. In some instances, the constitutions contain the provisions for membership in the tribe. Generally, the Indian Civil Rights Act provides civil rights, which is sometimes incorporated into tribal constitutions.[9] The Confederated Tribes of the Colville Reservation located in Nespelem, Washington have their own civil rights code.

D. Tribal Courts

Currently there are twenty-eight courts serving the twenty-nine federally recognized tribes in Washington.[10] Tribal judges are generally appointed to serve a specific term, although some tribes elect tribal judges.[11] Although most tribal judges are attorneys, some tribes allow for non-lawyers to serve as judges. There are tribal judges who speak both their tribal language and English. Not all tribes require tribal judges to be members of the tribe, although there is a preference to have tribal members or Native Americans from other tribes serve as judges.

Appeals from tribal trial courts are brought before each tribe's own appellate court. Some tribes have standing appellate courts, while others convene appellate courts as necessary. Appellate panels might be made up of appointed appellate judges, or tribal judges from other tribes, or in some cases tribes may appoint attorneys familiar with Indian law to serve as appellate judges.

For criminal matters, most tribes employ both prosecutors and public defenders. However, smaller court systems may have neither, because of insufficient funding. Legal representation may be provided by attorneys licensed in Washington, or persons familiar with the laws, customs, and traditions of the tribe.

Tribal courts use court procedures similar to those found in state and federal courts. Tribal courts do have limitations on their authority over certain acts and persons based on United States Supreme Court decisions and by federal law. Tribal courts do handle a variety of cases ranging from civil infractions, domestic relations, natural resource violations, dependency and juvenile delinquency actions, criminal, and general civil litigation. There is not a separation between levels of trial courts as found in the state judicial system, such as the district and superior courts. However, some tribes have established separate juvenile and administrative courts.

---

[9] See Attachment 4 of this chapter for the text of the Indian Civil Rights Act of 1968.

[10] Washington State Tribal Directory, Governor's Office of Indian Affairs, March 2013.

[11] The Lummi Nation Code of Laws, 1.03.020, provides for a six (6) year appointment for each judge by the Tribal Council.

Few tribes have their own jails or juvenile detention facilities. Therefore, many tribes contract to use local county jail facilities, or they contract with other tribes that have jail facilities.

II. Domestic Violence in Tribal Communities

A. Victims in Tribal Communities

For an overall presentation of domestic violence issues, the reader should refer to Chapter 2, *Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases*, located in this manual.

According the National Intimate Partners and Sexual Violence Survey (NISVS), four out of every ten American Indian or Alaska Native women (43.7%, and 46% respectively) have been the victim of rape, physical violence, and/or stalking by an intimate partner in their lifetime. In addition, nearly half of American Indian or Alaska Native men report experiencing rape, physical violence and/or stalking by an intimate partner during their lifetime.[12]

According to the U.S. Centers for Disease Control, 39% of American Indian and Alaska Native women will be subjected to violence by an intimate partner in their lifetimes, compared to 29% of African American women, 27% of White women, 21% of Hispanic women, and 10% of Asian women.[13]

Following statutory directive in section 904 of the 2005 Violence Against Women Reauthorization Act of 2005, Pub.L. No.109-162, 119 Stat. 2960 January 5, 2006 , the U.S. Department of Justice, National Institute of Justice (NIJ), commissioned a study and report on the literature and research on violence against American Indian and Alaska Native Women, which was issued in August of 2008.[14]

The report noted, that in addition to legal barriers that may impede American Indian and Alaska Native victims from obtaining assistance from the legal system to address domestic violence, there are numerous other barriers victims face in obtaining safety. Some American Indian and Alaska Native reservations are physically isolated, posing a

---

[12] Black, M.C., Basile, KC, Breiding, M.J., Smith. S.G., Walters, M.L., Merrick, M.T., Chen, J. & Stevens, M.R. (2011). *The National Intimate Partners and Sexual Violence Survey. (NISVS): 2010 Summary Report*, Atlanta, GA. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention

[13] "Adverse health conditions and health risk behaviors associated with intimate partner violence --- United States, 2005,"*Morbidity and Mortality Weekly Report (*MMWR) 57(05): 113-117, Centers for Disease Control and Prevention. February 8, 2008. Available from: www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm#tab1.

[14] Bachman, R., Zaykowski, H., Kallmyer, R., Poteyeva, M. & Lanier, C., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known (*National Institute of Justice, August 2008), Doc. 223691 [hereinafter NIJ Report]. Available from: www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

significant geographical barrier to victims residing on these reservations from obtaining many services that may be available to urban women. Many victims do not have the financial resources to leave the reservation and reestablish a household in another community to leave a domestic violence situation. In addition, due to limited tribal government resources, there is often a lack of "safe houses" or shelters on reservations, as well as other victim services.

In some of these communities, transportation and telephone services are difficult to access. American Indian and Alaska Native women who reside on very rural and isolated reservations must often travel great distances to obtain medical care.[15]

Native American victims may be reluctant to seek assistance from tribal victim service agencies because of confidentiality concerns about their victimization being shared through the community. Even in urban communities, these fears are often shared, where a local urban American Indian and Alaska Native community may be similar in closeness to a rural village.

Many Native American victims are reluctant to access non-Native sources of support and help.[16] To help overcome the reluctance of Native American victims to seek assistance, some reservations have implemented accessible on-reservation assistance programs that have increased culturally relevant advocacy resources for victims.[17]

---

[15] *Id, at 114.*
[16] *Id, at 115.*
[17] *Id.*, at 126-127

B. Domestic Violence Perpetrators in Tribal Communities

For the purposes of tribal enforcement of protection orders and criminal prosecution of domestic violence crimes, there are two classifications of perpetrators found in Native American communities: Native Americans and non-Native Americans. Tribal courts have criminal jurisdiction over tribal members and other Native Americans.[18] Therefore, tribal courts have the authority to issue and enforce civil and criminal protection orders against any Native American by means of arrest and prosecution for violation of protection orders.

Tribal enforcement of civil protection orders and criminal domestic violence statutes involving non-Indian respondents can present complicated jurisdictional issues. Among Native American women who are victims of rape and assault, an average of 63 percent describe the offender as non-Native.[19] Tribal courts generally do not have criminal jurisdiction over non-Indians, with the exception of certain domestic violence cases, as discussed below, in sections III, A and V, C. Therefore, non-Indians may not be prosecuted and jailed by tribal authorities in most criminal cases.[20] If a tribal court were to issue a civil protection order against a non-Indian, enforcement by tribal authorities for violations through arrest and prosecution probably could not be accomplished. However, tribal law enforcement does have the authority to stop and detain non-Indians for state authorities.[21]

For more information concerning domestic violence perpetrators or substance abuse related to domestic violence, the reader should see Chapter 2 and Appendix A of this book.

III. Enforcement of Protection Orders - Full Faith and Credit Laws

The following scenarios illustrate some of the difficulties that victims may have encountered historically when trying to have protection orders enforced across tribal and state jurisdictions. Recent amendments to the federal Violence Against Women Act and the Indian Civil Rights Act, [22] Washington state full-faith and credit laws, and numerous other actions are all working to alleviate the domestic violence crisis in Indian Country. To successfully extend protection to victims and the Native American communities will require cooperation and coordination between the state and tribal judicial systems.

- A Native American woman living within the boundaries of a local Indian reservation is assaulted by her non-Native American boyfriend. When she seeks a protection order in the tribal court, she is told that she must travel to the state

[18] 25 U.S.C. 1301.
[19] Bachman, R., *supra* at note 14.
[20] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).
[21] *State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332, *cert. denied*, 510 U.S. 931 (1993).
[22] Pub. L. No. 113-4, 127 Stat. 110 (March 7, 2013).

court to seek a protection order. Once she has obtained the state protection order, she is advised to register the protection order with the tribal police. The tribal police inform her that since the offender is a non-Native American, the tribal police can only detain him if he violates the order. She will have to call the sheriff's department to have him arrested and prosecuted if he violates the protection order. The 2013 amendments to the Federal Violence Against Women Act, are aimed at alleviating this major gap in protecting victims in Native communities.

- A tribal court issues a protection order to a Native American victim against her Native American ex-boyfriend. She travels off the reservation to a local shopping center. Upon returning to her car she notices a note placed under her windshield wiper. When she looks around to see who might have left the note, she sees her ex-boyfriend sitting in a car watching her. She immediately calls the local police. A city police officer arrives, reviews the protection order and informs the victim that the city police department does not enforce tribal protection orders due to liability reasons. Federal and State full-faith and credit provisions should remove this barrier to enforcement of tribal court orders.

- A non-Native American woman living on a reservation obtains a protection order in the state court against her non-Native American ex-husband. When her ex-husband arrives at her home intoxicated and demanding entry, she calls 911. The dispatcher notifies a sheriff's deputy to respond who is twenty minutes from the scene. The tribal police are only five minutes away. Cross-deputization of tribal officers and mutual aid agreements between tribal and state governments can help reduce this continuing problem.

These hypothetical scenarios illustrate some of the historical jurisdictional problems associated with enforcement of protection orders between tribes and the state of Washington. The continuation of any of these issues should be of mutual concern to both tribal and state officials. Jurisdictional issues on reservations are complex. Determining who has jurisdiction often depends on location of the incident, type of crime, whether the protection order is civil or criminal, and whether the offender is Native American or non-Native American.

The jurisdictional maze that is found on many reservations often prevents effective law enforcement. In emergency situations, there is little time to work through complex jurisdictional issues. Further, as a result of a lack of effective communication, procedures, and agreements between tribal and local governments, there are instances when authorities having jurisdiction may not be the nearest law enforcement agency, while closer law enforcement agencies may not be called to respond because they lack jurisdiction. Historically, some tribal judges felt compelled to recommend that tribal members also obtain a protection order in state court, to avoid the possibility that the tribal protection order may not be enforced outside the boundaries of the reservation, especially if the batterer is a non-Indian. Changes in state and federal law should alleviate the need to direct victims of violence to these extraordinary steps, but it will require

continued development of the law, and education of law enforcement, the courts, and the public to the expanded authority of tribal courts to protect the citizens of tribal communities.

A. Violence Against Women Act

The Violence Against Women Act (VAWA)[23] encourages cooperation between tribal and state law enforcement agencies and courts to improve criminal justice and community responses to domestic violence, dating violence, sexual assault, and stalking. VAWA was reauthorized and expanded in 2000, 2005, and 2013.

The court provisions of VAWA, codified at 18 U.S.C. 2265, directs that states, U.S. territories, and Indian tribes enforce valid civil and criminal protection orders issued by sister states, territories, and tribes as though they had been issued by the non-issuing, enforcing state or tribal court. VAWA does not require prior registration or pre-certification of an order of protection in an enforcing state in order to receive full faith and credit. The only requirement for interstate or inter-jurisdictional enforcement of a protection order is that the foreign order be valid as defined by VAWA.[24]

The purpose and rationale is simple: Victims who receive protection from any court, tribal or state, are entitled to protection throughout the United States and Indian country.[25] Whether a victim of domestic violence is crossing state or reservation lines for business, pleasure, or fleeing from her batterer, she is entitled to the protections afforded by the original state or tribal protective order.[26]

The 2013 reauthorization of VAWA granted tribal courts full civil jurisdiction to issue orders of protection against any person that commits acts of violence within that tribe's land. Under 18 U.S.C. §2265 (e):

> (e) Tribal Court Jurisdiction. For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising

---

[23] Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub.L. No.103–322,108 Stat. 1902 (September 13, 1994), reauthorized in 2000 in Division B of the Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, Pub.L. No. 106-386, 114 Stat. 1491, (October 28, 2000), in 2005, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R.3402, Pub.L. No. 109-162, 119 Stat. 2960 (Jan.5, 2006), and again in the Violence Against Women Reauthorization Act of 2013, Pub.L. No. 119-4, 127 Stat. 54 (March 7, 2013).

[24] 18 U.S.C.A. § 2265.

[25] Byron R. Johnson and Neil S. Websdale, eds., *Full Faith and Credit: Passport to Safety* (Reno, NV: National Council of Juvenile and Family Court Judges, 1997), 88.

[26] *Id*.

anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

In addition, this statutory amendment addresses potentially ambiguous language found in the 2000 amendments of VAWA, and overturns a holding in the Federal District Court of Western Washington that appeared to limit tribal court jurisdiction to protect victims of violence that occurs in Indian country.[27]

VAWA did not originally provide for enforcement procedures for protection orders. Establishing procedures for enforcement of foreign orders of protection has been left to the states and tribes. Since Section 2265 was enacted, a majority of states have addressed the issue of enforcement of out-of-state protection orders by amending their state domestic violence codes or statutes.[28] Washington adopted such a statute in 1999.[29]

B. Foreign Protection Order Full Faith and Credit Act—Washington State

Washington's Foreign Protection Order Full Faith and Credit Act removes barriers faced by persons entitled to protection under foreign protection orders.[30] The act also provides for criminal prosecution of violators of foreign protection orders.

The act provides that protection orders issued by tribal courts are to be given full faith and credit by Washington courts. The act defines foreign protection orders as injunctions or other orders related to domestic or family violence, harassment, sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against another person issued by a court of another state, territory, or possession of the United States, Puerto Rico, or the District of Columbia, or any United States military tribunal, or a tribal court, in a civil or criminal action.
To be enforced, a foreign protection order must be valid. The act prescribes that a foreign order is valid if it meets the following criteria:[31]

- If the issuing court had jurisdiction over the parties and subject matter under the law of the state, territory, possession, tribe, or U.S. military tribunal.

---

[27] Subsection (e) merely "confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians." *Statement of Thomas J. Perrelli, Assoc. Attorney General Before the Committee on Indian Affairs, United States Senate Legislative Hearing on Senate Bills 872, 1192, and 1763,* page4, November 10, 2011. *See also,* Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty,* American Constitution Society for Law and Policy (March 2009). This affirmation of prior Congressional intent "would effectively reverse a 2008 decision from a Federal district court in Washington state", in reference to the UNREPORTED decision in *Martinez v. Martinez*, No. C09-5503 FDB (W.D. Wash 2008), *Perrelli testimony at p. 4.*

[28] Seema Zeya, *Progress Report on Full Faith and Credit Enabling Legislation and Implementation Procedures* (Battered Women's Justice Project).

[29] Laws of 1999, ch. 184, §1.

[30] The act amended RCW 26.10.220, 26.26.138, 26.50.010, and 10.31.100, adding a new chapter to RCW Title 26.

[31] RCW 26.52.020.

- There is a presumption in favor of validity where an order appears authentic on its face.
- A person under restraint must be given reasonable notice and the opportunity to be heard before the order of the foreign state, territory, possession, tribe or United States military tribunal was issued; provided, in the case of ex parte orders, notice and opportunity to be heard was given as soon as possible after the order was issued, consistent with due process.

Division III of the Washington Court of Appeals has upheld a criminal prosecution by the State of Washington for a violation of a tribal protection order. *State v. Esquivel,* 132 Wash. App. 316, 132 P.3d 751 (2006). The Court of Appeals held that a defendant could be prosecuted by the State for violating a restraining order issued by a tribal court, if the order was entered consistent with tribal law, even if it was inconsistent with Washington state protection order requirements.

RCW 26.52.050 provides for peace officer immunity. "A peace officer or a peace officer's legal advisor may not be held criminally or civilly liable for making an arrest under this chapter if the peace officer or the peace officer's legal advisor acted in good faith and without malice."

RCW 26.52.030 provides that out-of-state courts may send a facsimile or electronic transmission to the clerk of the court of Washington as long as it contains a facsimile or digital signature by any person authorized to make such transmission. Because some tribal courts are located at great distances from county superior courts, procedures for registration of foreign protection orders should include a provision for filing of a faxed copy or e-mail of the original protection order from tribal courts. These provisions will prevent delays due to transportation problems or inclement weather.

C. Washington's Civil Rule 82.5

In 1990, the Washington State Forum to Seek Solutions to Jurisdictional Conflicts Between Tribal and State Courts recommended the adoption of Civil Rule 82.5. Retired Chief Justice Vernon R. Pearson, serving as chairperson of the Forum, submitted the proposed rule.[32] In 1995, the Washington Supreme Court adopted the rule, with minor modifications, which provides for full faith and credit for tribal court orders and judgments.

Rule 82.5 provides that superior courts shall recognize, implement, and enforce the orders, judgments, and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment, or decree: (1) lacked jurisdiction over a party or the subject matter; (2) denied due process as provided by the

[32] *Washington State Forum to Seek Solutions to Jurisdictional Conflicts Between Tribal and State Courts: Final Report* (Conference of Chief Justices National Coordinating Council, 1990), 2 [hereinafter CCJNCC Final Report].

Indian Civil Rights Act of 1968; or (3) does not reciprocally provide for recognition and implementation of orders, judgments, and decrees of the superior courts of the state of Washington.

IV. Tribal Domestic Violence Laws and Tribal Protection Orders

A. Tribal Domestic Violence Laws

Some tribes have adopted specific domestic violence codes. There is no uniform tribal domestic code; therefore, tribes that have adopted domestic violence codes may have differing provisions similar procedures, legal standards, and relief-granted remedies. Many tribal codes are now available online. If tribal laws cannot be found online, copies can usually be obtained by contacting the tribal court clerk's office.

B. Tribal Court Protection Orders

Not all Indian Tribal domestic violence protection orders are issued pursuant to each tribe's domestic violence laws. Generally, domestic violence protection orders may be issued pursuant to tribal civil domestic violence codes, while other tribes rely on general criminal or civil statutes to address the issue.

For example, the Lummi Nation, located in Bellingham, has an extensive domestic violence code, which was revised in 2005. Protection order cases begin with an ex parte temporary domestic violence protection order. Prior to issuance of an ex parte domestic violence protection order, the petitioner is required to provide sworn testimony as to the specific facts of the alleged domestic violence incident and the necessity for immediate issuance of a protection order without notice to the respondent. If the judge determines that an emergency does exist, a temporary order of protection may be issued that same day. Typically, within 14 days after issuance of the temporary ex parte protection order is issued, the court will hold a hearing with both parties present.

The temporary ex parte order usually expires on the day set for the hearing. Most tribal jurisdictions will schedule a hearing on an ex parte order within three days if the petitioner requests temporary custody of children, or has requested possession of a shared residence or vehicle.

After a hearing, if supported by the facts and law, the court will issue a "permanent" domestic violence protection order. Although titled "permanent," these orders usually expire one year after issuance and can be renewed by the court if warranted.

The Lummi Nation domestic violence code requires that tribal law enforcement provide for the safety of victims and family members by arresting the primary physical aggressor and by confiscating any weapons that may have been used to perpetrate domestic violence. The code provides that the tribal police are to assist the victim to obtain transportation to a shelter or medical facility. Finally, tribal police are to provide the

victim with notice of the rights of the victim and remedies and services available. Examples of similar provisions for advising victims of their rights and providing transportation can be found in the Spokane Tribal Code, Puyallup Tribal Code, and Quinault Tribal Code.

Common relief provisions authorized in tribal court domestic violence protection orders include:

- Restraining the perpetrator from committing further acts of domestic violence, family violence, dating violence, or stalking.
- Excluding the respondent from the residence, workplace, school, and grounds of the dwelling of the petitioner.
- Awarding temporary custody and/or establishing temporary visitation rights, or restraining the respondent from interfering with child custody or removing a child from the jurisdiction of the court.
- Awarding temporary use of a shared residence or vehicle.
- Restraining one or both parties from transferring, encumbering, concealing, or disposing of property.

Two issues that commonly arise regarding tribal court–issued domestic violence protection orders is (1) enforcement and (2) conflicts between tribal and state court orders regarding child custody and visitation.

1. Enforcement - Washington's Project Passport.

To provide greater consistency in the enforcement of protection orders across jurisdictions, many tribes and Washington State, along with many other states, have adopted uniform conventions of placement of certain information on the first page of a protection order. The relative uniformity is intended to assist law enforcement officers in identifying that a court order is a domestic violence protective order and thus should be given full faith and credit.

2. Conflicts between tribal and state court orders regarding custody and visitation.

Occasionally, conflicts in tribal and state court orders occur when a custody case has been filed in one jurisdiction and a protection order petition has been filed in another. Tribal courts have authority to make temporary orders regarding custody and visitation in domestic violence protection orders. Temporary relief regarding custody and visitation is granted with the expectation that the parties will address the custody matter in a separate custody case. Tribal courts usually allow modification of the relief ordered in the domestic violence protection order to conform to the custody and visitation orders. The main concern is that the custody

and visitation order issued in the custody case has taken into consideration the incident leading to the issuance of the domestic violence protection order.

Practice pointer: Ask for a copy of the orders from the other jurisdiction to review the specific language of the foreign order to determine if there are actually conflicts in the orders.

V. Criminal Jurisdiction in Indian Country

Domestic violence may involve major crimes and less serious crimes to persons or property. This section discusses the authority by which tribal courts can enforce tribal criminal laws. Tribal courts are limited in the types of crimes and persons over which they can exercise criminal jurisdiction. There are also limits on sentences that can be imposed upon Native Americans convicted of crimes taking place within reservation boundaries.

A. Indian Civil Rights Act of 1968[33]

In 1968, Congress passed the Indian Civil Rights Act (ICRA).[34] The ICRA provided for civil rights for all persons who are subject to the jurisdiction of tribal governments. The ICRA also placed limits on the maximum penalties that tribal courts could impose for each criminal offense. The maximum penalty for any one offense is limited to one (1) year in jail, and/or a fine of $5000.

In 2010, the Tribal Law and Order Act[35] was approved, providing tribes with expanded sentencing authority of three (3) years in jail and/or a fine of $15,000 for any one offense with a maximum of nine (9) years in jail. Tribes may opt in to this expanded sentencing authority if they meet the following additional provisions of ICRA;

1. The offense is one that would be punishable by more than a year if prosecuted in state or federal court;
2. Defendants have a right to effective assistance of counsel, appointed at no expense if indigent;
3. The judge assigned to the matter must be licensed by any jurisdiction and possess sufficient legal training to hear criminal matters;
4. The tribe's laws must be publicly available for review; and

[33] 25 U.S.C.A. § 1301-03.
[34] Pub. L. 90-284, title II, 82 Stat. 77 (Apr. 11, 1968).
[35] Pub.L. No. 111-211, H.R. 725, 124 Stat. 2258, (July 29, 2010).

5. The tribal court must maintain of record of all proceedings.

See Attachment 4 for the complete text of ICRA.

B. Indian Major Crimes Act[36]

The Indian Major Crimes Act provides that any Indian committing a felony against the person or property of another Indian or other person—namely, murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in Section 1365 of Title 18), assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under Section 661 of Title 18 within Indian country—shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. These crimes may be investigated by the FBI and referred to the U.S. Attorney's Office for prosecution in federal district court. Tribes may prosecute cases when the U.S. Attorney declines to prosecute, with the penalty limitations imposed by the ICRA.

C. Non-Native Americans

In the majority of cases tribes do not have general criminal jurisdiction over non-Native Americans.[1] The 2013 reauthorization of VAWA, however, amended the Indian Civil Rights Act to recognize and affirm tribes' inherent authority to exercise special domestic violence criminal jurisdiction over all persons, including non-Indian perpetrators. This expanded jurisdiction is effective after March 7, 2015,[37] is limited to a specific nature of crime, and requires tribes to assure defendants prosecuted are afforded due process. The limitations and requirements include;

1. Tribes may only prosecute crimes involving domestic violence, dating violence, and violation of protection orders.
2. Prosecuted perpetrators must have "sufficient ties to the tribe" to warrant exercise of jurisdiction. "Sufficient ties" is defined as residing on the reservation, working for the tribe, and/or being the spouse or dating partner of a member or Native resident of the tribe.
3. This authority does not include prosecuting crimes between two non-Indians or crimes that occur outside of the tribal territory.
4. Tribes that prosecute non-Indians must assure that defendants have all of the rights afforded to a defendant in state or federal court, as well as all of the rights and protections created under the Indian Civil Rights Act as amended by the Tribal Law and Order Act (discussed above).
5. Jury pools must be drawn from sources that reflect a fair cross-section of the community and may not systematically exclude any distinctive group, including non-Indians.

---

[36] Ch. 341, 23 Stat. 385 (Mar. 3, 1885), codified at 18 U.S.C.A. § 1153.

[37] A limited number of tribes may exercise this jurisdiction prior to this date as part of a "pilot project" authorized by the Act.

6. Defendants prosecuted and sentenced to jail under this authority may appeal to a tribal court of appeals and have a right to file a Habeas corpus petition in federal district court.

Even in cases where the tribal court may not have jurisdiction to prosecute a non-native criminally, tribal police have been held to have authority to stop and detain non-Native American law violators within the boundaries of reservations until state authorities arrive.[38]

D. Tribal Exclusion

Tribes have a unique remedy they may exercise against non-members of the tribe known as exclusion. This remedy, often guaranteed by treaty, permits tribes to exclude unwanted persons from their reservations. The power of exclusion might be viewed as quasi-criminal, and can be exercised against non-Indians.[39] Tribes do not have authority to exclude from their reservations federal officials engaged in carrying out their duties. Non-members may be excluded from within the exterior boundaries of reservations for violating tribal law or for felony convictions in state or federal court. However, owners of non-trust land may not be excluded from the land they own. Persons to be excluded are given notice and the opportunity for a hearing before the tribal court. The person to be excluded may appeal an unfavorable decision to the Tribal Court of Appeals. Those persons excluded who refuse to obey the order may be referred to the United States Attorney.

VI. Child Custody and Visitation Issues

Some tribal domestic violence codes provide for temporary child custody arrangements to be made through protection orders. Child custody and visitation issues can make for complex problems when issuing and enforcing domestic violence protection orders when there are conflicting orders issued by two jurisdictions.

A. Tribal Court Jurisdiction to Issue and Enforce DV Protection Orders

When child custody or visitation is presented as an issue within a protection order request, judges should question the parties about the existence of a current custody or visitation order from another court. At a minimum, judges should note the existence of the previously issued custody or visitation order in the protection order.

In protection order cases involving non-Indians, the Violence Against Women Reauthorization Act of 2013 clarifies that tribal courts have full civil jurisdiction to both issue and enforce domestic violence protection orders:

---

[38] *State v. Schmuck*, *supra* note 21.

[39] William C. Canby, Jr., *American Indian Law in a Nut Shell*, 3rd ed. (St. Paul, Minn.: West Group, 1998), 165.

a. Regardless of whether they involve member Indians, non-member Indians, or non-Indians;
b. In matters arising anywhere within the Tribe's "Indian Country." (This includes all tribal trust, individual trust, and fee land within the exterior borders of the Tribe's reservation, as well as other lands described in 18 U.S.C. 1151).

18 .S.C. 2265 (e).

B. Full Faith and Credit for Child Custody Provisions in Tribal Court Domestic Violence Protection Orders

Washington's Foreign Protection Order Full Faith and Credit Act provides that, "any disputes regarding provisions in foreign protection orders dealing with custody of children, residential placement of children, or visitation with children shall be resolved judicially. The proper venue and jurisdiction for such judicial proceedings shall be determined in accordance with RCW 26.27 and in accordance with the parental kidnapping prevention act, 28 U.S.C.A. 1738A."[40]

RCW 26.52.080 further provides that law enforcement officers shall not remove a child from his or her current placement unless:

- There is a writ of habeas corpus to produce the child issued by a superior court of Washington State, or
- There is probable cause to believe the child is abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.

Washington's Foreign Protection Order Full Faith and Credit Act plainly states that venue and jurisdiction issues concerning child custody are decided in accordance with the UCCJEA. RCW 26.52.080.

This was consistent with VAWA as originally passed in September of 1994. At that time the definition of "protection order" specifically excluded child custody orders.[41] However, in the 2006 amendments to VAWA, Congress expanded the definition of covered protection orders:

> [A]ny support, *child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or stay away injunction* pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, dating violence, sexual assault, or stalking. 18 U.S.C. 13925 (a)(24)(B)(emphasis added).

---

[40] RCW 26.52.080

[41] Pub.L. No. 103-322, §. 40221, 108 STAT. 1931 (Sept 13, 1994)

Therefore, child custody and visitation provisions of tribal court protection order entered in accordance with 18 U.S.C. 2265 (b) are entitled to full faith and credit to the same extent as all other provisions of the order.

VII. State and Tribal Courts Working Together

The Foreign Protection Order Full Faith and Credit Act and the Violence Against Women Act are designed to provide legal mechanisms for the cross-jurisdiction enforcement of protection orders between tribal and state courts, which will ultimately assist victims of domestic violence in navigating a jurisdictional maze to obtain needed protection to prevent further acts of domestic violence.

In recent years there have been efforts made to improve enforcement of protection orders across jurisdictions. Some tribal courts have made efforts to adopt uniform domestic violence orders and cover sheets similar to those used by state courts in order to assist law enforcement recognize protection orders issued by other jurisdictions.

The 1989 Washington Centennial Accord sought to build confidence in the viability of true government-to-government relations with tribes and to serve as the foundation for further agreements. One purpose of the Accord was to improve the delivery of services to all individuals represented by all parties by improving communication at the agency level.

In 1990, the Washington State Forum to Seek Solutions to Jurisdictional Conflicts between tribal and state courts issued its final report. The report recommended that tribal and state agencies should, to the extent permitted by resources and subject matter, work to create agreements resolving and reducing jurisdictional conflicts.[42] The report suggested that resolution of jurisdictional conflicts between state and tribal courts could be accomplished by interpersonal contacts between judges.

In August 2002, the Conference of Chief Justices adopted Resolution 27, "To Continue the Improved Operating Relations Among Tribal, State and Federal Judicial Systems." The Conference endorsed the principle that tribal, state, and federal courts should continue cooperative efforts to enhance relations and resolve jurisdictional issues. They also endorsed the principle that tribal, state, and federal authorities should take steps to increase the cross-recognition of judgments, final orders, laws, and public acts of the other three jurisdictions. The Conference gave support to intergovernmental agreements that provide for cross-utilization of facilities, programs, the exchange of justice system records information, and extradition to and from Indian country.

[42] CCJNCC Final Report, *supra* note 31, at 6.

BIBLIOGRAPHY

Articles

Cornell, Stephen and Jonathan B. Taylor, "Sovereignty, Devolution, and the Future of Tribal-State Relations," Harvard Project on American Indian Development, June, 2000.

Jones, B.J., "Role of Indian Tribal Courts In The Justice System," Center on Child Abuse and Neglect, March, 2000.

Kamkoff, Daniel, "Crime Victim Services in Indian Country," Lummi Victims of Crime Program, 1997.

Perry, Steven W., "A BJS Statistical Profile, 1992-2002, American Indians and Crime," U.S. Department of Justice Bureau of Justice Statistics, 2004.

Pommersheim, Frank, "Tribal-State Relations: Hope for the Future?" *South Dakota Law Review*, Vol. 36, 1991.

"Washington State Forum to Seek Solutions to Jurisdictional Conflicts Between Tribal and State Courts: Final Report," The Forum was established by the Conference of Chief Justices' National Coordinating Council, 1990.

Zeya, Seema, "Progress Report on Full Faith and Credit Enabling Legislation and Implementation Procedures," Battered Women's Justice Project, Harrisburg, PA, Internet Site at,

http://www.vaw.umn.edu/documents/ffc/ffcprogfin/ffcprogfin.html.

Books

Canby, William C., Jr., *American Indian Law In a Nut Shell*, Fourth Ed., West Group, St. Paul, Minn., 2004.

Cohen, Felix S., *Handbook of Federal Indian Law,* William S. Hein Co., Buffalo, NY, 1988.

Deloria, Vine, Jr., and Clifford M. Lytle, *American Indians, American Justice*, University of Texas Press, Austin, Norman and London, 1983, Sixth Paperback Printing, 1992.

Johnson, Byron R. and Neil S. Websdale (eds.), *Full Faith and Credit: Passport to Safety*, National Council of Juvenile and Family Court Judges, Reno, Nevada, 1997.

O'Brien, Sharon, *American Indian Tribal Governments*, University of Oklahoma Press, Norman and London, 1989).

Pevar, Stephen L., *The Rights of Indians and Tribes*, Second Ed., Carbondale and Edwardsville Southern Illinois University Press, 1992.

ATTACHMENTS

TABLE OF CONTENTS

1. List of Federally Recognized Indian Tribes within Washington State.

2. Violence Against Women Act (VAWA), 18 U.S.C.A. 2265—Crimes and Criminal Procedures.

3. Washington State Superior Court Civil Rule (CR) 82.5—Tribal Court Jurisdiction.

4. Indian Civil Rights Act of 1968.

ATTACHMENT 1

Federally Recognized Indian Tribes within Washington State

Tribe	Location	Phone #s
Chehalis Confederated Tribes	Oakville	(360) 273-5911
Confederated Tribes of the Colville Reservation	Nespelem	(509) 634-2500
Cowlitz Indian Tribe	Longview	(360) 577-8140
Hoh Tribe	Forks	(360) 374-4305
Jamestown S'Klallam	Sequim	(360) 683-1109
Kalispel Tribe	Usk	(509) 445-1664
Lower Elwha Klallam Tribe	Port Angeles	(360) 452-8471
Lummi Nation	Bellingham	(360) 384-2305
Makah Tribe	Neah Bay	(360) 645-3302
Muckleshoot Tribe	Auburn	(253) 939-3311
Nisqually Tribe	Olympia	(360) 456-5221
Nooksack Tribe	Deming	(360) 592-4158
Port Gamble S'Klallam Tribe	Kingston	(360) 297-2646
Puyallup Tribe	Tacoma	(253) 573-7826
Quileute Tribe	La Push	(360) 374-6294
Quinault Nation	Taholah	(360) 276-8211
Samish Indian Nation	Anacortes	(360) 293-6404
Sauk-Suiattle Tribe	Darrington	(360) 436-0131
Shoalwater Bay Tribe	Tokeland	(360) 267-6766
Skokomish Tribe	Skokomish	(360) 426-4740
Snoqualmie Tribe	Carnation	(425) 333-6551
Spokane Tribe	Wellpinit	(509) 258-7717
Squaxin Island Tribe	Shelton	(360) 432-3828
Stillaguamish Tribe	Arlington	(360) 652-7362
Suquamish Tribe	Suquamish	(360) 394-8521
Swinomish	LaConner	(360) 466-72177255
Tulalip Tribes	Tulalip	(360) 651-4049
Upper Skagit Tribe	Sedro Woolley	(360) 854-7080
Yakama Nation	Toppenish	(509) 865-5121

ATTACHMENT 2

Violence Against Women Act (VAWA), 18 U.S.C.A. §2265
Crimes and Criminal Procedure

§2265. Full faith and credit given to protection orders

(a) Full Faith and Credit.—Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory [1] as if it were the order of the enforcing State or tribe.

(c) Protection Order.—A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

> (1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and
>
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(d) Cross or Counter Petition.—A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if—

> (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
> (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(e) Notification and Registration.—

> (1) Notification.—A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

(2) No prior registration or filing as prerequisite for enforcement.—Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) Limits on internet publication of registration information.—A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(f) Tribal Court Jurisdiction.—For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.

(Added Pub. L. 103–322, title IV, §40221(a), Sept. 13, 1994, 108 Stat. 1930; amended Pub. L. 106–386, div. B, title I, §1101(b)(4), Oct. 28, 2000, 114 Stat. 1493; Pub. L. 109–162, title I, §106(a)–(c), Jan. 5, 2006, 119 Stat. 2981, 2982; Pub. L. 109–271, §2(n), Aug. 12, 2006, 120 Stat. 754.)

ATTACHMENT 3

Washington Court Rules for Superior Court, Civil Rule (CR) 82.5—Tribal Court Jurisdiction

(a) Indian Tribal Court; Exclusive Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, exclusive jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court shall, upon motion of a party or upon its own motion, dismiss such action pursuant to CR 12(b)(1), unless transfer is required under federal law.

(b) Indian Tribal Court; Concurrent Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.

(c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees. The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington. [Adopted effective September 1, 1995.]

ATTACHMENT 4

Indian Civil Rights Act of 1968[43] as amended by the 2010 Tribal Law and Order Act and 2013 VAWA Reauthorization.

§ 1302. Constitutional rights

(a) In general - No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7) (A) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(B) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(C) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

[43] 25 U.S.C.A. § 1302 (Constitutional Rights).

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000 — A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants — In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—
(A) has sufficient legal training to preside over criminal proceedings; and (B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences — In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—
(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;
(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
(D) in an alternative rehabilitation center of an Indian tribe; or
(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense — In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section — Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. Habeas corpus
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction Over Crimes of Domestic Violence (a) Definitions — In this section:
(1) DATING VIOLENCE.—The term 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
(2) DOMESTIC VIOLENCE.—The term 'domestic violence' means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.
(3) INDIAN COUNTRY.—The term 'Indian country' has the meaning given the term in section 1151 of title 18, United States Code.
(4) PARTICIPATING TRIBE.—The term 'participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.
(5) PROTECTION ORDER.—The term 'protection order'—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.
(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.—The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
(7) SPOUSE OR INTIMATE PARTNER.—The term 'spouse or intimate partner' has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of the Criminal Jurisdiction —
(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.
(2) CONCURRENT JURISDICTION.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
(3) APPLICABILITY.—Nothing in this section—
(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or
(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.
(4) EXCEPTIONS.—
(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—
(i) IN GENERAL.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.
(ii) DEFINITION OF VICTIM.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.
(B) DEFENDANT LACKS TIES TO THE INDIAN TRIBE.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—
(i) resides in the Indian country of the participating tribe;
(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—
(I) a member of the participating tribe; or
(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct — A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:
(1) DOMESTIC VIOLENCE AND DATING VIOLENCE.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
(2) VIOLATIONS OF PROTECTION ORDERS.—An act that— (A) occurs in the Indian country of the participating tribe; and (B) violates the portion of a protection order that—
(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
(ii) was issued against the defendant;
(iii) is enforceable by the participating tribe; and
(iv) is consistent with section 2265(b) of title 18, United States Code.

(d) Rights of Defendants — In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
(1) all applicable rights under this Act;
(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c);
(3) the right to a trial by an impartial jury that is drawn from sources that— (A) reflect a fair cross section of the community; and
(B) do not systematically exclude any distinctive group in the community, including non-Indians; and
(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention —
(1) IN GENERAL.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further detention of that person by the participating tribe.
(2) GRANT OF STAY.—A court shall grant a stay described in paragraph (1) if the court—
(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the

petitioner is not likely to flee or pose a danger to any person or the community if released.
(3) NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303

(f) Grants to Tribal Governments — The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—
(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—
(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);
(B) prosecution;
(C) trial and appellate courts;
(D) probation systems;
(E) detention and correctional facilities;
(F) alternative rehabilitation centers;
(G) culturally appropriate services and assistance for victims and their families; and
(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;
(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;
(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and
(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

APPENDIX A

Domestic Violence Evaluations and Assessments[1,2]

Appendix A is an overview of issues[3] related to domestic violence (DV) evaluations that may appear before the courts: criminal, civil, family law, dependency, or juvenile courts. Specialized domestic violence evaluations may have been requested by the court or introduced as part of the case by lawyers, professionals related to the courts, or the parties themselves. DV evaluations may be a standalone evaluation or be a subset of another evaluation.

I. **Domestic Violence Evaluations** are specialized evaluations of domestic violence–specific issues and are conducted using DV-specific evaluation protocols.

A. Domestic violence evaluations for court proceedings address a wide variety of questions[4]:

- Whether or not specific conduct that did occur fits the behavioral definition of domestic violence?
- If the conduct is domestic violence, then who is the adult victim and/or who is the DV perpetrator of that conduct?

---

[1] This appendix focuses primarily on domestic violence evaluations/assessments of the perpetrator used in court proceedings; some of the comments and examples may also relevant to evaluations for domestic violence adult victims and or their children. It is beyond the scope of this appendix to handle this topic in an exhaustive manner. It should be taken only as a primer for judicial officers, which highlights some of the dilemmas surrounding such evaluations. Also this appendix is limited to domestic violence evaluations only and does not address issues related to other types of non-domestic violence forensic evaluations, except where they specifically intersect with domestic violence evaluations. For this discussion, the terms DV evaluation and assessment are used interchangeably.

[2] See Chapter 2 for coverage of lethality assessments. That detail will not be repeated in this appendix; although, lethality assessment is always part of the domestic violence assessment.

[3] There is little direct research on DV evaluations or assessments protocols. What is presented in here is the consensus of experts in the field and based on the author's seminars for judges and publications: A. Ganley, ***Domestic Violence, Parenting Evaluations, and Parenting Plans: Practice Guide for Parenting Evaluators in Family Court Proceedings*** (2009), available online through http://www.kccadv.org/reports/family-law-reports/ ; A. *Ganley & M. Hobart,* ***Social Worker's Practice Guide to Domestic Violence*****,** Children's Administration, Washington State Department of Social and Health Services (2010, 2012R)

[4] At the close of this appendix (pgs. 13-24) there are examples of questions that evaluators ask parties for purposes of conducting the evaluation and which judicial officers can also use in considering domestic violence in a specific case.

- If domestic violence has been or is present, what are the risks of future danger? To whom? And by whom? (Assessment of lethality and dangerousness?)
- What have been the impacts/harms of domestic violence on the adult victim?
- What have been the impacts/harms of domestic violence on the children?
- How does the domestic violence affect the parenting of the adult victim? Of the domestic violence perpetrator?
- What ongoing or future risks of harm does the domestic violence perpetrator pose to the adult victim? To children? To others?
- Is the DV perpetrator amenable to treatment/motivated to change?
- Are there co-occurring issues for the DV perpetrator that may negatively impact treatment/change?
- For court review: has the domestic violence perpetrator stopped the pattern of assaultive and coercive behaviors? Become a safe parent? A safe citizen?

B. Multiple Evaluations in DV Cases:

- **Not all evaluations in domestic violence cases are DV evaluations**. There may be different types of evaluations in DV cases. Sometimes a case before the court has multiple and competing evaluations. Knowing the limitations as well as the strengths of the different evaluations assists the judicial officer (1) in deciding which evaluation if any the court would order and/or (2) in understanding the relevance of DV evaluations brought to cases. Behavioral assessment techniques have been shown to be critical for assessing domestic violence, which is a behavioral problem rather than a personality problem. Often mental health evaluations (psychological or psychiatric) do not include ***behavioral assessments*** of domestic violence conduct. Therefore, they have limited value in addressing the standard questions before the court for DV cases:

    - Determining whether or not domestic violence occurred.
    - Determining who is or who is not a DV perpetrator (or DV victim).
    - Assessing impact of the entire pattern of assaultive and coercive behavior on the adult victim and children.
    - Determining future risks to adult victim.
    - Determining future risks to children posed by domestic violence.

- **Mental Health/Psychiatric Evaluations.** Standard mental health evaluations focus on personality, motivation, cognitive psychological functioning, and use psychological tests and tools (see page 8 for cautions regarding psychological testing in DV cases) in addition to interviews. Psychiatric evaluations do the above and include medical assessment techniques as well. Typically these evaluations do not systematically gather the information regarding person's

behaviors or conduct, which is standard procedure for a Domestic Violence Evaluation. Standard mental health or psychiatric evaluations do not provide the specific information needed for establishing a parenting plan or child welfare service plan, such as whether the party's mental health issue (or DV issue) affects their parenting capacities, whether the identified mental health (or DV issue) barrier to parenting are short or long term, and if the mental health (or DV issues are resolvable through specific conditions of the parenting plan or child welfare service.

- **Substance Abuse Evaluations.** These focus on assessing and individuals for substance abuse and or addition issues. There are standards for substance abuse evaluations (including procedures and tests that may be used). They do not assess for co-occurring issues (domestic diolence, sexual deviancy, etc.).

- **Sexual Deviancy Evaluations.** These are similar to substance abuse evaluations in that their purpose is to focus on one issue. This may be an appropriate evaluation as an adjunct evaluation when there are questions about a co-occurring issue of sexual deviancy.

- **Parenting Evaluations:** the focus of this evaluation is on assessing the specific parenting capacities of specific parents of specific children. There is a great deal of variety in how effective parenting evaluations are for cases with domestic violence. Traditional parenting evaluation protocols do not routinely screen for domestic violence and only address the issue if parents alleged domestic violence. Even then, they do not use behavioral assessment tools in the interviews with the parties. In addition, they frequently do not integrate standardized domestic violence assessment protocols in assessing identified domestic violence in the case.

Both mental health and parenting evaluations have other limitations in common: high cost, often difficult to obtain in communities, failure to address trauma, failure to assess domestic violence, and, too often, they are culturally or linguistically inappropriate. For domestic violence cases mental health evaluations, parenting evaluations, substance abuse, sexual deviancy evaluations frequently fail to capture the specifics of the abuser's pattern of assaultive and coercive behaviors and the impact of that conduct on the legal questions before the court.

C. Use of specialized domestic violence evaluations/assessments in different courts.

- **Criminal Proceedings.** There may be stand-alone domestic violence evaluations or DV risk assessments to address safety issues before, during and after court. Such DV evaluations may also be used to provide information for charging, as part of the testimony given at trial, or for sentencing purposes.

- **Dependency court proceedings.** As of 2009, the Washington State Department of Social and Health Services, Children's Administration has adopted domestic violence–specific policies[5] which shifted to (1) universal (regardless of the allegation) screening/routine identification of domestic violence repeated at each stage of a child welfare case, (2) if domestic violence is identified in the case, then workers will conduct a specialized assessment of risks posed to children by identified domestic violence, and 3) case decision-making and service plans based on this Specialized Domestic Violence Assessment. The Children's Administration has produced a practice guide so workers are able to conduct this routine screening and the specialized assessment of domestic violence as part of their safety assessment role rather than to refer out all domestic violence evaluations to specialists outside Child Welfare. As part of reasonable efforts, DSHS Children's Administration is responsible for following its domestic violence–specific policies. See Chapter 11, Attachment 2 for more information. A domestic violence evaluation may be offered by Child Welfare workers or may be sought by the parents who are party to the case.

- **Family Law Proceedings.** There may be either stand-alone domestic violence evaluations or a domestic violence evaluation may be a focused part of another evaluation. Washington allows psychologists to conduct limited service evaluations related to parenting evaluations (WAC 246-924-467, limited services related to parenting evaluations) on certain topics (domestic violence, substance abuse, sexual deviancy, mental health issues) without the evaluator having to conduct a full parenting evaluation. For some cases, such a focused domestic violence evaluation is all that is needed. Having multiple evaluations may be burdensome to both the family and the court. In other cases, the domestic violence evaluation can be conducted as a subset of a parenting evaluation or a mental health evaluation. Those conducting a domestic violence evaluation within another evaluation still needs to follow the domestic violence evaluation protocol for that subset and have the same qualifications as professionals doing the stand-alone domestic violence evaluations.

D. Evaluating the evaluations. It is important that the court stay clear on:

- The legal questions of this case before the court.
- The purpose of the domestic violence evaluation and its relevance to those legal questions before the court.
- The reliability, validity, and relevance of the evaluation methods used in the domestic violence evaluation.
- The quality of the data and conclusions from the domestic violence evaluation.
- The qualifications and experience of a competent domestic violence evaluator.

---

[5] A. Ganley & M. Hobart, *Social Worker's Practice Guide to Domestic Violence*, Children's Administration, Washington State Department of Social and Health Services(2010, R 2012) .

II. Domestic Violence Evaluations:

A. Which Court? What is/are the Legal Question? Can a DV evaluation address the questions before the court?

A specialized domestic violence evaluation can be helpful to the court in responding to certain legal questions before the court. A domestic violence evaluation conducted by a competent DV evaluator can provide invaluable domestic violence specific information to a court faced with making complicated decisions that have far-reaching implications in the lives of family members.

1. Criminal court proceedings

Domestic violence evaluation may be offered to assist the court in determining whether or not an individual committed a crime:

a. Did this defendant engage in this behavior or commit these acts? Was their conduct behavior a crime (e.g., assault, stalking, harassment) or not (e.g., self-defense, accident)?

Domestic violence evaluations *alone* cannot determine whether or not someone engaged in certain behaviors. The domestic violence evaluator is rarely a witness to the events and may be interviewing only one party and gathering input from other parties. Evaluators are not the triers of fact and do not render legal opinions. Occasionally, in the course of an evaluation by a skilled domestic violence evaluator, the domestic violence perpetrator will self-report descriptions of behaviors that fit the behavioral and legal definitions of domestic violence and confirms that domestic violence occurred. Or in the course of the evaluation the domestic violence perpetrator may specifically use a controlling tactic of abuse (such as threatening to harm to victim or to the evaluator or to the judicial officer). In such cases, that information about or direct observation of conduct would be useful to the court. However, the lack of such collateral reports to the evaluator or the denial of domestic violence behaviors to the DV evaluator cannot be used to confirm that domestic violence did not occur. The court considers information in addition to the domestic violence evaluation to determine whether domestic violence behaviors constituted a crime (e.g. assault, stalking, arson, menacing, harassment) or not (the conduct was self-defense, accident, etc.)

b. Whether or not the criminal behavior was committed under duress? Whether or not there are other mitigating circumstances?

Once again, the domestic violence evaluator is not the trier of fact. Domestic violence evaluators may render professional opinions on the motivation and meaning of the identified conduct which may address the questions before the court involving mitigating circumstances. For example, a domestic violence evaluation in a case may reveal that the domestic violence victim/defendant engaged in the criminal act of robbery under threat of physical harm from the domestic violence perpetrator (i.e., domestic violence victims compelled to crime by DV perpetrators).

c. Sentencing:

Domestic violence evaluations may also assist the court in determining appropriate conditions for sentencing:

- Is the criminal conduct that has been adjudicated to have occurred actually domestic violence or not? (Does the criminal conduct fit the behavioral definition of domestic violence or not?)
- How lethal is the domestic violence? Future risk?
- Would the offender benefit or not from a batterer's treatment program?
- Is the domestic violence perpetrator amenable to treatment?

While domestic violence evaluations alone cannot determine whether or not the criminal act took place, the domestic violence evaluation can render an opinion as to whether or not this behavior is part of an ongoing pattern of assaultive and coercive behaviors known as domestic violence. Domestic violence is a pattern of behavior, not an isolated individual event. So knowing whether or not the assault or other criminal act constitute part of a pattern of assaultive and coercive behaviors defined as domestic violence is important in determining danger assessment, effective interventions, court orders, and sentence. For example, the facts of the case may clearly establish that the person did push the other person against a wall (i.e., committed assault), but unless this is part of a pattern of assaultive and coercive behaviors, that assault may not be domestic violence, and the offender would not benefit from in a domestic violence treatment program. For example, a if domestic violence victim retaliates after having endured repeated domestic violence by assaulting the domestic violence perpetrator, that assault is not part of an ongoing pattern of coercive control. The court would sentence on the assault issue, but not

call it domestic violence invoking domestic violence intervention strategies.

A domestic violence evaluation (or the court) may conclude that even though the offender committed the crime and the crime is part of a pattern of assaultive and coercive behaviors called domestic violence, the evaluation provides information that the domestic violence perpetrator is not amenable to treatment because he or she:

- totally denies his/her abusive conduct or justifies it; and/or
- is too high risk to repeat lethal domestic violence. For such cases domestic violence interventions programs would be contra-indicated.

2. **Civil court proceedings (family law, dependency, juvenile, protection orders, and tort cases).**

A domestic violence evaluation may be relevant to a variety of other questions before the court:

- Is there domestic violence in this case? If so, who is the perpetrator? Who is the adult victim?
- Are there lethality and safety issues for the adult victim? Children? Community? Court? Imminent? Or future?
- Impact of the domestic violence on the adult victim?
- Impact of the domestic violence on the children?
- Impact on the victim's and/or domestic violence perpetrator's parenting?
- Custody issues? Residential access? Visitation? Parental decision-making regarding children?
- How does the specific history of domestic violence impact the parenting plans? How can a parenting plan be constructed that will keep both the adult victim and the children safe and support their resiliency? How can the parenting plan (1) decrease the abuser's ability to continue to exercise power and control over the victim and children and (2) engage the abuser in becoming a safe and responsible parent?
- How does the history or presence of domestic violence affect the child welfare decision-making and services for both parents and for the children in a specific case? Visitation?
- Damage assessment for tort cases involving domestic violence?

B. Elements of a Specialized Domestic Violence Assessment

The court should expect the following to be clearly stated in the Domestic Violence Evaluation:

1. **Purpose:** List of those questions before the court to be addressed specifically by this Domestic Violence evaluation.

2. **Domestic Violence Evaluation Methods Used:**

   a. **Behavioral Assessment Interviews conducted with the parties and with collaterals (dates and time spent).**

   Domestic violence evaluations rely heavily on behavioral assessment interview strategies and are a departure from many of the clinical interview techniques used by parenting evaluators and or in psychological evaluations of a party. These domestic violence behavioral assessment protocols are different than the allegation models used by many parenting evaluators.[6] Behavioral assessment techniques have been shown to be the most useful in assessing domestic violence, which is a behavioral problem rather than a personality problem.

   b. **List all Materials reviewed for evaluation.**

   Domestic violence evaluations should be conducted using multiple sources of data

   c. **Tests (if used) administered and interpreted**

Caution: Psychological testing is NOT useful for the following:

- Determining whether or not domestic violence occurred
- Determining who is or who is not a perpetrator (or victim)
- Determining future risks to adult victim
- Determining future risks to children posed by domestic violence

Many of the tests appearing in evaluations are psychological tests regarding personality. Domestic violence is a behavior problem, not a personality problem, and is exhibited by individuals from a wide variety of personality types, including those who test clinically normal. It is impossible to determine

[6] For full comparison of the techniques used …see A.Ganley, *Domestic Violence, Parenting Evaluations, and Parenting Plans: Practice Guide for Parenting Evaluators in Family Court Proceedings*, (2009), available online through http://www.kccadv.org/reports/family-law-reports/

whether or not someone is domestically violent by looking at results of a personality test. Being a victim of domestic violence is due to the behavior of another, and victims of domestic violence can have any personality type. Some victims may test with clinically significant characteristics, as a result of living with domestic violence, and these so-called personality "traits" often disappear when victim is free of the abuse and coercion. Some have personality or psychiatric diagnoses independent of being victims of domestic violence but their diagnosis does not justify DV perpetrators' use of domestic violence against them. Psychological tests or diagnoses, if used, need to be interpreted in light of the information about the perpetrator's domestic violence tactics.

Psychological tests cannot rule out risk to adult victims posed by domestic violence perpetrators. The current risk assessments involve interviewing and gathering information about the behavioral pattern, information about the offender, and the current context—not about the personality profiles of either party.

Psychological tests cannot determine risk to children from domestic violence. There has been some progress in developing instruments to measure risk of child maltreatment. However, these tools were not designed to measure risk to children posed by intimate partner violence. Whenever psychological tests are used in domestic violence evaluations, or in other evaluations for custody evaluations or for parenting plans, they must be interpreted in the context of a detailed assessment of the domestic violence.

However, psychological tests (personality and cognitive testing) may be helpful for treatment purposes. Understanding a person's personality style or how they function may suggest which treatment approaches need to be used. Alone, they are not useful in identifying whether or not there is domestic violence and whether or not there is future risk.

3. Definition of domestic violence used in evaluation.

Most of the questions needing to be addressed by a domestic violence assessment require the use of both the behavioral definition of domestic violence and the legal definitions (see Chapter 2). Because domestic violence is a pattern of behavior with a variety of effects and posing a variety of risks, any assessment that determines yes or no domestic violence, based on a limited legal definition of domestic violence applied to one incident (see Chapter 2) is generally not useful to the court. Furthermore, limiting the evaluations simply to the legal definitions of domestic violence is inadequate for assessing dangerousness and for assessing the complex issues involved in family and dependency courts.

Evaluators use a wide range of definitions for domestic violence. For example, some think there is no domestic violence unless there has been significant documented physical injury to adult victim or child and therefore claim there is no domestic violence in the case. They may base their determination on outcome rather than on behavior engaged in by the offender, and in doing so, may place individuals at risk for future harm. Others may think there is no domestic violence unless there has been an arrest or conviction for domestic violence if the assault that occurred is distant history or against another partner. Others focus solely on the physical assaults. **At a minimum, the evaluator should state in the report or testimony the definition of domestic violence used for the evaluation so the court is able to understand the evaluator's opinions.**

4. Domestic violence evaluation questions and topics

a. Questions:

- Whether or not there is domestic violence? If there is, who is the adult victim and who is the domestic violence perpetrator? This should be clearly stated for the court.

- If there is no domestic violence, then the evaluator would state the basis for the no domestic violence conclusion. The domestic violence assessment would stop there.

b. Elements of Specialized Assessment of Identified Domestic Violence:

If there is alleged domestic violence, then the specialized DV assessment of the identified domestic violence should include the following:

- **Detailed description of the pattern of abuse *over the course of the time***: physical, sexual, and psychological attacks (stalking, threats, reproductive coercion, emotional abuse, isolation, controlling tactics, etc.), economic coercion, and use of children against adult victim.
- **A description of the time period considered for the assessment:** throughout the course of the relationship, including the time period after separation, up to the date of the evaluation. Oftentimes evaluators only consider behavior during the relationship and ignore the behavior that continues after the relationship has supposedly ended. Domestic violence does not occur only in marriages or cohabitating relationships. The pattern or coercive conduct occurs throughout and after legal proceedings. There may be a shift in tactics, such as using the court system against the domestic violence victim or sabotaging the parenting plan, but domestic violence perpetrators continue their patterns of coercive conduct after separation.

- **Impacts of domestic violence on adult victim:** physical and mental health, education, employment, housing, social/family/community relationships, access to resources, autonomy, degree of control over the victim enforced by the domestic violence abuser, etc.
- **Impact of domestic violence on children**: including but not limited to impact on parenting by adult victim, and on parenting by perpetrator,[7] as well as impact on the child's safety, health, housing, education, social networks, religious affiliations, access to resources, etc.
- **Lethality assessment** (see Chapter 2, Section IV)
- **Co-occurring issues**: substance abuse, mental illness, sexual deviancy, poverty, etc.
- **Protective factors:** in adult victim, children, DV perpetrator, community, including cultural issues as related to protective factors.
- **Demographic data about parties and children**

Some of the evaluations will need to complete certain sections in more detail depending on the court.

5. Qualifications for a Competent Domestic Violence Evaluator

a. Types of evaluators:
    - Psychologists, social workers, psychiatrists, lawyers
    - Family court service svaluators (King County)
    - Professional parenting evaluators
    - GALS (lawyers or mental health specialists) domestic violence specialists
    - Domestic violence specialists
    - For Child Welfare: court proceedings: social workers using Children's Administration tools of safety assessment, structured decision-making assessment, family assessment, and who specialize in domestic violence cases following the 2010 DV practice guide

b. Contributors to DV evaluations (do not conduct DV evaluations)

[7] Appendix B.

- Treating therapists for parents, child
- CASA (volunteer or professionals), GALS
- Child care providers, parenting coaches, etc.

c. Qualifications: specialized DV training, not necessarily degrees.

- **Specialized education in domestic violence and domestic violence specific evaluation methodologies.** To conduct domestic violence evaluation, the evaluator must have specialized education in domestic violence dynamics, domestic violence–specific screening protocols, and domestic violence assessment protocols, domestic violence risk assessment, and in safety planning, as well as experience in working with domestic violence perpetrators, victims, and their children.

  A professional may be a highly skilled forensic expert, parenting evaluator, mental health expert, or child welfare expert, but not be able to do a competent domestic violence evaluation. For the most part, psychiatry, psychology, and social work graduate-level education provides little, if any, education in the area of domestic violence. Consequently, to do a domestic violence evaluation, and to integrate that domestic violence information into their assessments, professionals need to take continuing education seminars in specific domestic violence–related topics and evaluation methodologies, as well as have direct experience working with domestic violence perpetrators, adult victims, and their children.

  Judicial officers should consider carefully (specifically ask evaluators) what qualifies the professional to conduct domestic violence evaluations.

- **Evaluator's consultation with domestic violence specialists** If an evaluator does not have this specialized training and experience, then the evaluator should consult with a domestic violence specialist and incorporate that information into their assessment of the case. This is especially important in family law and dependency cases with the complicated factors surrounding parenting capacities. The consultation should be done prior to interviewing the parties in order to select the most appropriate evaluation protocols and then again when coming to conclusions and or recommendations. This consult should be noted in the report or testimony before the court.

- **Therapists should not conduct domestic violence evaluations for their own clients.**

  The role of the evaluator and the therapist is very different. While therapists can provide some useful information to evaluators or to the court (especially if they routinely gather behavioral information from their clients), their therapeutic role with the client may compromise their objectivity or their value to the client may be undermined when therapists are used as an evaluator.

  Mental health professionals too often do not routinely screen for domestic violence, even though the standard of care has moved toward routine screening at least for domestic violence victimization for all patients (there is a growing trend in health care to screen for domestic violence perpetration as well).[8] Consequently, some professionals do not even know whether or not their clients have experienced domestic violence as a victim or perpetrator, because they do not do routine screening. The professional may mistakenly think clients will bring up these issues on their own, and assume that if it was not brought up, then it did not happen. In family law and child welfare cases when adult victims raise domestic violence concerns, professionals often mistakenly assume that the adult victims are merely doing so to have the advantage in a divorce or custody case and dismiss the adult victims' concerns.

- **State-certified domestic violence perpetrator programs** by state standards provide to the court appropriate signed releases of information about clients status, treatment, and participation in the program (see State standards, Appendix B.).

  Domestic violence perpetrator treatment programs may have a policy not to do domestic violence evaluations for the courts with their own clients or even for those not in the treatment phase of the program. There are multiple reasons why the programs may take this or a modified position:

  - Competent evaluations, assessments, reports, or testimony for courts take a lot of time. Many programs have limited staff. It is difficult to do treatment assessments, maintain the active treatment program, and do separate domestic violence

[8] K. McCloskey and N. Grigsby, "The Ubiquitous Clinical Problem of Adult Intimate Partner Violence: The Need for Routine Assessment," *Professional Psychology: Research and Practice* 36, no. 3 (2005): 264-275.

evaluations on individuals who often do not want to participate in or are not appropriate for the treatment phase of the program.

- An actual, or the appearance of, conflict of interest.
- It results in a situation where clients are more focused on the evaluation than on their participation in rehabilitation.

SAMPLE INTERVIEW QUESTIONS
ASSESSMENT OF RISK POSED TO CHILDREN
BY DOMESTIC VIOLENCE
Anne L. Ganley, Ph.D.

- Domestic Violence: Initial Interview Comments and Questions
- Interview Questions Re: Domestic Violence Perpetrator's Pattern of Assaultive and Coercive Behavior
- Interview Questions Re: the Impact of Domestic Violence on the Adult Victim
- Interview Questions Re: the Impact of Domestic Violence on Children
- Information to Consider in Assessing Protective Factors
- Interview Questions Re: the Outcome of the victim's Past Help-Seeking
- Assessing the Lethality Risk of Domestic Violence
- Domestic Violence Lethality Assessment: Factors to Consider

This material was adapted from the Family Violence Prevention Fund's publication *Domestic Violence: A National Curriculum for Child Protective Services, 1996,* written by Anne L. Ganley, PhD and Susan Schechter, MS.

HANDOUT 4—4

DOMESTIC VIOLENCE: SAMPLE INITIAL INTERVIEW COMMENTS AND QUESTIONS

- All families disagree and have conflicts. I am interested in how your family fights (argues, resolves conflict). I am interested in **HOW** you and your partner communicate when upset.

- What happens when you and your partner disagree and your partner wants to get his/her way?

- Have you ever been hurt or injured in an argument (have you ever injured…)? Has your partner (have you) ever used physical force against you or anyone else or property during an argument? Has your partner threatened /intimidated you? Have you ever felt threatened or intimidated by your partner? How?

- If your partner uses physical force against a person or property in arguments with you, tell me about one time that happened. Tell me about the worst or most violent episode. What was the most recent episode? Are you afraid of you or your children being harmed or injured?

- Have you ever used physical force against your partner? If so, tell me about the worst episode. What was the most recent episode? Is your partner afraid of you?

- Have the children ever been hurt or injured in any of these episodes? Have the children been present? Are the children afraid of your partner? Afraid of you?

- How frequently do the violent episodes occur? Have there been any changes in the frequency or severity of the abuse in the last month or the last year? Is any of the abuse (physical, sexual, psychological) getting worse or happening more often? Have the police or any other agency been involved?

HANDOUT 4—5

INTERVIEW QUESTIONS FOR ASSESSING DOMESTIC VIOLENCE PERPETRATOR'S PATTERN OF ASSAULTIVE AND COERCIVE BEHAVIORS

For each question listed below, if the adult victim (or domestic violence perpetrator) answers yes, encourage a description of exactly what happened. Monitor responses as they unfold and adjust your inquiries accordingly; you do not have to ask every suggested question. For example, sometimes in telling a story of an episode, the victim or perpetrator will supply many illustrations of domestic violence tactics inventoried below.

1. **Physical Assaults**
   a. Has your partner used physical force against you? (Have you... against your partner?)
   b. Has your partner pushed, shoved, grabbed, shaken you? (Have you...your partner?)
   c. Has your partner restrained you, blocked your way, and pinned you down? (Have you...your partner?)
   d. Has your partner hit you? Open hand? Closed hand? Struck you with object? (Have you...?)
   e. Has your partner choked you? Used weapons against you? (Have you...?)
   f. Has your partner assaulted you physically in any other way? (Have you...?)
2. **Sexual Assaults**
   a. Has your partner pressured you for sex when you did not want it? If so, describe how. (Have you...?)
   b. Has your partner manipulated or coerced you into sex at a time or in a way that you did not want? If so, how? (Have you...?)
   c. Has your partner physically forced you to have sex at a time or in a way that you did not want? Has your partner injured you sexually? Forced you to have unsafe sex? Prevented you from using birth control? Force pregnancy or termination or pregnancy, (Have you...to your partner?)

Continued...

HANDOUT 4—5

Continued…

3. **Psychological Assaults**
   a. Has your partner threatened violence against you, the children, others or self? (Have you...?)
   b. Has your partner used violence against the children, family, friends, or others? (Have you...?)
   c. Has your partner attacked property or pets, stalked, harassed, or intimidated you in any other way? Has your partner threatened to harm you? How does your partner frighten you? (Have you...?)
   d. Has your partner humiliated you? In what ways does your partner hurt you emotionally? What names or put-downs does your partner use against you? (Have you...?)
   e. Does your partner attempt to isolate you? Attempt to control your time, your activities, and your friends? Does your partner follow you, listen to phone calls, and open mail? (Do you...?)
4. **Economic coercion**
   a. Who makes the financial decisions? How are finances handled?
   b. Has your partner tried to control you through money (resources)? If so, how? (Have you...?)
5. **Use of children to control partner**
   a. Has your partner threatened or used violence against the children? Sexual abuse against children?
   b. Does your partner use the children against you? If so, how?
   c. Does your partner sabotage your parenting? Obstruct visitation?
   d. Has your partner taken or threatened to take the children?
   e. Has your partner threatened to harm the children? Interfered with your care for the children?
   f. Has your partner made the children watch or participate in your being abused? Made the children spy on you?
   g. Has your partner ever threatened to report you to Child Protective Services? Have you reported your partner to CPS? Immigration?
   h. Have you done any of the above?

HANDOUT 4—6

INTERVIEW QUESTIONS FOR ASSESSING THE IMPACT OF DOMESTIC VIOLENCE ON THE ADULT VICTIM

When a victim or perpetrator acknowledges domestic violence, ask for elaboration as follows:

1. **What kinds of injuries or health problems have you (has your partner) had due to the domestic violence?**
   a. Loss of appetite or excessive eating? Sleep disturbances? Increased use of alcohol or drugs? Headaches, pain?
   b. Increased illnesses or medical problems?
2. **What kind of psychological and emotional problems are you (is your partner) having?**
   a. Difficulties concentrating, depression, anxiety, fears, feelings of being numb, nightmares? Are you (is your partner) taking any medications for these problems?
   b. Have you (has your partner) tried to hurt or thought about hurting yourself (herself)? Do you (does your partner) have a plan? Do you (does your partner) have a sense of failure?
   c. Have you (your partner) thought of hurting or harming your partner (you)? Do you (your partner) have a plan? Do you (or your partner) have thoughts of hurting someone else?
   d. Are you having trouble caring for the children?
3. **In what ways does your partner control you? (Do you control your partner in any of the following ways?)**
   a. Do you have to get your partner's permission (or does your partner have to get your permission) for any of the following:
      - What you wear?
      - What time you go to bed? Your daily schedule?
      - Who you see? What appointments you have?
      - Your discipline of the children? Where you work?

Continued…

HANDOUT 4—6

Continued…

- How you spend your money?
- How much time you spend with your partner?
- Talking with CPS? Therapists? Outside resources (church, treatment ,etc)

b. What would happen if you (he/she) did something your partner (you) opposed? What would happen if CPS wanted you (your partner) to do something your partner (you) opposed?

HANDOUT 4—7

INTERVIEW QUESTIONS FOR ASSESSING THE IMPACT OF THE DOMESTIC VIOLENCE ON THE CHILDREN

1. **Injuries or health impact to children?**

   What kinds of health issues does your child have? Medical problems due to the domestic violence? Injuries or other health effects? Bruises, broken bones, black eyes, burns, pain, unconsciousness due to hitting or choking? Injuries from weapons? Has your child's health changed in recent months?

2. **Psychological and emotional Impact?**

   Have there been any emotional changes? Withdrawal, depression, increased irritability, anxiety, nightmares? Are you aware of any suicidal thoughts or acts by the child?

3. **Behavioral Problems?**

   Have your children had behavior problems in family, school, and peer relationships? Have your children used physical force or threats of physical force against you or others? Are the children dealing with anger in ways that disturb you? Problems in eating, sleeping, running away, alcohol or drug abuse, cutting themselves, harming animals, destroying toys?

4. **Social Problems?**

   Have your children suffered social disruption due to the domestic violence: moves, changing schools, isolation from friends, loss of family members, etc.? Social relationships with family, peers, other adults? Problems in learning?

5. **How does the domestic violence impact the adult victim's parenting of the children?**

   Is the domestic violence interfering with your ability to take care of the child, to consider the child's best interests, to keep the child safe? Do you feel supported in parenting the child? By the perpetrator? By others?

6. **How does the domestic violence impact the parenting of the domestic violence perpetrator?**

   Is the perpetrator able to take care of the child, to consider the child's best interests, to keep the child safe? Does the perpetrator support the parenting of the adult victim? Does the perpetrator undermine the parenting of the victim or expect the victim to be the sole parent? Does the perpetrator use the children to control the adult victim? Does the perpetrator use physical force against the children?

HANDOUT 4—8

INFORMATION TO CONSIDER IN ASSESSING PROTECTIVE FACTORS

Gather information about protective factors from all sources, including adult victims, perpetrators, and others with knowledge of family and community.

1. Victim resources include factors such as the victim's

a. Resistance to the perpetrator's or community's victim-blaming.
b. Belief in herself and/or her children.
c. Willingness to seek help.
d. Use of available money, time, and material goods.
e. Work skills.
f. Parenting skills.
g. Ability to plan for the children's safety.
h. Knowledge of the abuser and the situation.
i. Health and physical strength.
j. Use of safety strategies for herself and the children.

2. Children's resources include such factors as the children's

a. Age and developmental stage.
b. Positive relationships with adult victim, siblings, other family members, and neighbors.
c. Actions during violence.
d. Help-seeking behavior.
e. Instructions from the adult victim or perpetrator about what to do.
f. Ability to carry out safety plans.

3. Community resources for victim safety and perpetrator accountability include

a. Victim advocacy/support services.
b. Effective criminal justice response to domestic violence (police, prosecutors, courts, and corrections).
c. Effective civil or family court response to domestic violence.
d. Welfare and social services.
e. Effective health care.
f. Accessible safe housing.
g. Community of faith.
h. Family/friends of the victim and/or perpetrator.
i. Rehabilitation programs for domestic violence perpetrators.
j. Accessible substance abuse treatment for either survivors or perpetrators. *Continued...*

HANDOUT 4—8

Continued...

4. A perpetrator's resources to stop the abuse include

a. Halting abuse of the victim or children during the CI'S process.
b. Acknowledgement of abusive behavior as a problem.
c. Acknowledgement of responsibility for stopping abuse.
d. Cooperation with current efforts to address abusive behavior.
e. Awareness of the negative consequences of abusive behaviors on the victim, children, and the abuser's physical well-being, self-image, legal status, social relationships, and employment.
f. Cooperation during the interviews.
g. Commitment to victim safety.
h. Demonstration of ability to comply with court orders.
i. Successfully stopping abuse in the past.
j. Respect for limits set by victim and/or other agencies.
k. Support for parenting efforts of adult victim.
l. Consideration of children's best interests over parental rights.

HANDOUT **4—9**

INTERVIEW QUESTIONS FOR ASSESSING THE OUTCOME OF THE VICTIM'S PAST HELP-SEEKING

Understanding past outcomes of seeking help is important for current and future planning. These questions are directed primarily to the adult victim, although modified versions can be posed to the perpetrator or the children.

1. Does the extended family know about the violence? Who knows? What has been the response? Do you feel safe in talking with them about the problem?

2. Is there anyone outside the family (friends, co-workers, and clergy) who knows about the violence? How have they responded? Have you felt supported? Do you feel it is safe to talk with them?

3. Have the police been called? Who called them? What was their response? Did that help you?

4. Have you gone to court for a protection order? To press charges? To get a divorce? What was the experience like for you?

5. Have you ever left home to protect yourself or the children? What happened? Was this helpful to you? Were you able to take the children?

6. Have you ever gone to a counselor or to medical personnel for help with this issue? What happened?

7. Have you ever used a DV services program? What happened?

8. Has your partner ever gone to counseling or to a program for the domestic violence? What happened?

HANDOUT 4—10

ASSESSING THE LETHALITY RISK OF DOMESTIC VIOLENCE

Domestic Violence can pose risk of injury or death to

1. adult victim
2. children
3. community members
4. perpetrators

Due to the behaviors of

1. perpetrator
2. adult victim
3. children

Gather information from

1. adult victim
2. children
3. other family members
4. perpetrator
5. others (probation, police, counselors, anyone having contact with family)

HANDOUT 4—11

DOMESTIC VIOLENCE LETHALITY ASSESSMENT: FACTORS TO CONSIDER

1. **Domestic violence perpetrator's access to the victim**
2. **Pattern of the perpetrator's abuse**
   a. frequency/severity of the abuse in current, concurrent, past relationships
   b. use and presence of weapons
   c. threats to kill
   d. hostage taking, stalking
   e. past criminal record
3. **Perpetrator's state of mind**
   a. obsession with victim, jealousy
   b. ignoring negative consequences of his violence
   c. depression/desperation
4. **Individual factors that reduce behavioral controls of either victim or perpetrator**
   a. substance abuse
   b. certain medications
   c. psychosis, other major mental illnesses
   d. brain damage
5. **Suicidality of victim, children, or perpetrator**
6. **Adult victims' use of physical force**
7. **Children's use of violence**
8. **Situational factors**
   a. separation violence/victim autonomy
   b. presence of other major stresses
9. **Past failures of systems to respond appropriately**

APPENDIX B

COURT-MANDATED/DIRECTED TREATMENT FOR DOMESTIC VIOLENCE PERPETRATORS[1] [2]

By Anne L. Ganley, Ph.D.

Introduction

Appendix B[3] provides an overview of issues related to court-mandated/directed treatment for domestic violence perpetrators and is based on a review of the literature and on current expertise in the field of domestic violence.[4]

Washington court-mandated/directed perpetrator treatment programs refer to those programs for domestic violence perpetrators who have been referred either through:

- **Juvenile or adult criminal courts proceedings** where the treatment may be a condition of deferred prosecution, a stipulated order of continuance, or of sentencing; or

- **Civil court proceedings: protection orders, family law, or dependency proceedings** where participating in domestic violence perpetrator treatment may be part of a court

---

[1] Appendix B has been adapted from earlier versions of the *Washington State Domestic Violence Manual for Judges* (1997, 2001, 2006) and reflects a review of the literature and research regarding not only "treatment" for DV perpetrators but also of court based interventions such as probation, court reviews, use of court orders both in criminal and civil court proceedings after 2006.

[2] For Appendix B, the terms domestic violence perpetrator and batterer are used inter-changeably to denote those persons who use **a pattern of assaultive and coercive tactics against their intimate partner.** These individuals may or may not have been legally adjudicated for this conduct. .

[3] Appendix B focuses specifically on intimate partner violence. Intimate partner is the most common type of relationship context defined by Washington State statutes (see Chapter 2 legal definitions section). This over view does not cover issues related to perpetrators of non-intimate partner violence (e.g., abuse/violence done to and by other adult household members). Perpetrators of non-intimate partner violence have not been separated out in either treatment programs or in research. Consequently, little is specifically known about effective interventions for the population who assault adult siblings, parents, in-laws, or other non-intimate partner adult household members.

[4] Since the prior edition of the Washington State Domestic Violence Manual was published, there have been few research studies about DV specific court practices, and there are even fewer research studies on outcomes about treatment/ interventions for domestic violence perpetrators. For emerging materials, judges can access http://www.vawnet.org, and www.mincava.umn.edu, and http://www.ncjfcj.org/; and review the National Institute of Justice website topical publication collection on court responses to domestic violence or for domestic violence perpetrators, at http://nij.gov/publications/pages/publication-list.aspx?tags=Types of Courts.

protection order, a condition included in a parenting plan, or a requirement of a child welfare service plan for a parent.

Court-ordered/directed domestic violence perpetrator treatment is recommended by a wide variety of professionals related to the courts:

- prosecutors, defense attorneys;
- child welfare workers, dependency attorneys, CASA, and other child welfare professionals,;
- Family law attorneys, GALS, CASA, and parenting evaluators.

The primary goals of Washington domestic violence perpetrator treatment programs are:

- to increase the safety of domestic violence victims and their children,
- to increase domestic violence perpetrator accountability, and
- to decrease re-occurring abuse[5].

To make decisions regarding court-mandated treatment, judicial officers are informed not only by the particularities of an individual case and of the court context, but also by their understanding of the following:

1. Purpose of court-mandated/directed treatment for domestic violence perpetrators in Washington,
2. Efficacy of court-mandated/directed treatment for domestic violence perpetrators,
3. Reservations regarding the court's use of court-mandated/directed domestic violence perpetrator treatment,
4. Considerations *before* the court orders domestic violence perpetrator treatment,
5. Assessing perpetrator's suitability/amenability for court-ordered treatment,
6. Special conditions to consider when mandating treatment for a domestic violence perpetrators, and
7. Standards for programs for domestic violence offenders[6].

I. Purpose for domestic violence perpetrator treatment programs (DVPTP[7]):

The primary goal by statute is ***victim safety,*** by holding batterers accountable and "facilitating" change in the batterer's behavior. The purpose of court-mandated/directed treatment for domestic violence perpetrators remain the same whether perpetrators are referred by criminal or civil court proceedings (or are voluntary).

[5] See, WAC 388-60-0045

[6] Attachment 1. Summary of the Washington State Domestic Violence Perpetrator Treatment Program Standards.

[7] DVPTP refer to WA state programs. Nationally, the programs are sometimes referred to as Batterer Intervention Programs (BIPS).

"The primary goal of a domestic violence perpetrator treatment program must be to increase the victim's safety by:

(1) Facilitating change in the participant's abusive behavior; and

(2) Holding the participant accountable for changing the participant's patterns of behaviors, thinking, and beliefs." RCW 26.50.150; WAC 388-60-0055.

While the state standards for DVPTP do not focus just on the issues of court-mandated treatment, the policies and procedures outlined do address the practices necessary for the programs to work collaboratively with courts in holding participants accountable (see summary of state standards, attached or the full WAC section 388-60.)

II. Efficacy of Court Ordered Treatment for Domestic violence Perpetrators

Given both lethal and non-lethal damage to families caused by domestic violence, judicial officers, domestic violence survivors, and the community as a whole have been very concerned about the efficacy of domestic violence perpetrator programs since their inception in 1977. Do they work to increase domestic violence victim safety? Do they work to hold domestic violence perpetrators accountable for both the domestic violence and to change perpetrators' pattern of abusive conduct? For which perpetrators? And in what court context?

Efficacy questions are complicated and layered. The research[8] on DVPTP efficacy has been greatly hampered by the lack of outcome studies, by lack of research programs within their court contexts, and by the fact that measures of efficacy are not administered over time.[9] Consequently, the conclusions about efficacy of DVPTP remain sometimes contradictory and more often, inconclusive.

The Washington State Institute for Public Policy 2013 Report

The summary for the 2013 report from the Washington State Institute for Public Policy, hereinafter "WSIPP report" "What Works to Reduce Recidivism by Domestic Violence Offenders,[10] makes two problematic assertions:

---

[8] "E.W. Gondolf, **The Future of Batterer's Programs,** 2012, Northeastern University Press, Boston.

[9] See Klein, A., Centerbar, D., Keller, S. and Klein, J. (2014). The Impact of Differential Sentencing Severity for Domestic Violence and All Other Offenses over Abusers' Life Spans. Report to National Institute of Justice, U.S. Department of Justice, NCJ 244757. In it the cases were followed for 6 years to get sufficient data on re-offenses. available at, https://www.ncjrs.gov/pdffiles1/nij/grants/244757.pdf

[10] Miller, M., Drake, E., & Nafziger, M. (2013). ***What works to reduce recidivism by domestic violence offenders?*** (Document No. 13-01-1201). Olympia: Washington State Institute for Public Policy. Unfortunately, most reports, including this 2013 Washington State Institute for Public Policy studies rely on Meta analysis of the same early DV perpetrator treatment outcome studies. Such repeated meta-analysis of the same, disparate studies remain extremely limited regarding any conclusions that can be drawn. Of the original outcome studies selected for WSIPP meta analysis (11 total, 8 of sample were from 1988 and 2003), only 2 (2007, 2008)was research not reviewed for the 2006 WA Judges Manual. Both those original outcome studies selected by WSIPP as well as the limitations of meta-analysis have been previously and extensively critiqued in multiple peer journals. Yet the WSIPP 2013 report included none of that critique and included simply erroneous statements in Summary about "the Duluth Model" and

(1) the report singles out one specific treatment model as not reducing recidivism ("no effect on domestic violencec recidivism"), and
(2) mischaracterizes the WAC 388-60, Domestic Violence Perpetrator Treatment Program Standards, as requiring the particular treatment model ("…model required by Washington State law"). It is beyond the scope of this appendix to outline the multiple research errors represented in the WSIPP study on efficacy of DVPTP in reducing recidivism by domestic violence criminal offenders. The major flaw of the research study and the report is the author's attempt to compare the efficacy of different treatment models by measuring recidivism. The data necessary to evaluate the efficacy of different group treatment models is not available in the studies selected by WSIPP. While the current recidivism outcome studies can provide data about modest effects or no effects of DVPTP in general, there is insufficient data at this time to draw conclusions about any one particular model. That remains a future goal for research.

The initial WSIPP 2013 report prompted so many concerns from courts and from domestic violence treatment/research experts that the January 2013 release of the WSIPP report, was accompanied by a response from WSIPP's collaborative partner, the Washington State Supreme Court Gender and Justice Commission, and with a written response by the Northwest Association of Domestic Violence Treatment Professionals (NWADVTP). WSIPP, throughout that project, received a great deal of critical (and potentially useful) feedback regarding both their research methodology and their reporting of their conclusions. Unfortunately for Washington, WSIPP integrated little to none of the feedback into their final report.

In spite of the multiple concerns raised about the methodology and the report's overstatement of its conclusions, the WSIPP study has been promoted through presentations at conferences for judicial officers and prosecutors and at a Domestic Violence Symposium as the definitive word on domestic violence perpetrator treatment for Washington (and beyond). Some prosecutors and judicial officers state they no longer refer criminal defendants to Washington State–certified programs "because they do not work." And even though the WSIPP research did not address populations of domestic violence perpetrators in non-criminal settings, some Washington State parent's attorneys in family law or dependency proceedings have also insisted that DVPTPs no longer be noted in parenting plans or in child welfare service plans "because the WSIPP 2013 report has shown they do not work." In addition, WSIPP's conclusions have been cited by the National Institute of Corrections,[11] stating that BIPS "using the… model do not work."
Rather than prematurely debating aboutthe efficacy of specific treatment techniques for specific batterers or prematurely statinge that the positive effect is too small to warrant court-mandated treatment, Washington courts and communities need to use the limited rehabilitation funds to support those batterer intervention programs that (1) do meet state standards, (2) function effectively with the courts, and (3) can work with the full diversity of batterers. Those programs and the court practices that support them should be researched so that both judicial officers and the community can have needed answers to the complex questions regarding efficacy. Programs that offer variety of approaches should be encouraged to become state certified (see section on state standards).

---

the Washington State Standards for Domestic Violence Perpetrators. They are not only inaccurate but simply cannot supported either by the authors own meta-analysis or by a comprehensive review of the literature.

[11] See, http://nicic.gov/library/027743.

Research on Efficacy

There are very few outcome studies over the past 20 years for court-mandated treatment for domestic violence perpetrators within the criminal justice system[12]. They remain inconclusive at best and misleading at worse. Unfortunately, studies,[13] [14] [15] [16] [17] [18] [19] [20] including the Washington's [21] research/reports on the efficacy of court-mandated treatment for domestic violence perpetrators, continue to raise more questions about the quality of research methodology than answer questions about outcomes for court-mandated treatment for domestic violence perpetrators.[22]

In particular, it is premature to make any claims, as did the WSIPP 2013 report, about the efficacy of one treatment model versus another, as measured by recidivism studies, especially when there is no consideration of contextual factors (e.g., did the defendant receive the treatment while in prison or while on close supervision for a year or in a community program that had no means to monitor behavior?). It is beyond the scope of this appendix to provide a detailed review of the severe limitations of the research on efficacy.

---

[12] And there are no outcome studies for DV perpetrators treatment programs directed by civil, family and dependency court proceedings.

[13] J. C. Babcock and R. Steiner, "The effects of treatment and incarceration on recidivism of battering: A longitudinal study of Seattle's coordinated community response to domestic violence," *Journal of Family Psychology* 13 (1999): 46-59.

[14] L. Bennet and O. Williams, "Controversies and Recent Studies of Batterer Intervention Program Effectiveness," (National Online Resource Center on Violence Against Women (VAWnet), Applied Research Forum, August 2001).

[15] J. Babcock, C. Green and C. Robie, "Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment," *Clinical Psychology Review* 23 (Pergamon: 2004): 1023-1053, available online at www.sciencedirect.com.

[16] S. Jackson, L. Feder, D. Forde, R. Davis, C. Maxwell and B. Taylor, *Batterer Intervention Programs: Where Do We Go from Here?* (National Institute of Justice NIJ Special Report, 2003).

[17] E. W. Gondolf, "Evaluating batterer counseling programs: A Difficult task showing some effects and implications." *Aggression and Violent Behavior* 9 (2004): 605-631.

[18] L. Feder and D. Wilson, "A Meta-Analytic Review of Court Mandated Batterer Intervention Programs: Can We Affect Abusers' Behavior?" *Journal of Experimental Criminology* 1 (Springer, 2005): 239-262.

[19] J. Edleson, *Evidence-Based Practice with Men Who Batter: The Simplicity of Certainty* (presentation at the 49th Annual Washington Judicial Conference, 2006).

[20] David Adams, (2003) *Certified Batterer Intervention Programs: History, Philosophies, Techniques, Collaborations, Innovations and Challenges*, FUTURES WITHOUT VIOLENCE, ,Available at http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Certified%20Batterer%20Intervention%20Programs.pdf

[21] George, T.P. (2013) Domestic Violence Sentencing and Recidivism. Washington State Center for Court Research, Administrative Office of the Courts, Olympia, WA.

[22] For a comprehensive examination of the research and issues related to batterer's intervention see "**The Future of Batterer's Programs,** 2012, E.W. Gondolf, Northeastern University Press, Boston. Questions regarding efficacy of programs have been raised by research that uses Meta analysis of the various studies conducted over several years. Unfortunately, it is unclear whether the finding of little or no impact is actually valid since differences in outcomes often are lost when reviewing research with disparate research designs and when studying programs of with differing goals and contexts.

Two examples of the challenges when attempting to draw conclusions regarding any one model of treatment from this research:

- Treatment approaches used in programs studied to date all have elements different from and similar to each other, including the treatment model identified by the Washington study. All approaches have been evolving. Treatment models are not static and it is impossible to make comparative statements particularly from a meta-analysis of such disparate studies. The research/outcomes studies of some programs (not included in WSIPP research) show modest efficacy while others showed none as measured by varying measures of recidivism.

- Change in individual batterers is imprecisely captured in recidivism (measured by official criminal justice records) studies. Domestic violence is a pattern of assaultive and coercive behavior that occurs over time. It is a behavior problem that has a high relapse rate (very similar to substance abuse), but for some, change does occur over time. So measuring recidivism at one point can be very misleading. Some may relapse (recidivism) at one point (during treatment, post treatment, or months after treatment) and then make progress over time with or without additional treatment. If efficacy of a program or court practice is measured by reducing recidivism of domestic violence, then those measures must be captured multiple times over a significant period of time.

Generally, the research indicates that some batterers benefit from treatment, some do not, and for some, the treatment effect of the program is unknown. There appears to be a small but significant benefit from court-mandated treatment that is part of a coordinated community response to domestic violence. A coordinated community response (CCR) is one where the systems having contact with the offender give a consistent message:
(1) domestic violence is wrong/against the law/harmful to others,
(2) the perpetrator (not the victim) is responsible for that abusive conduct, and
(3) the perpetrator is responsible for changing that conduct to become a safe and responsible family member/ citizen.
The CCR must have policies and procedures in place for the systems to work collaboratively and efficiently.

Research[23] indicates that batterers change due to a series of experiences that communicate that domestic violence perpetrators are responsible both for their abusive conduct and for changing that behavior. It is not treatment alone that changes batterers, but treatment programs that are embedded in a variety systems for increasing victim safety and domestic violence perpetrator accountability. For criminal cases, that accountability includes law enforcement, criminal prosecution, adjudicated sanctions, and close court monitoring as well as rehabilitation/intervention programs that promote safety and change. For family, juvenile, and/or dependency court, accountability includes the expectations and practices of the judicial officers, lawyers, GALS, CASA workers, and child welfare workers as well as of the intervention/rehabilitation professionals.

[23] E. W. Gondolf, *supra* note 9.

Measuring efficacy is complicated.

- Measuring efficacy of batterers' intervention programs as distinct from efficacy of other parts of the coordinated community response is a complicated and often futile task. Did that batterer change (or not change) because of the program or because of what the judge said in court or what the law enforcement or probation officer did or because of the speed of response to noncompliance? Or did the change occur because of the community-provided safety for the adult victim and the children? Or did the change occur because of all those steps? Or do individual batterers changed for different reasons? Should one part of the response system be included only if it can be proven to be independently a stand-alone reducer of recidivism?

- How is efficacy/success/change defined (e.g., Ceasing the violence, the terroristic tactics, the psychological and economic coercion, the coercive control? Increasing safety of victims and children?)? And then, how is success measured (e.g., by recidivism in the legal system; reports to child welfare; reports to family law courts; by adult victim reports; by third party reports)?

- Is efficacy measured by recidivism the only reason to send an abuser to court-ordered treatment? Is it possible there may be other purposes that treatment may serve in terms of justice making, or in terms of what victims need for increased safety? Minimally, court-directed domestic violence perpetrator treatment is a consequence to domestic violence abusers that shifts, even temporarily, responsibility for conduct to the abuser and not to the victim. It may be that being someplace the domestic violence abuser does not want to be once a week for two to three hours is the most that is going to happen for abusing one's intimate partner. Or at least during domestic violence perpetrator treatment session, the domestic violence survivors have some time to call their support system, rest, or plan next steps. Perpetrator treatment programs may serve a purpose for victims knowing that their partner had an opportunity to get support for changing but passed it up or did not change anyway. This can be important information to the domestic violence victim. Finally, the domestic violence perpetrator treatment programs that check in with victims following requirements of Washington State standards may serve another purpose by assisting victims in thinking about safety of self and children and by referring domestic violence victims to advocacy services.

Gaps in Research on Domestic Violence Batterer Intervention Programs

While the research is still somewhat fragmented and while some trends about efficacy can only be deduced, there are gaps to be addressed before the research can provide comprehensive and definitive answers on the efficacy question.

- **Effectiveness of the monitoring system** that may be one of the greatest influences on successful outcome of treatment.[24] Research on the effectiveness of various

[24] A. A. Gerlock, *supra* note 15; E. Gondolf, *supra* note 15.

models of court reviews or probation services[25] (e.g., face to face versus telephone; weekly versus monthly versus every three months) individual sessions versus group sessions, versus administrative monitoring, etc.

- **Models for reviewing compliance by civil courts.**

- **Court practices to increase "readiness factor"** for individuals making significant changes. Successful outcome in treatment may be due in part to the individual's readiness to make changes. There needs to be more attention to the role of the judge, the defense attorney, the prosecutor, the court monitor, the child welfare worker, or mental health professional in contributing to the readiness of the batterer to make changes.[26] Strategies for holding batterers (and not the victims) accountable for both the abuse and for stopping the abuse may go a long way in promoting readiness to change.

- **Issues of race, class, gender, and sexual orientation as they intersect with treatment and change.**[27] However, few communities can afford to have multiple specialized programs to reach the diversity found in a population of batterers. Wherever possible, specialized domestic violence intervention programs should be implemented and studied. There is much to learn from a consideration of a variety of approaches to implementing the Washington State Standards.

III. Reservations about the Courts Use of Court Mandated Perpetrator Treatment

Not all the reservations about court-ordered treatment for domestic violence perpetrators relate to the complex issues of efficacy of treatment, but are due to other concerns such as:

---

[25] Klein, Andy, et al May 2008 , **Evaluation of the Rhode Island Probation Specialized Domestic Violence Supervision Unit** The full report can be found at: http://www.ahpnet.com/Misc/Differential-Sentencing.aspx

[26] For discussion of the impact of the judge's demeanor on victims of domestic violence, see J. Ptacek, *Battered Women in the Courtroom: the Power of Judicial Responses* (Boston: Northeastern University Press, 1999).

[27] E. Aldarondo and F. Mederos, *Men Who Batter: Intervention and Prevention Strategies in a Diverse Society* (Kingston, NJ: Civic Research Institute, 2002); R.V. Almedia and K. Dolan-Delvecchio, "Addressing Culture in Batterers' Intervention: the Asian Indian Community as an Illustrative Example," *Violence Against Women* 5, no. 6 (1999): 654-681; R. Carrillo and J. Tello, eds., *Family Violence and Men of Color: Healing the Wounded Male Spirit* (New York: Springer, 1998); S. S. Doe, "Cultural Factors in Child Maltreatment and Domestic Violence in Korea," *Children and Youth Service Review* 22, no. 3/4 (2000): 231-236; O. J. Williams, "Treatment for African American Men Who Batter," *CURA Reporter* 25, no. 3 (1995): 6-10; O. J. Williams and L. R. Becker, "Partner Abuse Programs and Cultural Competence: The Results of a National Study," *Violence and Victims* 9, no. 3 (1994): 287-296; O. J. Williams, "Group Work With African American Men Who Batter: Toward More Ethnically Sensitive Practice," *Journal of Comparative Family Studies* 25 (1994): 91-103; O. J. Williams, "Ethnically Sensitive Practice to Enhance Treatment Participation of African American Men Who Batter," *Families in Society* 73 (1992): 588-95.

- **Victim/child safety:** using perpetrator treatment programs as a substitute for court actions needed to protect the safety of the victim and/or children (jail time, no-contact orders, restitutions, permanent protection orders, restrictions in parenting plans, limitations in visitation, or even termination of parental rights of one parent, etc.).

- **Case management tool:** using ’perpetrator treatment programs as a calendar management tool to relieve overcrowded court calendars, to overcrowded jails, to avoid developing alternative sentences/intervention services, to manage the lack of intervention services for parents in child welfare system, etc.

- **Inadequate program guidelines**: regarding the safety of the victim and the children, or the number and content of sessions required for the domestic violence perpetrator to attend;[28] or noncompliance; and/or do not meet standards for Washington State programs.

- **Seriousness of domestic violence crimes**: For criminal cases, concern that use of treatment may convey domestic violence crimes are taken less seriously than stranger crimes.

- **Lack of monitoring of batterers:** Perpetrator treatment programs, probation departments, and courts inadequately monitor batterers’ participation and progress; or if ordered by civil court proceedings, batterers usually are not monitored at all by the courts.

IV. Considerations Before a Court Orders Domestic Violence Perpetrator Treatment

In light of the above concerns, it is important for the court to take a leadership role in the following areas **before** ordering or directing domestic violence perpetrators to attend treatment:

- **Ensuring that the victim's and the children’s safety are addressed** through referrals to advocacy services, development of a safety plan, including issuance of case-specific court protective orders *when sought by the victim* in all cases where the batterer is ordered to attend domestic violence perpetrator treatment.

- **Treatment is for rehabilitation, not punishment**. It may be an appropriate alternative sentence combined with other sanctions in criminal cases or as a condition in a civil proceeding. It should be used only in those cases where the courts believe that a focus on rehabilitation is warranted.

[28] See in this appendix the attachment of a summary the *Washington State Domestic Violence Perpetrator Program Standards*, which provides direction and flexibility in programming for diverse clients.

- **Assessment of the batterer's suitability for court-ordered treatment** (see V below for more detail:
    - to ensure that only those offenders likely to benefit from treatment are referred. Those unlikely to benefit can be held accountable through other means, such as jail time, restitution or fines, or close probation supervision without treatment.
    - to take into account that many perpetrators who appear to be first-time offenders in a criminal case have often committed unreported domestic violence assaults, or have been abusive in other relationships.

- **Availability of perpetrator treatment programs in the community**. Determine whether an appropriate Washington State–certified domestic violence perpetrator treatment program exists in the community. These programs specifically are mandated to address issues of victim safety and domestic violence perpetrators' accountability for changing their patterns of assaultive and coercive behaviors in the context of its root causes. These specialized domestic violence perpetrator programs view the batterer's conduct (1) as a distinct problem rather than merely as a symptom of other issues (substance abuse, mental health issues, a dysfunctional relationship) and the treatment must address the domestic violence conduct directly, and (2) as being learned in social context and as being used to maintain power and control over domestic violence victims and their children.

- **Assurance of adequate monitoring of the batterer's compliance progress** during the treatment period by the court through a standardize court review process.

- **Immediate court response to noncompliance:** Assurance that criminal (or the appropriate civil, family law, or dependency court) proceedings are promptly reinstated if the court determines that a new offense has been committed or that the domestic violence perpetrator is not progressing satisfactorily in the treatment program. This would be done in a variety of ways depending on the court context: criminal, juvenile, family law, or dependency court.

V. Assessing Domestic Violence Perpetrator's Suitability and Amenability for Court-Ordered or Court-Directed Treatment

A. Determining Domestic Violence Perpetrator's Suitability for Treatment

- Does the perpetrator meet the statutory requirements for court-mandated or court-directed treatment?

- Does the victim fear reassault by the perpetrator? How dangerous is this batterer? Is there any danger posed to the adult victim or children by ordering the perpetrator to attend a domestic violence treatment program? Will the victim be safe during the batterer's rehabilitation process?

- Has the batterer previously disregarded court orders?

- Has the perpetrator previously been terminated for unsuccessful completion of a treatment program addressing the violent behavior?

B. Assessing Perpetrator's Amenability to Treatment

Suitability for court-ordered treatment is different from being amenable to treatment. Ordering a perpetrator to attend treatment is inappropriate and a waste of the limited available treatment resources if the domestic violence perpetrator is unable or unwilling to benefit from such a program. In these cases, the court must find other avenues for holding the perpetrator accountable, which may include jail time, work release, limitations in parenting time or in access to children, etc.

When treatment is used primarily as a case management tool (e.g. referring cases not strong enough for full prosecution or as a plea bargain measure or as leverage in family law case), courts run the risk of referring mostly individuals who deny that they committed the conduct or that they are in any way responsible for making changes. These individuals not only do not benefit from the rehabilitation program, but they undermine the program for those who may be more ready for treatment.

Factors to consider in evaluating a batterer's amenability to treatment:

Those who are most appropriate for treatment:

- Acknowledge their abusive behavior.
- Take responsibility for making changes in themselves.
- Do not have a long history of abusing.
- Have access to state certified domestic violence treatment programs.
- Possess language and learning abilities necessary to be successful in the available program.

C. Assessment of suitability/amenability by the treatment program:

- The court may determine that a particular client is appropriate for rehabilitative programs according to the above factors and the criteria established for sentencing or for setting conditions in civil proceedings. However, a court's determination does not guarantee that there are rehabilitative programs available in the community that can provide treatment for all referred domestic violence clients.

- The court's referral is followed by the domestic violence perpetrator treatment program's assessment of the individual regarding the offender's ability and willingness to benefit from the specific program.

- The domestic violence intervention program must retain control over who is admitted to the treatment phase of the program, since only the staff knows the program well enough to know what will be effective with which kind of client.[29]

D. **Non-acceptance by domestic violence perpetrator program**:

- The court should be informed immediately of the rejection and be provided the reasons for non-acceptance.

- The court should give very careful consideration as whether or not the batterer is suitable for any court-ordered treatment. Too often batterers deny responsibility for their conduct and resist becoming engaged in treatment and change, and courts simply pass them from one program to another, consuming both the court's time and the limited rehabilitation program resources of a community. Court referral to treatment should be used only with those batterers who can and want to benefit from it.

VI. Special Conditions to Consider When Mandating Treatment for a Domestic violence Perpetrator

A. Refer to Specialized Domestic Violence Programs for Perpetrators

The court's order for a domestic violence perpetrator to attend treatment should mandate that the batterer attend a treatment program which specifically focuses on safety of the victim and the accountability of the batterer and for ending the pattern of assaultive and coercive behavior.

B. Length of Treatment Period

The maximum period allowed by law should be ordered for treatment since it is difficult to predict how long the rehabilitation process will take with a particular batterer. This approach leads to the lowest rate of recidivism.[30]

There continues to be a consensus among domestic violence experts that a minimum of one year is required for treatment to be effective. If the offender successfully completes treatment sooner, the perpetrator can seek early termination of the court requirements. Experts in treating domestic violence perpetrators opine that battering represents a complex, long-term behavior pattern

---

[29] A. Ganley, "Perpetrators of Domestic Violence: An Overview of Counseling the Court-Mandated Client," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. J. Sonkin (1987).

[30] D. J. Sonkin, "The Assessment of Court-Mandated Male Batterers," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. J. Sonkin (1987).

that is not easily changed through six, twelve, sixteen, or even twenty-six week programs.[31]

C. **Use of No-Contact Orders, Protection Orders**

Criminal courts should consider issuing a criminal court no-contact order in cases where the victim appears to be in danger of intimidation or assault from the perpetrator. (See Chapter 4, Section III for discussion of no-contact orders.) Civil court proceedings may issue protection orders[32] **when sought by adult victims for themselves and/or their children**, and when sought for children by child welfare in dependency proceedings. Criminal no-contact orders and civil protection orders should be time limited with procedures for modification or extension explained to the parties. These can be effective when used in the context of a coordinated community response that responds quickly and decisively to violations of the order.

D. Co-Occurring Issues: Substance Abuse Issues or Mental Health Issues

Where the batterer appears to also have a substance abuse problem or a mental health issue, the court should consider ordering concurrent treatment for the identified problems (and in these cases the court orders should be specific about concurrent treatment). Domestic violence, substance abuse, and mental health issues are co-occurring problems that require separate solutions.[33] In jurisdictions where substance abuse and domestic violence programs have collaborated to offer conjoint programs, the substance-abusing batterer can be ordered to complete that comprehensive program. If the batterer has psychiatric or mental health issues, then rehabilitation should address both issues.

E. Domestic Violence Victims Should Not Be Mandated Into Treatment

As stated in the Washington State Domestic Violence Perpetrator Program Standards, adult victims should not be required to participate in court-mandated treatment programs intended for perpetrators. Victims may be encouraged to provide input and to attend specialized victim support services, if available in their community, and they should be encouraged to seek services for mental health or substance abuse when appropriate.

F. Clear Consequences for Perpetrator Noncompliance with Court Orders

- **Spell out timelines more clearly**, or give an example. Be clear that abusers should not be given multiple chances to be brought into court and make excuses

[31] A. R. Klein, *Probation/Parole Supervision Protocol for Spousal Abusers* (1989), 86.

[32] DV perpetrator Treatment may also be a condition of an order from a civil court proceeding (included as part of a protection order or part of parenting plan or as part of a service plan with Child Protective Services).

[33] Kaufman, "The Drunken Bum Theory of Wife Beating," *Social Problems* 34, no. 3 (1987): 224.

for not having contacted the program; judges should know how long it takes to get into an appointment in their community and not accept excuses for not having done an intake in a timely matter. Repeated failure to enroll in a program may be interpreted as a signal that treatment may not be a good idea. The court should use its powers to encourage follow-through and impose consequences for failure, including a few days in jail.

- **Spell out consequences:** Any court-ordered treatment should be accompanied by an admonition to the perpetrator that failure to gain admissions, to follow through, and to participate successfully may result in revocation of probation or diversion, and reinstatement of criminal charges, or, in civil proceedings, the appropriate consequences for noncompliance. Perpetrators should be given a limited time to gain admission to treatment programs. The courts should be aware that certified programs are required by the state standards to measure the individual's successful participation and not simply attendance or payment of fees in order to determine participant's status in the program. Therefore, programs may terminate an individual for multiple reasons, including lack of progress, as well as re-offense (of criminal and non-criminal abusive conduct), noncompliance with program rules, and non-payment of fees. Courts will then need to decide how to best hold these perpetrators accountable.

VII. National and State Guidance for Washington State Standards

National and state experts in treating domestic violence offenders continue to support the following standards for batterers' treatment programs.[34] [35]

[34] This list was adapted originally from the County of Los Angeles Domestic Violence Council's publication, *Batterer's Treatment Program Guidelines* (June 1988). This list emerged from and continues to be modified by the fields of psychology , health care, social work, psychiatry, probation, corrections, and domestic violence .(effectiveness of group work and cognitive behavioral approaches, motivational interviewing, interventions for DV and co-occurring issues, etc).

[35] The WSSIP report reducing all state standards as containing some elements of the…model (and therefore inadequate) fails to recognize the evidence based practices used by the… model and are contained in the WA Standards. Once again WSIPP review of the literature and research is not balanced and the report draws conclusions that simply cannot be supported by the literature and research in the field of DV or in the fields (salient) to changing human behavior.

A. The program's philosophy should:

1. **Define domestic violence as learned and socially sanctioned behavior**, which can be changed by the batterer. Domestic violence (like substance abuse) is a stand-alone behavior problem of the individual, rather than merely as a symptom of an individual's pathology, a mental disorder, or relationship dysfunction, and requires specialized interventions to produce change.

2. **Define domestic violence as a pattern of assaultive and coercive control that includes physical, sexual, and psychological attacks as well as economic abuse.** Tactics of coercive control may include stalking, isolation, emotional abuse, and threats of violence against victim, self, or others, as well as use of children to control adult victim. It is as a pattern of assaultive and coercive conduct which includes both criminal and non-criminal acts (see discussion of behavioral and legal definitions in Chapter 2).

3. **Hold the perpetrator accountable** for the violence in a manner that does not collude with the perpetrator in blaming the victim's behavior for the violence, or on the batterer's use of alcohol or drugs as the cause.

4. **Have the primary goals of safety and stopping the pattern of assaultive and coercive conduct**, taking priority over keeping the couple together or resolving other relationship issues.

B. The program components should include:

1. **Releases of Information**: Clear requirement that assessments for and admission to the program occurs only when the appropriate release of information forms have been completed.

2. **Victim Safety policies/ procedures:**

   - A "limited confidentiality" policy whereby the adult victim is entitled to information from the program regarding the acceptance or rejection of the perpetrator into the program, whether the offender is attending the program, perpetrator progress, termination, cause for termination, and warnings about risk of future violence.

   - Any information provided by the victim to the program must be held in confidence, unless the victim provides written permission to release the information.

3. **Dangerousness Assessments: Initial and ongoing** assessments of the danger posed to the adult victim and children by the domestic violence perpetrator, and

procedures for alerting both the victim and appropriate authorities should the victim's safety become a concern.

4. **Adequate initial assessment of co-occurring issues** that may influence the perpetrator's ability to benefit from treatment (e.g., substance abuse, psychosis, PTSD, organic impairment).

5. **A minimum of one-year accountability** (e.g., minimum of six months of weekly sessions followed by a minimum of six months of once-a-month sessions) to the treatment program, with additional sessions available within the program or through referrals when indicated.

6. **Use of group as the treatment of choice**. This approach decreases the batterer's isolation and dependency on the partner and ensures that the perpetrator is accountable to the group as well as to the community.

7. **Procedures for conducting an ongoing assessment of the batterer's pattern of assaultive and coercive behaviors** throughout the course of treatment, such as informing the perpetrator at the beginning of the program that the victim and others (with appropriate releases of information signed) will be contacted periodically to assess whether the abusive conduct has stopped.

8. **Requirements that batterers with substance abuse problems** attend domestic violence group treatment substance-free, and to seek concurrent treatment for substance abuse.

9. **Demonstrated ability to submit timely progress reports** to court or court designated monitoring system (the probation department, court reviews, etc.) once a month.

10. **Procedures for reporting any new offense or violations of court orders committed** by a court-mandated client during treatment to appropriate court authorities.

11. **Cultural competencies of program:** Capacities to treat culturally (language, ethnicity, faith, etc.) diverse populations.

C. Washington Programs for Domestic Violence Perpetrators: Standards for Referral

1. Statutory Requirements for Criminal Cases:

The Statutory Requirements are discussed in Chapter 7, Section VI.

2. Statutory Requirements for Civil Proceedings

RCW 26.50.150, which governs domestic violence perpetrator treatment programs, requires that any program that purports to offer domestic violence perpetrator treatment must comply with Washington State certification standards. Various statutes provide for referral to domestic violence perpetrator treatment, including in the context of domestic violence protection orders under RCW 26.50.060(1)(e), and cross-reference such orders in other civil proceedings, including dissolutions of marriage, parentage, or non-parental custody cases. RCW 26.50.025.

3. Washington Certified Domestic Violence Perpetrator Programs

- **The Washington State Standards for domestic violence perpetrator programs are *not* a "one size fits all" approach.**

  There is recurring criticism of the so-called "one size fits all" approach to batterer's intervention. A careful read of the Washington State Standards reveals that the standards allow for a wide variety of treatment approaches[36] and for individualizing treatment for this diverse population within the general framework. Due to the potentially lethal nature of domestic violence, the state legislature felt it was imperative that guidance be given to ensure public safety. As written, the state standards do not create a uniform system but rather provide that basic framework where victim safety, victim autonomy, and perpetrator accountability, as well as treatment program accountability, are central to effective treatment. The Washington State Standards for Domestic Violence Perpetrator Programs recognize that there are other interventions that may need to be used in lieu of, or in addition to, treatment (jail, close probation, fines, etc.). The Washington State Standards only cover the treatment interventions.

- **The court's leadership role: refer identified batterers to state-certified domestic violence programs**.

  - Washington established standards for certified batterers' treatment programs primarily because of the lethal nature of domestic violence. There has been resistance from some judges to referring identified batterers to the certified programs. While there are multiple sources of

[36] It is particularly flawed that both the 2013 WSIPP report and the George study of court orders and recidivism to negatively characterize (1) WA perpetrator treatment programs as "Duluth like programs", (2) the State Standards as promoting Duluth model. and (3) the Duluth treatment approaches as being inadequate. Those characterizations go beyond what can be drawn from their research and appear to be based on a misread of the literature. The WA State standards actually allow for a wide variety of treatment approaches within the framework of victim safety and perpetrator accountability, staff training, and best practices for policies and procedures. Other approaches are and can be used. If other programs want to seek certification then they should apply and receive WA state certification.

this resistance, it is important for judges to review carefully their position on this issue.

- Holding batterers accountable for their domestic violence and for changing their behavior is the hallmark of effective perpetrator intervention. People do not change problems they do not think they have. Batterers are always seeking others who will collude with their denial of their responsibility so they do not have to stop their violence and their abusive control of the victims. See Chapter 7, Section VI and Attachment 1 of this Appendix for full discussion of the standards for Washington Certified Domestic Violence Perpetrator Programs.

- **Not recommended**: Traditional anger management, couples counseling, and family counseling are not recommended because of their ineffectiveness in stopping the abusive conduct and their potential for increasing the danger to the victim, their children, and community.

For a current list of Washington State Certified Domestic Violence Intervention Programs, please visit https://www.dshs.wa.gov/ca/domestic-violence/domestic-violence-perpetrator-treatment

Conclusion

While domestic violence evaluations (Appendix A) and treatment for domestic violence perpetrators are important tools, they remain just two of the multiple interventions needed to address domestic violence perpetrators. Domestic violence evaluations, done well, can increase the safety of adult victims and their children. Evaluations (and domestic violence perpetrator treatment) can address the specific issues of batterers and can contribute to the efficacy of the court response by considering the individual issues. Done poorly, they can endanger adult victims, their children, and the community.

Domestic violence treatment alone is not a panacea for stopping domestic violence and it will not work for some individual perpetrators. For treatment programs to be effective they must be embedded in a coordinated community response. The courts need to have a variety of interventions, including sanctions and careful monitoring, to create readiness for change in individual batterers. Since treatment is basically a rehabilitation program for those already abusive, it alone will not alter this widespread social problem. Courts must join with community institutions to communicate new norms of respect and equality in intimate relationships.

APPENDIX B: ATTACHMENT 1

Washington State Domestic Violence Perpetrator Treatment Program Standards Summary:

This summary highlights selected sections of Washington Administrative Code (WAC) 388-60. For the complete chapter, please see: http://apps.leg.wa.gov/WAC/default.aspx?cite=388-60.

Authority

RCW 26.50.150 requires any program that provides domestic violence perpetrator treatment to be certified by the Department of Social and Health Services (DSHS).

- It includes some minimum qualifications for perpetrator treatment programs and also directs DSHS to adopt rules for standards for such programs.
- The rules and minimum standards for domestic violence perpetrator treatment programs are set forth in WAC) 388-60**.**

Scope

The minimum standards in WAC 388-60 apply to any program that:

- Advertises that it provides domestic violence perpetrator treatment; or
- Defines its services as meeting court orders that require enrollment in and/or completion of domestic violence perpetrator treatment.

Treatment Focus:

RCW 26.50.150 (4) requires domestic violence perpetrator treatment programs to focus primarily on ending the participant's physical, sexual, and psychological abuse, holding the perpetrator accountable for abuse that occurred and for changing violent and abusive behavior. The program must base all treatment on strategies and philosophies that do not blame the victim or imply that the victim shares any responsibility for the abuse which occurred.

Victim Safety

WAC 388-60-0065 and WAC 388-60-0155 address issues related to victim safety.

- WAC 388-60-0065 requires domestic violence perpetrator programs to:
  - Notify the victim of each program participant within fourteen days of the participant being accepted or denied entrance to the program that the participant has enrolled in or has been rejected for treatment services.
  - Have written policies and procedures that assess the safety of the victims of program participants;
  - Encourages victims to make plans to protect themselves and their children
  - Inform victims of outreach, advocacy, emergency and safety-planning services offered by a domestic violence victim program in the victim's community.
  - Give victims a brief description of domestic violence perpetrator treatment services, and inform them of the limitations of perpetrator treatment.
- WAC 388-60-0155 requires domestic violence perpetrator treatment programs to treat all information the victim provides to the perpetrator treatment program as confidential.

Clinical Intake

RCW 26.50.150 (1) requires that all treatment must be based upon a full, complete clinical intake including, but not limited to: current and past violence history; a lethality risk assessment; history of treatment from past domestic violence perpetrator treatment programs, a complete diagnostic evaluation; a substance abuse assessment; criminal history; assessment of cultural issues, learning disabilities, literacy, and special language needs; and a treatment plan that adequately and appropriately addresses the treatment needs of the individual.

Group Treatment Required

RCW 26.50.150(3) requires participants to participate in group sessions unless there is a documented, clinical reason for another modality.

Minimum Treatment Period

WAC 388-60-0255 specifies that the minimum treatment period for domestic violence perpetrator treatment program participants is the time required for the participant to fulfill all conditions of treatment set by the perpetrator treatment program.

- WAC 388-60-0255 (2) requires perpetrator treatment programs to require participants to satisfactorily attend treatment for at least twelve consecutive months.
- WAC 388-60-0255 (3) requires perpetrator treatment programs to require participants to attend a *minimum* of twenty-six consecutive weekly same gender group sessions, followed by monthly sessions until twelve months are complete

Substitute Treatment Prohibited

RCW 26.50.150(3) prohibits substituting other therapies, such as individual, marital, or family therapy, substance abuse evaluations or therapy, medication reviews, or psychiatric interviews; however, some of the above may occur concurrently with the weekly group treatment sessions.

WAC 388-60-0095(5) prohibits marriage or couples' therapy during the first six months of perpetrator treatment and allows such therapy only where the victim has reported that participant has ceased engaging in violent and/or controlling behavior.

Impact of Domestic Violence on Children

WAC 388-60-0245(5) requires domestic violence perpetrator treatment programs to include an educational component that informs participants on the impact of domestic violence on children and the incompatibility of domestic violence and abuse with responsible parenting.

Participant Contract

WAC 388-60-0225(2) requires domestic violence perpetrator treatment programs to have participants enter into a contract in which the participant agrees to:

- Cooperate with all program rules;

- Stop violent and threatening behaviors;
- Be non-abusive and non-controlling in relationships;
- Develop and adhere to a responsibility plan;
- Comply with all court orders;
- Cooperate with the rules for group participation; and
- Sign all required releases of information.

Violation of contract rules may be grounds for the domestic violence perpetrator treatment program to terminate the participant. If a perpetrator treatment program chooses not to terminate the participant, the program must note the noncompliance in the client's progress notes and report the noncompliance to the court and the victim. See WAC 388-60-0295(4).

Required Releases of Information

To facilitate communication necessary for periodic safety checks and case monitoring, RCW 26.50.150(2) requires domestic violence perpetrator treatment programs to require the perpetrator to sign the following releases:

- For the program to inform the victim and victim's community and legal advocates that the perpetrator is in treatment with the program, and to provide information, for safety purposes, to the victim and victim's community and legal advocates;
- To prior and current treatment agencies to provide information on the perpetrator to the program; and
- For the program to provide information on the perpetrator to relevant legal entities including lawyers, courts, parole, probation, child protective services, and child welfare services.

Satisfactory Completion

WAC 388-60-0265(1) requires domestic violence perpetrator treatment programs to have written criteria for satisfactory completion.

WAC 388-60-0255(1) provides that satisfactory completion of treatment is not based solely on participating in treatment for a certain period of time or a number of sessions, but is based on the participant fulfilling all conditions set by the domestic violence perpetrator treatment program.

After successful completion by a program participant, WAC 388-60-0275(1) requires the domestic violence perpetrator treatment program to notify:

- Courts having jurisdiction, if the participant is court-mandated to attend domestic violence perpetrator treatment; and
- The victim of the program participant, if feasible.

Discharge of Participants Who Do Not Complete Treatment

WAC 388-60-0295(1) requires perpetrator treatment programs to have guidelines for discharging participants who do not satisfactorily complete the program.

- WAC 388-60-0295(2) provides that a perpetrator treatment program may terminate a participant from treatment for non-compliance with the participant contract.

After discharge of a participant who does not complete domestic violence perpetrator treatment, WAC 388-60-0305(4) requires treatment programs to notify the following parties within three days of termination of the participant:
    - Courts having jurisdiction, if the participant is court-mandated to attend domestic violence perpetrator treatment;
    - The participant's probation officer, if any; and
    - The victim of the program participant.
- If a program chooses not to discharge a participant who has not complied with the domestic violence perpetrator treatment contract, a court order, a probation agreement, or group rules, the program must note the re-offense and/or noncompliance in the client's progress notes, reports to the court, and reports to the victim (if feasible).
    - The program must state in the client's record the program's rationale for not terminating the participant, and state what corrective action was taken. WAC 388-60-0295(5).

Certification/Recertification

DSHS certifies domestic violence perpetrator treatment programs; DSHS does not issue an individual professional domestic violence perpetrator treatment credential to individuals.

- Requirements for obtaining initial certification can be found in WAC 388-60-0435 through 388-60-0495.
- Certified domestic violence perpetrator treatment programs must apply for recertification every two years. Requirements for recertification can be found in WAC 388-60-0505 through 388-60-0545.

Domestic Violence Perpetrator Treatment Staff Requirements

Requirements for domestic violence perpetrator direct treatment staff can be found in WAC 388-60-0315 through WAC 388-60-0425. Before staff can provide domestic violence perpetrator treatment services for a certified program, the certified program must submit documentation to DSHS that verifies that the proposed perpetrator treatment staff meets the required minimum qualifications in these sections.

This summary was prepared on May 6, 2014 by:
Maureen Kelly, Domestic Violence Perpetrator Treatment Certification Program Manager
DSHS-Children's Administration, (360) 902-7901

APPENDIX C

FEDERAL DOMESTIC VIOLENCE LAWS

Restrictions on the possession of firearms by persons subject to a domestic violence order or convicted of a misdemeanor crime of domestic violence were enacted in 1996 amendments to the federal Gun Control Act. The authority for Congress to act in this area comes from the commerce clause, and by its terms, the Gun Control Act only applies to firearms possessed "in or affecting commerce." However, the phrase "in or affecting commerce" has been interpreted broadly by the United States Supreme Court such that any gun that has moved across state lines at least once is covered by the Gun Control Act.

In 2000, Congress amended the Violence Against Women Act (VAWA) to prohibit interstate domestic violence, stalking, and violations of protection orders. VAWA also requires that states give full faith and credit to domestic violence protection orders issued by other states.

In 2005, Congress amended VAWA to enhance judicial and law enforcement tools to combat violence against women. The Violence Against Women and the Department of Justice Reauthorization Act of 2005 was enacted on January 5, 2006. In 2013, Congress amended VAWA to enhance certain protections that had been previously been unenforceable for many victims of domestic and sexual violence, including protections available to Native American victims, LGBT victims, college students, and residents of public housing.

This appendix summarizes the provisions relating to domestic violence in the Gun Control Act and the Violence Against Women Act, and includes excerpts from the relevant federal statutes.

TABLE OF CONTENTS

GUN CONTROL ACT OF 1968, AMENDED 1996
Possession of Firearms by Persons Subject to a Civil Domestic Violence Restraining Order C-2
Possession of Firearms by Persons Convicted of a Misdemeanor Crime of Domestic Violence C-3
Sale or Disposal of Firearms to Persons Convicted of a Misdemeanor Crime of Domestic Violence or Known to be Subject to a Civil Domestic Violence Restraining Order C-4
Application of Gun Control Act to Law Enforcement Officers C-5
Gun Control Act Definitions C-6

VIOLENCE AGAINST WOMEN ACT (VAWA), AMENDED 2013
Interstate Domestic Violence C-7
Interstate Stalking C-8
Interstate Violation of a Protection Order C-9
Full Faith and Credit Given to Protection Orders C-10
Limits on Internet Posting of Protection Order Information C-11
Definitions for Terms in VAWA C-11

GUN CONTROL ACT OF 1968, AMENDED 1996

Possession of Firearms by Persons Subject to a Civil Domestic Violence Restraining Order

Federal law prohibits possession of a firearm by anyone who is restrained by a domestic violence order for protection. The firearm restriction does not apply to temporary orders for protection, which are issued without notice to respondent. The restriction only applies if the order was issued after a hearing for which the person received actual notice and at which the person had the opportunity to participate.

In addition, the protection order must include a finding that the defendant poses a credible threat to the physical safety of the victim or the order must prohibit the defendant from using any force that would cause injury to the victim. Washington mandatory form DV 3.015, Order for Protection complies with the requirements of this section.

Law enforcement officers are exempted from the application of this restriction as to firearms issued by the state or local government. (See 18 U.S.C. § 925, infra at C-6.)

The penalty for violation of this provision is a fine and/or imprisonment for not more than ten years.

Title 18, United States Code, Section 922(g)(8), Unlawful Acts

"(g) It shall be unlawful for any person--
(8) who is subject to a court order that--
(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; **or**
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;
. . .
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Possession of Firearms by Persons Convicted of a Misdemeanor Crime of Domestic Violence

It is a federal crime to possess a firearm after conviction for a qualifying misdemeanor crime of domestic violence.

A qualifying crime is one that is a misdemeanor under either federal or state law and has as an element the use or attempted use of physical force or threatened use of a deadly weapon. The crime must also have been committed by:

- a current or former spouse, parent, or guardian of the victim
- a person with whom the victim shares a child in common,
- a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, **or**
- a person similarly situated to a spouse, parent, or guardian of the victim.

This restriction applies to law enforcement officers.

The restriction does not apply to convictions that have been expunged or pardoned, or as to which civil rights have been restored.

The penalty for violation of this provision is a fine and/or imprisonment for not more than ten years.

The "physical force" requirement under 18 U.S.C. § 922(g)(9), is satisfied by the "offensive touching" degree of force that supports a common-law battery conviction and does not require the greater showing of violent contact. ***U.S. v. Castleman***, 134 S. Ct. 1405, 572 US __, 188 L. Ed. 2d 426 (2014).

Title 18, United States Code, Section 922(g)(9), Unlawful Acts

"(g) It shall be unlawful for any person--

(9) who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Title 18, United States Code, Section 921, Definitions

"(a) As used in this chapter—

(33)(A) Except as provided in subparagraph (C)*, the term '**misdemeanor crime of domestic violence**' means an offense that --

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the

victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless --

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

***No subparagraph (C) was enacted.**

Sale or Disposal of Firearms to Persons Convicted of a Misdemeanor Crime of Domestic Violence or Known to be Subject to a Civil Domestic Violence Restraining Order

It is a federal crime to sell or give a firearm to a person who has been convicted of a misdemeanor crime of domestic violence or a person known to be subject to a civil domestic violence restraining order. The person restrained by the order must have had actual notice of a hearing and the opportunity to participate in the hearing.

The penalty for violation of this provision is a fine and/or imprisonment for not more than ten years.

Title 18, United States Code, Section 922(d), Unlawful Acts

"(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that --

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter."

Application of Gun Control Act to Law Enforcement Officers

With some exceptions, possession of a firearm that has been issued by the federal or state government is exempted from the restrictions in the Gun Control Act. However, law enforcement officers are not exempt from the provision that restricts possession of a firearm after conviction of a misdemeanor crime of domestic violence. (18 U.S.C. § 922(g)(9).)

Title 18, United States Code, Section 925, Exceptions: Relief from disabilities

"(a)(1) The provisions of this chapter, except for sections 922(d)(9)* and 922(g)(9)** and provisions relating to firearms subject to the prohibitions of Section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."

---

*Section 922(d)(9) prohibits the sale or other disposal of any firearm to a person knowing or having reasonable cause to believe that such person has been convicted of a misdemeanor crime of domestic violence. See page C-7, *supra*.

**Section 922(g)(9) prohibits possession of any firearm by a person who has been convicted in any court of a misdemeanor crime of domestic violence. See page C-6, *supra*.

Gun Control Act Definitions

Title 18, United States Code, Section 921, Definitions

"(a) As used in this chapter—

(3) The term '**firearm**' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(32) The term '**intimate partner**' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33) (A) Except as provided in subparagraph (C)*, the term '**misdemeanor crime of domestic violence**'means an offense that --

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless --

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

***No subparagraph C was enacted.**

Violence Against Women Act (VAWA)

Federal Domestic Violence, Sexual Assault, Stalking and Dating Violence

It is a federal crime to cross state or foreign lines or enter or leave Indian country or within the special maritime and territorial jurisdiction of the United States to commit or attempt to commit a crime of violence against an intimate partner. There is no requirement that actual injury be sustained but the defendant must have intended to kill, injure, harass, or intimidate when crossing the line.

It is also a federal crime to force or coerce an intimate partner to cross state or foreign lines or enter or leave Indian country or within the special maritime and territorial jurisdiction of the United States if the conduct or travel leads to the commission or the attempted commission of a crime of violence against the victim.

A crime of violence is defined as an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another, and any other felony offense that involves a substantial risk of physical force against the person or property of another during the commission of the offense.

18 U.S.C. § 2261. Interstate domestic violence (Amended by the Violence Against Women Act of 2013)

"(a) Offenses.
(1) Travel or conduct of offender. A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).
(2) Causing travel of victim. A person who causes a spouse, intimate partner or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(b) Penalties. A person who violates this section or section 2261A shall be fined under this title, imprisoned--
(1) for life or any term of years, if death of the victim results;
(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
(4) as provided for the applicable conduct under chapter 109A [18 U.S.C.S. §§ 2241 et seq.] if the offense would constitute an offense under chapter 109A [18 U.S.C.S. §§ 2241 et seq.] (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
(5) for not more than 5 years, in any other case, or both fined and imprisoned.
or both fined and imprisoned.
(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order describes in section 2266 of title 18, United States code, shall be punished by imprisonment for not less than 1 year."

Note: Chapter 109A (18 U.S.C.S. §§ 2241 et seq.) deals with sexual crimes.

Interstate Stalking

It is a federal crime to cross state or foreign lines or within the special maritime and territorial jurisdiction of the United States to stalk another person. There must be proof that the stalking placed the victim in reasonable fear of death, serious bodily injury, or caused substantial emotional distress and the defendant must have intended to kill, injure, harass, or intimidate when crossing the line.

It is also a federal crime to use the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that places a person in reasonable fear of death or serious bodily injury.

The penalty for these crimes is the same as for Interstate Domestic Violence. *See* 18 U.S.C. § 2261(b), page C-8, *supra*.

18 U.S.C. § 2261A. Stalking (Amended 2013)

"Whoever—

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--

(A) places that person in reasonable fear of the death of, or serious bodily injury to--

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title."

Section 2261(b) Enhanced penalties for stalking.
''(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year."

---

*18 U.S.C. §115(c)(2) provides: "immediate family member of an individual means—

(A) his spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or

(B) any other person living in his household and related to him by blood or marriage;"

Interstate Violation of a Protection Order

It is a federal crime to cross state or foreign lines or enter or leave Indian country and violate a protection order that protects the victim against violence, threats, harassment against, contact or communication with, or physical proximity to, another person, or that would violate a portion of a protection order in the jurisdiction in which the order was issued.

It is also a federal crime to force or coerce a person to cross state or foreign lines or enter or leave Indian country if the force or coercion leads to a violation of the portion of a Protection Order that prohibits or provides protection against violence, threats or harassment against, contact or communication with, or physical proximity to the protected person.

18 U.S.C. § 2262. INTERSTATE VIOLATION OF PROTECTION ORDER.

"(a) Offenses.
(1) Travel or conduct of offender. A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).
(2) Causing travel of victim. A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

(b) Penalties. A person who violates this section shall be fined under this title, imprisoned—
(1) for life or any term of years, if death of the victim results;
(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
(4) as provided for the applicable conduct under chapter 109A* [18 U.S.C.S. §§ 2241 et seq.] if the offense would constitute an offense under chapter 109A* [18 U.S.C.S. §§ 2241 et seq.] (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
(5) for not more than 5 years, in any other case, or both fined and imprisoned.

---

*Chapter 109A (18 U.S.C.S §§ 2241 et seq.) deals with sexual crimes.

Full Faith and Credit Given to Protection Orders

Any protection order that is issued consistent with the requirements of the federal law must be accorded full faith and credit by the courts of another State, Indian tribe, or territory. The protection order is consistent with the federal requirements if:

1. The issuing court has jurisdiction over the parties and the matter under the law of that State, Indian tribe, or territory, and

2. Reasonable notice and an opportunity to be heard are given to the person against whom the order is sought sufficient to protect that person's right to due process.

Ex parte orders are covered by these provisions if notice and opportunity to be heard is provided within the time required by the State, tribal, or territorial law.

When according full faith and credit to an order issued by a court of another State, tribe, or territory, notice to the party against whom the order was issued is not required, unless the party protected under the order requests it.

18 U.S.C. § 2265 Full Faith and Credit Given to Protection Orders

"(a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State, Indian tribe, or territory.

(b) Protection order. A protection order issued by a State, tribal, or territorial court is consistent with this subsection if –
(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and
(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition. A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if –
(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and registration.
(1) Notification. A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

(2) No prior registration or filing as prerequisite for enforcement. Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction.

(3) Limits on internet publication of registration information. A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration or filing of a protection order, restraining order, or injunction [, restraining order, or injunction] in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) Tribal Court Jurisdiction. For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151)or otherwise within the authority of the Indian tribe."

Limits on Internet Posting of Protection Order Information

Note re 18 U.S.C. § 2265(d)(3):

§ 106 of the Violence Against Women Act Court Training and Improvement Act of 2005, 109 P.L. 162; 119 Stat. 2960, codified 18 U.S.C. 2265(d)(3) was originally in the "STOP GRANT" portion of the VAWA Reauthorization Act and conditioned STOP GRANT funding on compliance with the law. It was moved to the full faith and credit section of the act when the bill reached the US Senate. The Senate version was signed by the President.

. In 2004, GR 31 was amended to permit courts to make court records available remotely, despite the language in 18 U.S.C. §2265(d)(3) .Various counties across the state have made court records—or at least some sub-set of court records—available on line. These include superior courts in King, Pierce, Chelan, Kitsap, and Thurston counties, partially in reliance on an AOC memo that interpreted the pre-2005 federal statute to only apply to foreign protection orders.

There has been no written guidance from the Department of Justice Office on Violence Against Women regarding this issue.

Definitions for Terms in VAWA

18 U.S.C. § 2266. Definitions (Amended by VAWA 2013)

"In this chapter [18 U.S.C.S. §§ 2266. et seq.]:
(1) **Bodily injury.**--The term 'bodily injury' means any act, except one done in self-defense, that results in physical injury or sexual abuse.

(2) **Course of conduct.**--The term 'course of conduct' means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.

(3) **Enter or leave Indian country.**--The term 'enter or leave Indian country' includes leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government.

(4) **Indian country.** The term 'Indian country' has the meaning stated in section 1151 of this title.

(5) **Protection order**.--The term 'protection order includes—
(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long

as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

(7) **Spouse or intimate partner**.--The term 'spouse or intimate partner' includes--

(A) for purposes of—

(i) sections other than section 2261A—

(I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(ii) section 2261A

(I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking,, and a person who cohabits or has cohabited as a spouse with the target of the stalking,; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

(8) **State**.--The term 'State' includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.

(9) **Travel in interstate or foreign commerce**.--The term 'travel in interstate or foreign commerce' does not include travel from one State to another by an individual who is a member of an Indian tribe and who remains at all times in the territory of the Indian tribe of which the individual is a member.

(10) **Dating partner**.—The term 'dating partner' refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser and the existence of such a relationship based on a consideration of—

(A) the length of the relationship; and

(B) the type of relationship; and

(C) the frequency of interaction between the persons involved in the relationship."

APPENDIX D

Domestic Violence in Lesbian, Gay, Bisexual, Transgender, and Queer Relationships

By Judge Elizabeth Berns, David Ward, J.D., Breanne Schuster, & Tristin Sullivan Lepa

I. Introduction

Most experts agree that domestic violence in lesbian, gay, bisexual, transgender, and queer (LGBTQ) relationships occurs with the same frequency and severity as in heterosexual relationships. However, domestic violence in the LGBTQ community contains unique factors and characteristics that often relate to the anti-LGBTQ bias within society.

A. Recent Recognition

The federal Violence Against Women Act (VAWA) did not specifically recognize LGBTQ domestic violence survivors prior to the 2013 reauthorization. The 2013 reauthorization, however, added new provisions applicable to LGBTQ domestic violence survivors. Under the reauthorization of VAWA, the definition of domestic violence is amended to explicitly include "intimate partners" as well as spouses. In addition, it adds civil rights provisions that prohibit discrimination based on a person's sexual orientation or gender identity.[1]

B. Treatment of LGBTQ Survivors Under Washington Domestic Violence Laws

Washington's domestic violence laws do not distinguish between heterosexual and LGBTQ relationships. The laws provide equal protection to domestic violence survivors who are in LGBTQ relationships.

For example, under RCW 26.50.010(2), the definition of "family or household member" for the purposes of domestic violence laws includes (but is not limited to):

- Current and former spouses and domestic partners,
- Adults who are presently residing together or who have resided together in the past,
- Persons sixteen years old or older with whom a person sixteen years old or older has or has had a dating relationship.

[1] Title IV, Sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355

C. LGBTQ Families[2]

- Approximately 37% of LGBTQ-identified adults have or have had a child at some time in their lives.
- Nearly 17% of same-sex couples are raising children.
- An estimated 125,000 same-sex couples are raising approximately 220,000 children.
- Of the same-sex couples under age 50 raising children, approximately 48% are female couples.

II. Terminology[3]

- **Bisexual:** A term identifying a person who is attracted to members of either sex emotionally, physically, spiritually, and/or sexually.

- **Gay:** A term commonly identifying a man who is predominantly or exclusively attracted to men emotionally, physically, spiritually, and/or sexually. Also sometimes used as a blanket term ("the gay community") including both men and women.

- **Gender Identity:** The gender with which a person identifies (i.e. whether one perceives oneself to be male, female, or describes oneself in other ways).

- **Heterosexism:** A cultural assumption based on the idea that everyone is heterosexual and that it is the correct sexual orientation.

- **Heterosexual:** A person who is predominantly or exclusively attracted to different-sex individuals emotionally, physically, spiritually, and/or sexually.

- **Homophobia:** The fear of same-sex relationships as well as of those who identify as gay, lesbian, bisexual, or transgender.

- **Homosexual:** A person who is predominantly or exclusively attracted to individuals of the same sex emotionally, physically, spiritually, and/or sexually. The term is generally disfavored in the LGBTQ community.

---

[2] Gary J. Gates, "LGBT Parenting in the United States," The Williams Institute, February 2013, available at: http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf

[3] The Center, Trans Basics: Glossary of Terms, http://www.gaycenter.org/gip/transbasics/glossary; Web MD, http://www.webmd.com/sex-relationships/guide/sexual-orientation; The Williams Institute, http://www.courts.ca.gov/documents/lgbtq_final_12-4.pdf. The Northwest Network, http://www.nwnetwork.org.

- **Lesbian:** A woman who is predominately or exclusively attracted to women emotionally, physically, spiritually and/or sexually.

- **Queer**: An inclusive term that refers collectively to LGBT individuals and others who may not identify with any of these categories but identify as queer. Although embraced by some members of the LGBTQ community, others may still consider the term to be a pejorative.

- **Sexual Orientation:** A person's emotional, romantic, and/or sexual attraction to individuals of a particular gender.

- **Trans or Transgender:** An umbrella term for people whose gender identity, expression, or behavior differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, male to female (MTF), female to male (FTM), and gender nonconforming people.

- **Transphobia:** The fear, hatred or dislike of, or discrimination towards a person because that person is transgender.

III. Statistics

In 2012, Gallup conducted the first-of-its-kind study about LGBTQ populations across the United States. Interviewers posed the following question: "Do you, personally, identify as lesbian, gay, bisexual, or transgender?" giving participants the opportunity to self-identify. The study recognizes that it is difficult to gather accurate and complete data on this population because "these concepts involve complex social and cultural patterns." Nevertheless, the results dispel the previously held stereotype that this population is concentrated in only certain states. The survey reveals that 3.4% of those surveyed self-identified as LGBTQ, from 1.7% in North Dakota to 5.1% in Hawaii. The District of Columbia reported 10% of its population self-reporting as LGBTQ. In Washington State, 4.0% of those surveyed self-identified as LGBTQ.

Gallup also reported on racial groups identifying as members of this community with the following estimates: 4.6% of African-Americans, 4.0% of Hispanics, 4.3% of Asian-Americans, and 3.2% of white Americans identify as LGBTQ.

Finally, Gallup introduced age as a factor and survey results indicated estimates that adults aged 18 to 29 are more than three times as likely to identify as LGBTQ than older Americans—6.4% of adults ages 18 to 29 identify as LGBT while only 1.9% of seniors aged 65 and older identify as LGBTQ.

A. Domestic Violence in the LGBT Community compared to Heterosexual Community[4]

Male Survivors:

Bisexual Men in the United States

- 26.0% have reported experiencing rape, physical violence, and/or stalking by an intimate partner.
- 27.0% have been a victim of physical violence by an intimate partner.
- 53% have reported experiencing psychological aggression in the context of an intimate relationship.

Heterosexual Men in the United States

- 29.0% have reported experiencing rape, physical violence, and /or stalking by an intimate partner.
- 26.3% have been a victim of physical violence by an intimate partner.
- 49% have reported experiencing psychological aggression in the context of an intimate relationship at some point.

Gay Men in the United States:

- 24.0% have been a victim of physical violence by an intimate partner.
- 60% have reported experiencing psychological aggression in the context of an intimate relationship.

Female Survivors:

Bisexual Women in the United States:

- 22% have been raped by an intimate partner.
- 40% have reported experiencing sexual violence other than rape by an intimate partner.
- 55.1% (over half of bisexual women) have been a victim of physical violence by an intimate partner.

---

[4] National Intimate Partner & Sexual Violence Survey, 2010) Findings on Victimization by Sexual Orientation, (January 2013) http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

- 76.2% have experienced psychological aggression by an intimate partner.

Heterosexual Women in the United States:

- 9.1% have been raped by an intimate partner.
- 15% have reported experiencing sexual violence other than rape by an intimate partner.
- 29.8% (more than one-quarter) have been a victim of physical violence by an intimate partner.
- 47.5% have experienced psychological aggression by an intimate partner.

Lesbian Women in the United States:

- 36.3% (more than one third of lesbian women) have been a victim of physical violence by an intimate partner.
- 63.0% have experienced psychological aggression by an intimate partner.

IV. Similarities and Differences between Domestic Violence in LGBTQ Relationships and Heterosexual Relationships

There are many similarities between domestic violence in LGBTQ relationships and in heterosexual relationships. In both types of relationships, the abuser's primary goal is to achieve power and control over the survivor.

However, it is important to recognize that there are unique issues that may be present in cases involving LGBTQ relationships. Abusers in LGBTQ relationships have different tools available to achieve power and control, and survivors face different realities when seeking help.

A. Domestic Violence Occurs in LGBTQ Relationships at Comparable Rates as in Heterosexual Relationships

Studies have indicated that 25 to 33% of people in same-sex relationships have reported experiencing domestic violence. This is comparable to the percentage of women in heterosexual relationships who report experiencing domestic violence.[5] The prevalence, dynamics, severity, and effects of domestic violence are similar in both LGBTQ and heterosexual relationships.

---

[5] Center for American Progress, Domestic Violence in the LGBT Community: A Fact Sheet (available at http://www.americanprogress.org/issues/lgbt/news/2011/06/14/9850/domestic-violence-in-the-lgbt-community/).

B. LGBTQ Couples Are No More Likely To Engage in "Mutual Abuse" Than Heterosexual Couples

There is no evidence that LGBTQ relationships have higher levels of "mutual abuse" than heterosexual relationships. However, it is sometimes incorrectly presumed that abuse in same-sex relationships must be mutual, based on stereotypes that "women can't batter" or "men can't become victims."

While an abuser in an LGBTQ relationship may attempt to portray domestic violence as "mutual," (especially if the survivor attempts to defend against it), the person who is the abuser is the person who exerts a pattern of power and control over his or her partner.

When it appears that both partners have used violence, it is important to assess who is further isolated and controlled by the behavior of the other partner.

C. Domestic Violence in LGBTQ Relationships and Heterosexual Relationships Share Many Common Characteristics

In LGBTQ relationships, the patterns of abuse often mirror those commonly found in heterosexual relationships. See Chapter II, including physical abuse: sexual abuse, stalking, emotional abuse, using coercion and threats, using children, economic abuse, isolation, minimizing, denying, and blaming others for abusive behaviors.

D. Special Issues in LGBTQ Domestic Violence

While there are many similarities between domestic violence in LGBTQ relationships and heterosexual relationships, there are also distinct issues that may arise in LGBTQ relationships. Some unique issues that may be present in LGBTQ relationships include:

1. Threatening to "out" a survivor to family members, friends, and co-workers[6]

The threat of "outing" is an effective tool to control and coerce a survivor who is "closeted" about his or her sexual orientation or gender identity. Even if a survivor is "out" to some people, he or she may not be at work or may not have disclosed his or her sexual orientation or gender identity to

[6] For various reasons, many LGBTQ people have not shared their sexual orientation or gender identity with everyone in their life. This is often due to fear of violence, being ostracized from friends and family, or experiencing negative consequences at work. Someone is "outed" when another person reveals his or her sexual orientation or gender identity without permission.

family members or friends. The consequences of being outed can lead to further isolation of a survivor.[7]

The fear of outing may also make LGBTQ survivors less likely to report abuse to legal authorities. Survivors may fear that reporting abuse will require them to reveal their sexual orientation publicly.

2. Forcing a survivor to engage in sexual acts to prove the survivor is a "true" LGBTQ person

An abusive partner may coerce a partner to perform sexual acts by complaining that the survivor is not "really" gay if he or she refuses to perform the acts. Transgender survivors may face similar coercion to have sex to prove their gender identity (e.g., "if you want to be a real woman, you have to have sex like this.").[8]

People in the LGBTQ community have long been exposed to messages that their sexual relationships are wrong. Exposure to these messages may make LGBTQ survivors more hesitant to disclose sexual abuse.

3. Threatening to end a survivor's relationship with his or her children due to sexual orientation, gender identity, or non-biological relationship to the children

Many LGBTQ couples are raising children together. LGBTQ couples may have children together through assisted reproduction, surrogacy, or adoption. LGBTQ couples may also raise children together who were born while one partner was in a prior relationship. The threat to end a survivor's relationship with a child is a powerful tool that can be used to control the survivor.

a. If a same-sex couple has children together, the abuser may threaten to separate the survivor from the couple's children. For example, if a survivor is not a biological parent, the abuser may claim the survivor has no legal rights to the child.[9]

---

[7] Connie Burk, *Think, Re-Think: Woman-To-Woman Domestic Violence*, WISCONSIN COALITION AGAINST DOMESTIC VIOLENCE NEWSLETTER, May 1999. (available at http://nwnetwork.org/wp-content/uploads/2011/11/Think-Re-think-Woman-to-Woman-DV.pdf .

[8] The Network, La Red: *Partner abuse happens to trans folks too!* (available at http://tnlr.org/wp-content/uploads/2011/04/trans-partner-abuse-handout.pdf).

[9] *Think, Re-Think*, *Supra* note 3 at 2

b. **NOTE**: Washington law provides that if a same-sex couple has a child while they are married or in a registered domestic partnership, both spouses/partners are legally presumed to be the child's parents. RCW 26.26.116(1).

There is also a presumption under Washington law that a person is a legal parent if the person lived in the same household for the first two years of the child's life and the person openly held out the child as his or her own. RCW 26.26.116(2).

In addition, Washington law also provides that if a same-sex couple raises a child together, the non-biological parent may establish a legal relationship by being adjudicated as the child's "de facto" parent. A de facto parent stands in legal parity with a child's natural or adoptive parent. In re Parentage of L.B., 155 Wn.2d 679 (2005).

c. If a same-sex couple has children together and both are the children's legal parents, the non-biological parent has the same legal rights as a parent as the biological parent. In such cases, a parent should not be awarded more residential time or be given sole decision-making based on the fact that the parent is biologically related to the child.

d. Some LGBTQ individuals have children from prior heterosexual relationships. In those cases, an abusive partner may threaten to "out" a survivor to the child's other biological parent. Washington law prohibits a parent's sexual orientation or gender identity from being considered in custody decisions. However, the history of discrimination against LGBTQ people may create fear that they will not be treated fairly in court.

4. Depicting sexual violence as consensual

People in both same-sex and different-sex relationships may engage in consensual "role playing" or sexual practices that involve intense and sometimes painful physical sensation. Many couples who participate in this type of activity have well-developed rules for keeping this experience safe through mutually agreed-upon boundaries and the use of "safe" words.

However, stereotypes may create a misperception that these practices are more common in LGBTQ sexual relationships. An abuser may recognize that these stereotypes exist and attempt to depict sexual abuse as

consensual. But if a partner violates the mutually agreed-upon boundaries, it is sexual abuse.[10]

5. Particular concerns for transgender survivors

Transgender people are uniquely vulnerable to a number of forms of abuse in relationships, including:

a. Hiding or destroying hormones. Manipulating a transgender survivor's ability to take hormones can have devastating effects both physically and emotionally. Missing just a few pills can have an effect on someone's physical appearance.

b. An abusive partner may demean or coerce a transgender survivor by calling his or her body parts by the wrong names or threatening to share nude photos of the survivor either post- or pre-transition.

c. A transgender survivor's partner may try to control how the survivor dresses and acts, or refuse to use the name or pronouns that conform with the survivor's gender identity.

d. Abusers may demean transgender survivors by saying things like "even with that wig on, you still look like a man" or "you are never going to find someone else who will date someone like you."

6. Telling survivor "All LGBTQ relationships are like this"

If the abuser has been "out" for longer than the survivor, the abuser may try to act as the authority on how same-sex relationships should "look." For example, the abuser may tell a survivor that all LGBTQ relationships are abusive or that "men can't abuse men" or "women can't abuse women."

7. Exploiting survivor's fears of discrimination

An abuser may exploit a survivor's fears of discrimination by telling the survivor that the police, judges, or CPS will not believe him or her because they are biased against LGBTQ people.

8. Accusing survivor of mutual abuse or being the abuser

---

[10] *See also* The Northwest Network, S/*M is not abuse – Abuse is not S/M* (available at http://nwnetwork.org/resources/info-and-articles/).

An abusive partner may claim the survivor was the abuser, particularly if the survivor appears to be bigger, stronger, or more masculine.

9. Using survivor's HIV status to coerce or threaten the survivor[11]

An abuser may use a survivor's HIV status in many ways to threaten, control, or demean the survivor, including:

a. Threatening to reveal the survivor's HIV status to family, friends, and/or employers.

b. Blaming the survivor for having HIV, using the survivor's HIV status to justify abuse, and/or telling partner he or she is "dirty."

c. Accusing the survivor of being an unfit parent because of HIV status or making the survivor feel guilty for the HIV status of children.

If the survivor becomes less able to care for himself or herself due to HIV or AIDS, the survivor becomes more dependent on the abuser. This can make it extremely challenging to leave the relationship.

10. Alienating and isolating the survivor from family and friends by claiming they are homophobic or transphobic

If a survivor does not feel comfortable contacting friends or family because the survivor believes they disapprove of his or her sexual orientation or gender identity, it will be harder to leave an abusive partner. The abusive partner may isolate the survivor by claiming that friends and family are homophobic/transphobic or judgmental. This may make the survivor hesitant to contact family and friends or to maintain those relationships.[12]

11. Using abuser's vulnerabilities as an LGBTQ person to manipulate and coerce the survivor.

An abuser may use his or her own history of abuse, bullying, or discrimination experienced as a result of being LGBTQ as a means to manipulate the survivor. For example, an abuser may minimize or excuse abusive behavior as a response to the trauma of having been abused, bullied, or discriminated against as an LGBTQ person.

---

[11] Office for the Prevention of Domestic Violence, New York State, *What do Professionals Need to Know? Domestic Violence and HIV/AIDS* (available at http://opdv.ny.gov/professionals/health/hivaids.html).

[12] *Think, Re-Think*, *Supra* note 3, at 2.

12. Threatening to have an immigrant survivor deported

The threat of deportation may be used in both heterosexual and LGBTQ relationships to control an undocumented survivor. However, the threat of deportation is particularly terrifying to an LGBTQ survivor if the survivor's home country does not have adequate protections for LGBTQ people.

13. Barriers for gay/bisexual men and transgender people in accessing many domestic violence shelters

Domestic violence programs may not accept male-identified survivors in communal shelters, and trans survivors may also be turned away due to transphobia or misgendering by shelter staff. With such barriers to services, it less likely that someone will seek the resources provided by domestic violence agencies. This may result in the survivor returning to the abuser due to a lack of safe spaces.

14. Ability of abusers to access "safe" spaces such as shelters, hospital rooms, bathrooms, or LGBTQ community spaces.

a. Because domestic violence is often characterized as men abusing women, service providers can miss the signs of domestic violence in LGBTQ relationships. Survivors have told stories of being asked questions by hospital staff about domestic violence while the abuser sits in the room, based on the assumption that the person is a sibling or friend.

b. The LGBTQ community within the area may be small and insular, making it less likely that an abused partner will be able to completely avoid the abuser. Even in large cities, there are relatively few LGBTQ community spaces. In smaller communities, there may be only one or none.

c. Because it may be difficult for a survivor to avoid contact with the abuser in a small and insular LGBTQ community, advocates in the LGBTQ community may focus on safety planning that has harm reduction as its goal, rather than asking the survivor to completely avoid the abuser at all costs.

15. Exploiting the survivor's desire to present LGBTQ relationships in a positive light

Abusers may coerce survivors not to reveal abuse because they claim it will present LGBTQ people in a negative light. For example, the abuser may tell the survivor that revealing the abuse to police, courts, or others would reinforce stereotypes that LGBTQ relationships are "abnormal."

Survivors may fear that disclosing abuse would harm broader efforts to advance LGBTQ equality. They may also fear that it will cause them to lose support from friends who want to maintain the myth that there are no problems in LGBTQ relationships.

V. Addressing LGBTQ Domestic Violence Issues in the Courtroom: Creating a Knowledgeable and Compassionate Courtroom

LGBTQ survivors of domestic violence are often reluctant to seek relief in court because of fears that they will not be believed, that they will not be treated respectfully, or that they will be forced to reveal their sexual orientation or gender identity publicly. It is important for judicial officers and staff to recognize and address these concerns appropriately.

A. Challenges LGBTQ Domestic Violence Survivors Face in Court

LGBTQ survivors face unique barriers in presenting their cases for many of the reasons discussed earlier. For example:

- The survivor may have been arrested based on stereotypes that abuse in LGBTQ relationships is mutual, or that the bigger, stronger, or more "masculine" partner is the abuser.
- LGBTQ survivors may be less likely to report the abuse to the police or medical providers due to a fear of mistreatment or "outing."
- Survivors may be reluctant to disclose in their petitions or in open court that they are LGBTQ.
- Survivors may fear that the judicial officers or staff will be hostile or will make fun of them.

Courts can address these barriers by recognizing the distinct issues that may be presented in cases involving LGBTQ survivors.

B. Creating a Bias-Free Courtroom

Washington's Code of Judicial Conduct prohibits expressions of bias. Beyond this fundamental requirement, there are many other steps that judges can take to ensure that LGBTQ litigants are treated respectfully and appropriately.

1. Washington's Code of Judicial Conduct Requires a Bias-Free Courtroom

Washington State Code of Judicial Conduct Rule 2.3 provides:

RULE 2.3 Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making reference to factors that are relevant to an issue in a proceeding.

"Harassment" is defined in the comment to Rule 2.3 as:

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, **sexual orientation**, marital status, socioeconomic status, or political affiliation.

2. Judges Should Refrain From Extrajudicial Activities That Could Appear to Express Bias or Prejudice

Comment (2) to Washington State Code of Judicial Conduct Rule 3.1 provides:

Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a

reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, **sexual orientation**, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination.

3. Practical Steps

Judges and court personnel can take many steps to ensure respectful and appropriate treatment of LGBTQ domestic violence in their courtrooms. These include:

- Do not force a survivor to "out" himself or herself in the process of the case.
- Do not make a big deal about the case involving an LGBTQ relationship.
- Do not assume that LGBTQ domestic violence is "mutual combat" based on stereotypes about LGBTQ relationships.
- If the couple has children, do not treat the biological parent as having superior rights to the other parent.
- Use the same terms to describe the relationship that the survivor uses (e.g., spouse or partner). Do not refer to the couple's relationship as "friends" or "roommates" unless the survivor chooses to characterize the relationship that way.
- For transgender survivors, use the pronouns that conform to the survivor's gender identity. If it is unclear which pronouns the survivor prefers to use, it is acceptable to ask.
- Update court forms to ensure that they are not worded in a way that excludes LGBTQ relationships.
- Do not tolerate derogatory remarks about a party's sexual orientation or gender identity by staff, court personnel, or witnesses.
- Train all court personnel on barriers that LGBTQ people face in accessing the courts.

WASHINGTON STATE

Title 26 Family Law

Guardian Ad Litem

Guidebook

Washington State Administrative Office of the Courts
1112 Quince Street SE
PO Box 41170
Olympia, WA 98504-1170

COPYRIGHT© 2008

© 2008 by the Washington State Administrative Office of the Courts. These materials have been prepared for the training of Washington State Family Law Guardians ad Litem, and neither the editors or authors make either express or implied warranties in regard to these materials. Each user must depend upon his or her own knowledge and legal expertise or that of an attorney in the use or modification of these materials. The reader may download or print these materials for personal use. However, no person or entity shall copy or distribute this Guidebook, or any portion of it, for profit except by permission the Washington State Administrative Office of the Courts.

Washington State Administrative Office of the Courts
1112 Quince Street SE
PO Box 41170
Olympia, WA 98504-1170

ACKNOWLEDGMENTS

In 1996, the Washington State Legislature required the Administrative Office of the Courts (AOC) to develop a curriculum for prospective guardians ad litem in family law cases under Title 26 RCW. The requirement was mandatory as of January 1, 1998. In 2005, stakeholders in the GAL programs called for a revision in the curriculum. AOC convened a Title 26 Revision Committee to review and revise the original curriculum. The need for a statewide guidebook was identified during that process.

The 2006 – 2007 Title 26 Curriculum Revision Committee, chaired by Pierce County Superior Court Judge Kitty-Ann van Doorninck, consisted of Jorge Chacon, Guardian ad Litem in Wenatchee; Marilyn Finsen, Assistant Administrator, Snohomish County Superior Court; Margaret E. Fisher, AOC; David M. Hardy, Administrator, Spokane County Superior Court; Peter J. Karademos, Attorney at Law; Karen Kirk, Family Court Services Coordinator, Benton County Superior Court; Roxanne Mennes, Guardian ad Litem Training Provider, King County Bar Association; and Commissioner Tracy Waggoner, Snohomish County Superior Court.

One obstacle remained that might have prevented the production of a Family Law GAL Guidebook. That obstacle was funding. The following entities made production of this Guidebook possible.

AOC Gender and Justice Commission

Washington State Bar Family Law Section
Spokane County Superior Court's Family Law GAL committee
American Academy of Matrimonial Lawyers, WA
Snohomish County Bar Association
Clark County Bar Association
Tacoma Pierce County Bar Association
King County Bar Association

Please join the Washington State Administrative Office of the Courts in thanking these entities for their generous contributions.

TABLE OF CONTENTS

Page

CHAPTER 1
INTRODUCTION TO SERVICE AS A FAMILY LAW GAL 1-1

CHAPTER 2
ETHICS AND PROFESSIONAL CONDUCT FOR FAMILY LAW
GUARDIANS AD LITEM 2-1

CHAPTER 3
LAWS AD LEGAL PROCESS FOR FAMILY LAW GUARDIANS AD LITEM 3-1

CHAPTER 4
FAMILY LAW GUARDIAN AD LITEM INVESTIGATIONS 4-1

CHAPTER 5
INTERVIEWING ADULTS AND CHILDREN IN FAMILY LAW GAL INVESTIGATIONS 5-1

CHAPTER 6
REPORT WRITING FOR FAMILY LAW GUARDIANS AD LITEM 6-1

CHAPTER 7
CHILD DEVELOPMENT 7-1

CHAPTER 8
WHAT A GUARDIAN AD LITEM SHOULD KNOW
ABOUT CHEMICAL ABUSE/DEPENDENCY 8-1

CHAPTER 9
CHILD ABUSE AND NEGLECT 9-1

CHAPTER 10
UNDERSTANDING THE DYNAMICS OF DOMESTIC VIOLENCE 10-1

TABLE OF CONTENTS

Page

CHAPTER 11
PERSONAL SAFETY **11-1**

CHAPTER 12
CULTURAL COMPETENCY **12-1**

CHAPTER 13
PUTTING IT ALL TOGETHER **13-1**

Chapter 14
Revised Code of Washington **14-1**

CHAPTER 1
INTRODUCTION TO SERVICE AS A FAMILY LAW GAL

INTRODUCTION TO SERVICE AS A FAMILY LAW GAL

Submitted by Roxanne Mennes

A guardian ad litem (GAL) is an adult who is appointed by the court to represent the best interests of a vulnerable or underage individual for a specific purpose, for a specific period of time. Under the direction of the court, a GAL performs an investigation and prepares a report. To become a GAL, an individual must complete an initial training program, provide background information to the court(s) in which the GAL wishes to serve, and meet all eligibility requirements set by individual county local court rules. (See Washington Courts at: http://www.courts.wa.gov/committee/?fa=committee.display&item_id=314&committee_id=105).

There are different types of GALs. Some investigate whether an aging adult is incapacitated. Some investigate child abuse, neglect and foster care issues. Some investigate settlement offers in personal injury cases. Family Law GALs investigate child custody disputes. Even though all GALs investigate what might be in the "best interest" of a vulnerable or underage person, the duties and responsibilities differ widely in each type of GAL assignment. The legal term "best interest" conforms to the statutes, rules and caselaw in each category of GAL work. This Guidebook will focus only on Washington State Family Law GALs, who investigate child custody issues.

Just like there are different types of GALs, there are different types of child custody disputes. Family Law GALs may be appointed in the following five types:

1. Dissolution: The parents are getting a divorce and a parenting plan must be ordered by the court.
2. Paternity: The parents are not married and a parenting plan must be ordered by the court.
3. Modification: A parenting plan was ordered by the court in the past, but one or both parties are seeking to change the parenting plan.
4. Relocation: One of the parents is seeking to move the child to a new location.
5. Third Party Custody: Someone who is not a parent has petitioned the court for custody, i.e., Grandparent or relative. [1]

While each type of child custody dispute differs from the rest, two factors remain constant for GALs. Family Law GALs are generally appointed in *high conflict* cases and the court needs additional information from a *neutral* source. The parties are typically struggling through very difficult child custody disputes that generate intense and painful emotions. Emotions can become so intense that the parties are unable to think or communicate rationally at times. Complex issues related to temporary or lifelong mental health issues might generate additional conflict between the parties or confusion for the court. Concerns about domestic violence, child

[1] Cases of Dependency, Child Abuse or Neglect are governed by RCW 13.34.100. GALs appointed ander this statuste are often called Dependency GALs. This Guidebook will focus only on GALs appointed under RCW 26.12.175, commonly referred to as Family Law GALs.

abuse or neglect might come into question. Substance abuse issues might concern or confuse the court. In short, child custody disputes involve families in varying degrees of crisis and the court appoints a GAL to gather more information it needs to make a decision. [2]

The role of a GAL is very different than anyone else associated with a child custody court case. Parties pursue their own interests. Lawyers advocate specifically for their clients. Doctors, social workers and therapists professionally evaluate and diagnose conditions. GALs do not act as lawyers, therapists or parties in the case. GALs do not provide legal advise, counseling or diagnosis. However, it is important that GALs become knowledgeable about family law and generally accepted therapeutic or diagnostic tools so the GAL's report will be useful to the court.

Three primary sources govern the appointment and work of a GAL:

1. RCWs: The Revised Code of Washington statutes govern appointment, duties and responsibilities of GALs. (See RCW 26.12.175 at http://apps.leg.wa.gov/RCW/default.aspx?cite=26.12.175).
2. Local Rules: Each county may have additional rules and policies that govern appointment, duties and responsibilities of GALs. These are called local rules. (A directory of courts can be found at http://www.courts.wa.gov/court_dir/?fa=court_dir.county . Local rules may be posted on the county's court webpage or available at a local law library.)
3. Order of Appointment: When a court appoints a GAL, the court enters an Order of Appointment that specifies the scope of the GAL appointment. GALs should take care to read the Order of Appointment carefully. (A sample template of an Order Appointing Guardian ad Litem on Behalf of Minor is available at http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=62).

Family Law GALs are expected to have read and understood the statutes, local rules and order of appointment prior to any investigation. Furthermore, GALs are expected to be familiar with the basic elements the court will weigh in each case type and gather information accordingly. Before taking cases, Family Law GALs are required to complete the following practicum in the county in which application is made, unless the court waives this requirement for good cause. A prospective GAL must complete the following before accepting appointments:

- Five hours shadowing a mentor for two cases. The focus should be on best practices. The prospective GAL should observe a child interview, observe an adult interview, assist in information gathering and investigation, and assist in report writing -AND-
- Five hours observing Title 26 cases in court. The focus should be on best practices. The prospective GAL should observe Family Law GAL-involved hearings.

[2] Note: GALs are not the "eyes and ears" of the court. Judges understand that the GAL presents one source of information among many… In re Guardianship of Stamm, 121 Wn. App. 830.

- In counties with no mentors available, the prospective GAL should observe 10 hours of Title 26 hearings in court. The prospective GAL should observe Family Law GAL-involved hearings

Serving as a Family Law GAL is an important job that requires clear understanding of the governing regulations whether one accepts volunteer assignments or paid assignments. GALs can be paid for their services, or serve as volunteer GALs or Family Law CASAs (court appointed special advocates). Policies and regulations about pay rates and payment procedures vary widely from county to county. Paid GALs might be employed by a county (perhaps family court services) but more often are individuals who accept appointments as independent contractors.

To get started, a prospective GAL should contact a Registry Manager in the county where application is intended. The superior court in each county maintains a list, called a Registry, of individuals who are qualified to serve as Family Law GALs. A Registry Manager is assigned to provide administrative oversight of the registry. A list of Registry Managers for each county can be found at http://www.courts.wa.gov/committee/?fa=committee.display&item_id=363&committee_id=105). GALs should contact a Registry Manager with any questions about applications, mentors, process of appointment, payment procedures or educational opportunities.

GALs as a group are typically passionate about helping courts better serve children and families. The community of GALs throughout the state offers support and insight. Meetings, listserves and mentors are available and welcoming. Network and exchange ideas. Family Law GALs are an insightful, interesting and energetic community of professionals!

CHAPTER 2
ETHICS AND PROFESSIONAL CONDUCT FOR FAMILY LAW GUARDIANS AD LITEM

ETHICS AND PROFESSIONAL CONDUCT FOR GUARDIANS AD LITEM

Submitted by Karen L. Hallis, JD, CPC

INTRODUCTION

Chapter Two covers some aspects of ethical issues in Family Law Guardian ad Litem (GAL) work. The ethical issues are evolving and have become more complex in recent years. This chapter will cover some of the issues. There is no way to inclusively know all the issues until they are brought to the attention of the GAL and legal communities.

GALs come from a wide variety of backgrounds. They may be: psychologists (Ph.D.), therapists (MA/MS), social workers (LiSCW and MSW), teachers (M.Ed. and BA/BS), lawyers (JD, LLM, Ph.D. and licensed to practice law), graduates from law schools (JD) and others come from a wide variety of other fields. Some GALs have licenses to practice in their original professions and some do not.

In the past, GALs were not trained to perform custody investigations. At hearings, when it became apparent that family dynamics were complicated and the interests of children were not protected, judges would pick an attorney from the courtroom (there to present matters on their own cases) to act as GAL and represent the child's best interests. Selection did not follow specific rules or protocol.

The process of using GALs has evolved. The three-day trainings for GALs in King and Pierce Counties cover a wide variety of topics. The trainings have changed over time to meet the changing needs of family law cases. GALs in some counties must take the Pierce or King County trainings in order to work as GALs in their home counties. Some counties do not require these trainings.

Ethical issues can have serious implications. The Washington Supreme Court decided in *In the Matter of the Disciplinary Proceeding Against Joseph P. Whitney* (No. 200, 173-4, September 29, 2005) that an attorney acting as a GAL could be disciplined as an attorney. Mr. Whitney was disbarred from the practice of law. This case may be looked upon as precedent, and GALs who are licensed to practice professions such as psychology, social work or other professions may be disciplined for work done as a GAL.

This material is a general overview of the ethical issues in GAL custody investigations. Each county may have its own local rules which address the application process for the GAL registry, requirements for being/remaining on the registry, GAL appointment processes, GALs' duties, GAL compensation, grievances against GALs, grievances by GALs, conflicts of interests, evaluation procedures and other topics. These local rules are in *Washington Court Rules: Local 2007*. They are probably online on each county's website. There may also be customs regarding local practices regarding GALs; these may be unwritten.

Hypothetical situations are dispersed throughout the material as practice questions or "PQs." These hypotheticals are intended to raise awareness of ethical issues. Since these situations can be interpreted in many ways, there are no answers. It is helpful to discuss these hypotheticals and your own experiences as GALs with other GALs and mentors. Each situation will be prefaced with "PQ."

CODES OF PROFESSIONAL CONDUCT, GENERAL RULES AND GAL RULES

GAL Rules

The Washington State Court Rules: Superior Court Guardian ad Litem Rules (GAL Rules or GALR) are the basis for all other rules and expectations for GAL conduct. These rules apply to conduct of people acting as GALs and also for how the GAL is treated by other professionals (attorneys included) and the Court. The GAL Rules can be found in *Washington Court Rules State* 2007 or online at www.courts.wa.gov and click on Court Rules. The volumes may be a wise investment, as they contain the rules for state court actions and also the new rules of Professional Responsibility for attorneys. If you come from a profession that has a code of ethics (like nursing, psychology, law, social work or medicine) get a copy of that code and read it.

The GAL Rules are broken into seven parts.

Rule 1 is "Scope and Definitions," and it states that the purpose of the GAL Rules is to establish a minimum set of standards applicable to all superior court cases where the court appoints a GAL. It defines a GAL as "…any person… appointed in a Title 11, 13 or 26 action under the Revised Code of Washington to represent the best interest of a child….The term [GAL] shall not include an attorney appointed to represent a party." This section also defines other terms.

Rule 2 is "General Responsibilities of GAL" and is widely referred to by the Court and attorneys who have read these rules. This rule applies to "every case in which a [GAL] is appointed." 2(a) states that the GAL "shall **represent the best interests** [emphasis added] the person for whom he or she is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interests the [GAL] represents. The [GAL] shall not advocate on behalf of or advise any party as to create in the mind of a reasonable person the appearance of representing the party as an attorney."

> PQ: what if a child tells you that s/he wants to live with one parent. Your investigation reveals that this parent is not the best suited for primary residential placement ("custody"). Do you have to follow the child's wishes? What factors do you consider as you make your decision?

2(b) states that a GAL "shall **maintain independence** [emphasis added], objectivity and the appearance of fairness in dealing with parties and professionals, inside and outside of the courtroom."

> PQ: while making a home visit to a parent's home, you are offered a glass of wine. Do you accept it? Would your answer change if you are offered a glass of water? Dinner? A cup of coffee?

PQ: a parent asks you to meet him or her at a coffeehouse instead of an office setting. What will you do?

PQ: you make a home visit to a parent's house. The children are not home. Do you stay?

PQ: an attorney on one of your GAL cases asks you to lunch. Do you go?

2(c) addresses **professional conduc**t and states that a GAL "shall maintain the ethical principles according to the GAL Rules…."

PQ: do your local county rules state that a GAL shall follow the rules of ethics for their professions" (e.g. psychology or law)?

2(d) states that a GAL shall **remain qualified for the registry** and "shall satisfy the training requirements and continuing education requirements developed for …Title 26 [GALs}…" GALs shall promptly notify the Court of any grounds for disqualification from serving as a GAL or unavailability to serve.

PQ: if you cannot make a local training to remain qualified for the registry, what do your local rules say about attending other trainings?

2(e) states that GALs shall avoid any actual or apparent **conflicts of interests**. GALs shall avoid self-dealing or associations for which the GAL might in-directly benefit, other than for compensation as GAL. A GAL shall take immediate action to resolve any potential conflict or impropriety, and a GAL shall advise the Court, attorneys and parties of actions taken, and then either resign from the matter or ask for Court directions regarding resolving the conflict. A GAL shall not accept or maintain appointments if the performance as GAL may be limited by the GAL's responsibilities to another client or a third person or the GAL's own interests.

PQ: your spouse, friend, neighbor is a psychologist and does parenting evaluations. Can you recommend that this person does a parenting evaluation on one of your GAL cases?

PQ: one of the parents in one of your cases has threatened you with physical harm. What will you do? Would your answer change if this person has not threatened you, but makes you feel uncomfortable?

2(f) states that a GAL is an officer of the court and shall **treat parties with respect**, courtesy, fairness and good faith.

PQ: you have been trying to treat the parties with respect, but a parent in a case continues to use abusive language with you. How will you treat this person with respect? Would your answer change if this person has not yet paid you and has told you that the case "is a slam dunk" and s/he stated that s/he will never pay you?

2(g) states that that a GAL shall **become informed about the case** and contact the parties, and that the GAL shall take into account the position of the parties as s/he investigates the facts of the case.

> PQ: you are trying to contact the parties. One party does not return your phone calls. You want to get started with the investigation. What will you do about this party?

2(h) states that the GAL shall **make requests for evaluations to the court** as authorized by statute or court orders following notice and opportunity to he heard.

> PQ: one party keeps telling you what evaluator that s/he wants to use. Will you select this evaluator? If you do, will you tell the other party of the first party's insistence on this evaluator?

2(i) states that a GAL shall **timely inform the court of relevant information**. The definition of "timely" may vary from county to county and may vary between judges and commissioners.

2(j) states that a GAL shall comply with the court's instructions as set out in the order of appointment, and shall **limit duties to those ordered by the court**. A GAL shall not provide or require services beyond the scope of appointment.

> PQ: you have discovered some information that impacts your views of this investigation. Your appointment order is vague about what you can actually do as GAL. What will you do about this?

2(k) states that a GAL shall **inform individuals about role in case**. A GAL shall identify his/her role in a case and explain the GALs duties to the parties and information sources at the "earliest practical time."

> PQ: do you have a set speech that you give to all parents (and their lawyers) about what your role as GAL is? If parties or lawyers expect you do perform certain functions due to your license in another profession, what do you do?

2(l) states that a Gal shall be given notice of all hearings and proceedings and shall **appear at hearings** for which the GAL's duties or scope of appointment are at issue.

> PQ: you do not get notice of and miss a hearing; what will do you?

2(m) states that a GAL shall not have **ex parte communication** concerning the case with a judge or commissioner involved in the matter except as permitted by a rule or statute.

2(n) states that a GAL shall **maintain privacy of parties** and make no disclosures about the case or the investigation except in reports or as necessary to perform the functions of GAL. A GAL shall maintain the confidential nature of identities or addresses where there are allegations of domestic violence or risk to the party's pr children's safety. A GAL may recommend that the court seal the report or portions of the report to preserve the privacy, confidentiality or safety of the parties or of the person for whom the GAL was appointed.

> PQ: people who are not part of a GAL case that you have walk up to you and ask you questions about the case. These people tell you that "everyone knows about this case, so you can talk to me." What will you do?

2(o) states that a GAL shall **perform duties in a timely manner** and may request judicial intervention in writing with notice to the parties.

2(p) states that a GAL shall **maintain documentation** to substantiate recommendations and conclusions shall keeps records of actions taken as GAL. The files are open and can be reviewed by parties and attorney upon written request to the GAL.

> PQ: a lawyer tells you to "drop the GAL file off at my office and pick it up in a few hours." What will you do?

2(q) states that a GAL shall **keep records of time and expenses** incurred during the GAL investigation and shall provide a copy of the time/expenses to each party responsible for payment. The Court shall make provisions for fees and expenses pursuant to statute in the Order of Appointment or in any subsequent order.

Rule 3 covers the Roles and Responsibilities of Title 13 GALs in Juvenile Court.

Rule 4 covers the **Authority of the Guardian ad Litem** and it starts out "[a]s an officer of the court, a [GAL] has only such authority conferred by the order of appointment;" the rules then enumerates a GAL's authorities.

4(a) states that a GAL shall have **access to party** for whom the GAL is appointed to represent and to all information relevant to why the GAL was appointed. When a GAL seeks access to a party represented by an attorney, a GAL shall get permission from the lawyer, unless otherwise ordered by the court.

> PQ: do you get lawyers' permission to talk to their clients?

4(b) states that a GAL shall be in **timely receipt of case documents** (relevant pleadings, documents and reports by the party which served or submitted this).

4(c) states that a GAL shall be **timely notified** of all hearings, administrative reviews, staffings, investigations, depositions, and other proceedings concerning the case.

4(d) states that a GAL shall be given **notice of proposed agreements** and opportunity to indicate dis-/agreement to any proposed agreed orders relating to the reasons why a GAL was appointed.

> PQ: you are not told that the parties are settling the matter. The proposed settlement does not take into account parenting arrangements that are in the best interests of the children. Do you sign off on the proposed settlement? What will you do if a party/his/her lawyer applies a lot of pressure on you to sign off?

4(e) states that a GAL shall **participate in all proceedings *consistent with 2(l)***, and that GAL shall submit written and supplemental oral reports.

> PQ: what if the facts of a case are so complicated that you cannot make a recommendation about primary residential placement?

4(f) states that a GAL shall have **access to records** pertaining to why a GAL was appointed, unless otherwise limited by law or if good cause is shown.

4(g) states that a GAL shall have **access to court files** of juvenile and superior court files. A GAL shall have access to a sealed court file through a separate court order.

4(h) states that a GAL shall have **additional rights under RCW 13.34 and 26.09**. Read the rule for enumeration.

4(i) states that for good cause shown, a GAL may petition the court **additional rights and power in other cases**.

4(j) stares that the AOC shall amend the current GAL mandatory training so that GALs are prepared to carry out their roles.

Rule 5 covers **Appointments of GALs** and states that each court will promulgate local rules to provide a system that establishes an **equitable distribution of workload** and that each court shall provide a **procedure to timely address complaints** make by any GAL regarding registry or appointment matters.

Rule 6 covers **limited appointments** of people in addition to, or instead of, a GAL to fulfill limited roles of **mediator**, **evaluator**, **visitation supervisor**, **settlement of minor's claims**, or **other**.

Rule 7 covers the **Grievance Procedures** and states that each court shall set out or refer to policies and procedures establishing and governing the filing, investigation and adjudicating grievances made by or against a GAL in a Title 11, 13, or 26 matters. These rules, at a minimum, comply with and address the following:

7(a) the rules are **clear and concise** and easily understood by attorneys and non-attorneys.

7(b) the rules shall establish **separate procedures** addressing the grievances or complaints made by pending cases and closed ones.

7(c) the rules shall establish procedures providing for **fair treatment of grievances** including appearance-of-fairness and conflict issues.

7(d) concerns **CASA grievances**.

7(e) the rules shall provide for **confidentiality** of complaints until merit has been found.

7(f) the rules shall provide a procedure for any GAL who is subject to a complaint to **respond** to it.

7(g) the rules shall include a time limit for **complaint resolution time standards** during which the complaint must be resolved. The limit for pending active cases is 25 days and is 60 days for closed cases.

7(h) the court shall keep a **record of the grievance** and any sanctions issued pursuant to local rules.

7(i) when a GAL is **removed from the registry**, the court of the county that a GAL served in shall send notice to the AOC of such removal.

7(j) local court rules establishing grievance procedures shall be filed in a manner provided in GR 7 (Local Rules- Filing and Effective Date).

APPOINTMENT ORDER

The Appointment Order (AO) is referred to in the GAL Rules and it is a basis for a GALs role. Appointment orders are fairly uniform, but they can be confusing. If a GAL has an AO that is vague, unclear or otherwise hard to understand, a GAL may note up a hearing for court clarification and simply ask the court what it wants the GAL to do. Most AOs state that a GAL "shall investigate and report factual information to the court concerning parenting arrangements for the child and shall represent the child's best interests." This language states that a GAL is a reporter of information. This is not be to confused with being an attorney, a therapist or any other role.

When looking at an AO, a GAL should be able to determine what type of case it is, who the parties are, the children's ages, what the court wants the GAL to do, how much the GAL is paid per hour and in an advancement of fees, the timeline for filing a report and the authority of the GAL and access to records pertaining to the case. A GAL will be able to determine if there are any conflicts of interest by seeing the names of the parties, children and attorneys. A GAL may have a conflict of interest with some attorneys due to a wide variety of reasons.

GENERAL RULES

There are rules which govern proceedings in court actions. The rules apply to attorneys and non-attorneys alike. Ignorance of the rules is no defense. In the *Washington Court Rules State* 2007, the General Rules are listed, as well as the Superior Court Civil Rules, the evidence rules, the Juvenile Court rules, Rules of Professional Conduct (attorneys) and the GAL Rules. It is helpful for a GAL to know what the rules are for drafting and filing motions, the rules regarding service of process and all the rules regarding hearings and trial. The rules apply to the GAL and also state how the cases should proceed. If a GAL notices that partiers and/or lawyers are not following the rules, then a GAL can bring this to the attention of the court and ask the court for instructions. If a GAL notices that a person (attorney, party or any other person) is preventing a GAL from performing his or her duties, then the GAL will be responsible for bringing this to the attention of the court.

PROFESSIONAL CONDUCT

The GAL (State of WA) Rules itemize how a GAL shall conduct his or her investigations. There may be local rules in each county that establish local rules for GAL conduct. There may also be amended administrative policies addressing GAL conduct.

If a GAL is a licensed professional, then s/he is subject to the codes of conduct for that profession. If a GAL is licensed to practice law, medicine, social work, psychology, nursing, teaching or any other profession, then a GAL should be aware of what the applicable code of ethics for that profession says. The question as to whether a person acting as a GAL can be disciplined in their licensed field of practice cannot be covered in this material and should be researched thoroughly be individual GALs in their respective fields of practice.

As is stated in a Washington State Court of Appeals Division II case, *In re the Marriage of Kinberly S. Bobbit and Ronald K. Bobbit*, No. 31997-7-II,

> [i]t has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior court about the best interests of the children, do their important work fairly and impartially. Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interaction of the courts and GALs and our Supreme Court adopted the GALR.

RCW 26.12 covers Family Court proceedings, of which Title 26 GAL work falls into. 26.12.175 covers **appointments of GAL, independent investigation, CASA, background and review of appointment**. This statute refers to best interests of the child, a GAL's role, recommendations, investigation, abilities of the parties to file responses to a GAL's report, GAL payment, training and education and applying to be on a GAL registry.

RCW 26.09.220 also refers to a GAL investigation and report concerning parenting arrangements, the GAL's role, the GAL's investigation, filing of a report and other requirements.

ETHICAL STANDARD AND DECISION MAKING

The AOC is not in a position to tell GALs how to make decisions regarding parenting arrangements for children for whom they are appointed.

When making decisions regarding primary residential placement and visitation regarding children, a GAL will be better able to make a decision if s/he understands the state and local rules pertaining to GALs, the applicable statutes to the case and all the facts as were either presented to him/her or discovered by the GAL throughout the course of his/her investigation.

A GAL may have biases that may or may not affect his/her decision making. If these biases can remain in the background and not impact his/her decision, then a GAL can proceed to the recommendation phase of the investigation. If the biases will prevent a GAL from making a fair and impartial assessment of the facts, law and rules and reach a set of recommendation, then under the GALR, a GAL must either resolve the bias or inform the Court of his/her inability to proceed with a case.

In the GAL training, it is suggested that GALs have mentors whom they can talk to and brainstorm with regarding the GAL's cases and recommendations. A GAL who works with a mentor must balance the rules regarding privacy of the parties and the cases when s/he talks with the mentor to get guidance. Some counties require that new GALs work with a mentor for a specified time after being added to a GAL registry. Check your GAL registry manager for the local rules regarding GAL appointment and conduct.

A GAL will benefit from understanding how s/he makes decisions – the procedure that s/he follows when making a recommendation concerning parenting arrangements. If a GAL can develop a step-by-step formula for making decisions in GAL cases, then the work will be easier to complete and easier to defend in the case of grievances and complaints against the GAL.

This formula will differ from GAL to GAL. The GALR and local rules provide some guidance. A mentor can share his or her decision making process. Other GALs can be a source of insight into a decision making formula.

GAL investigations produce information that GALs weigh and balance. Some of the information will have been provided to a GAL by parties and lawyers, some information will have been intentionally withheld from a GAL and discovered by a GAL through "digging," and some information will have been discovered that is not relevant to a GAL appointment. A GAL will have talked to a variety of collateral contacts. Some of these contacts are professionally trained to perform skilled jobs. A GAL may decide to give information from a party's friend different weight than information from a licensed therapist. A GAL may give different weight to information from a licensed therapist who worked with a party for two one-hour sessions than to a licensed therapist who worked consistently with a party in weekly sessions for two years.

If a GAL cannot reach a conclusion, then s/he may ask the court for direction. A GAL may ask the court to order evaluations of the children and/or parties if this would assist the GAL in his/her investigation and said evaluation falls into the scope of appointment. A GAL may also file the GAL report with the documents and sources considered and simply inform the court that the GAL cannot reach a recommendation and let the court decide what to do.

GAL Rules and Appointment Orders state that representing the best interests of a child may be inconsistent with doing what the child states that s/he wants. A GAL may take into account a child's stated preferences; however, a GAL must also consider a variety of factors. How old is the child? How mature is the child? Was the child coached by his/her parents? Is the child capable of knowing which parent s/he wants to live with? How emotionally stable is the child? Is there a "magic age" for children to state what they want?

REASONS AND PROCESSES FOR GAL REMOVAL

GALs can be removed from a registry for a variety of reasons.

GALs can be removed from the registry **upon their own requests**. GALs will ask to be removed from the list due to a new job, a career change or personal reasons. Methods for GAL requests for removal vary from county to county. A GAL will write a letter to the registry manager or appropriate court personnel, and this letter will be placed in the GALs file in the court, and in whatever binder or file that the superior court in the county has available to the public. If a GAL who is asking for removal has pending cases, the GAL will either finish the investigation or petition the court for withdrawal from the cases and re-appointment of a new GAL.

GAL withdrawal methods and requirement vary from county to county. Some courts do not allow for GAL withdrawal, as removing GALs from cases impacts the parties, the children and the status of the cases. Additionally, there may be an additional cost to the parties for a new GAL to familiarize his or herself with the facts of the case and become knowledgeable about what steps the new GAL needs to take.

GALs can be removed from a registry by **not applying to be on the GAL registry** at the next renewal date. GALs are required to apply to be on the GAL registry on a yearly basis. Some GALs decide that they do not want to continue the work and simply do not apply. Their names will not appear on the new GAL registry. These GALs will have to complete investigations on any active cases that they have.

GALs can be removed from a registry if they **do not meet the education and training requirements** specified by the GAL Rules and local county superior court requirements.

GALs can be removed from a registry if they **misrepresent their qualifications** to be a GAL.

Generally GALs can be removed if they (1) are **not suitable** to be a GAL for a wide variety of reasons, (2) has **exhibited inappropriate conduct** on a particular case, or (3) has exhibited **questionable conduct** in a particular case. Counties will differ on reasons for removal. Only parties or lawyers associated with the particular cases where the conduct is questioned or

allegedly inappropriate may file a complaint against the GAL appointed on those cases. This may vary from county to county.

Removal for any reason may be brought to the attention of the county superior court by a party or attorney. The court may also bring an action to remove GALs. If a party or attorney discover lack of a GALs education or training, allege questionable or inappropriate conduct or allege that a GAL is generally not suitable to be a GAL, they will file a complaint with the court administrator or court following the local rules for GAL grievance procedures. The complaint makes allegations and requests removal of the GAL or sanctions of some kind.

Someone, a judge, the court administrator or another designee, determines if the complaint has merit. If no merit is found, then the complaint is dismissed and notice of said dismissal is sent to the GAL and the complaining party. If the complaint is found to have merit, then a letter stating that merit was found is sent to the person who filed the complaint and to the GAL.

This complaint (after having been found to have merit) is forwarded to a judge, a GAL committee or another designee within the court. A GAL committee is composed of a panel of judges or groups of designees. The GAL committee looks at the complaint and may dismiss the complaint. A letter is sent out to the person who filed the complaint and the GAL, informing them of the GAL committee's decision. This decision can be appealed and will depend upon the local rules.

If the GAL committee does not dismiss the complaint, it may request a response from the GAL. A letter is sent to the GAL and asks for the response within a time deadline. The complaint will be included with that letter. The GAL writes a response to the complaint, methodically responding to each point. The GAL supplements his or her response with GAL reports filed with the court. If the GAL has not filed any reports, then the GAL refers to his or her file for dates and times of interviews with parties and collateral contacts, home visits, observations, pleadings and documents from the court and GAL files. The GAL attaches exhibits to his or her response. There may be a page limit or protocol for the response, depending on the county.

The GAL committee looks at the response and then copies and mails it to the complaintant. Depending on the county, the complaintant may or may not be able to reply to the GAL's response.

The GAL committee may dismiss the complaint based on the complaint, GAL response and complaintant reply (if there was one). A letter of dismissal is sent out to the complaintant and the GAL. The complaintant may file a written request for reconsideration within a time deadline set by local rules. The appropriate judge receives the reconsideration request and all documentation, and s/he presents the documents to the judges at their next regular meeting for final decision.

If the complaint is not dismissed, the complaint may be set for a hearing in front of a judge assigned to the complaint. Either the party who filed the complaint or the court, on its, own motion, may set the hearing. The rules for setting the hearing and service would be followed so that the GAL is afforded due process rights. At this hearing, the GAL appears and makes his or her case. The GAL may choose to hire an attorney to represent him or her. The complaining

party will have his or her counsel present. If one party is the complaining party, then the other party (non-complaining party) must have been served with notice of this hearing and have the opportunity to be present.

The GAL committee may order that a local attorney perform a fact-finding investigation to determine what occurred in the case. Is a local attorney the appropriate person for this job? Can s/he be fair and impartial? Should an attorney from another be used in the place of a local attorney? How would an outside attorney be chosen? How would any attorney, regardless of where s/he is from, be paid?

If the non-complaining party is not present at the hearing or was not served, the hearing may be continued to allow for another attempt at service. At the next hearing, if the non-complaining party is still not present, the hearing may or may not proceed, depending upon the judge and the local county rules and customs.

Once the hearing proceeds, the matter may or may not be adjudicated. If the matter can be adjudicated in this hearing, then the court will make a ruling. If either the GAL or the complaining party does not feel the ruling was appropriate, then that person may file a written request for reconsideration within a time deadline set by local rules. The presiding judge receives the reconsideration request and all documentation, and s/he would present the documents to the judges at their next regular meeting for final decision. This procedure varies depending on the county.

The complaint may not be able to be resolved at the hearing. The GAL or complaining party may request at the hearing that the matter be set for trial. The court may, upon its own motion, set the matter for trial. The trial may or may not be in front of a different judge than the judge who presided at the hearing, depending upon the county.

The GAL may represent him/herself at trial. The GAL may elect to hire an attorney. Trial will be a "typical" trial, with all applicable laws and other local court rules for civil procedure. The GAL calls her/her own witnesses and cross-examines witnesses for the complaintant. The GAL is called as a witness by the complaining party, and may testify on her/his own behalf and will be called as a witness by his/her own counsel. The GAL will pay the attorney an advancement of fees ("retainer") and may request attorney fees at the conclusion of the trial. The trial court may or may not grant the request.

The decision of the trail court may be to remove the GAL from the case, remove the GAL from the registry, to remain on the registry pending completion of additional training, sanction the GAL in some way, or to retain the GAL on the case and simply not take into account his or her recommendations in the determination of parenting arrangements for the child.

The decision of the trial court may be appealed to the court of appeals, following the appropriate court rules and applicable law.

WORKING WITH MENTORS

Working as a GAL can be an isolating experience. The cases that GALs work on are high conflict cases, and emotions may run high. GALs can experience pressure regarding their recommendations, and it is nice to have someone to brainstorm with about these cases. Privacy, in terms of parties names' and identities, is easy to maintain. It is a good idea to work with a mentor with whom you have a relationship with and have a level of trust. A mentor, to be effective in their role, will have more experience that you do and will have experience in areas that you do not. This allows the mentor to bring in a different perspective and add depth to your evaluation of the facts.

CONCLUSION

GAL work is a big commitment. It is work that can save lives and shape children's lives. It is not work that we can do without careful consideration. The current legal climate can make the work more combative and less efficient. Taking careful notes and following case procedure will help you maintain control of your cases. The state and local rules are there for your benefit. Read them and use them in your case procedures.

CHAPTER 3
LAWS AD LEGAL PROCESS FOR FAMILY LAW GUARDIANS AD LITEM

LAW AND LEGAL PROCESS

There are five basic types of cases where a court may appoint a Family Law GAL:

1. Dissolution Cases
2. Paternity Cases
3. Modifications of Parenting Plans
4. Relocation Cases
5. Third Party Custody Cases

In each case type, the court will weight certain factors established by statute and case law. While a Family Law GAL does not act as an attorney in a case and does not provide legal advice, it is important for the GAL to understand what information the court will need in order to make its findings and rulings. This chapter will provide a short overview of the five basic case types and the elements the court must weigh in making its determinations.

DISSOLUTION CASES

Submitted by Virginia Amis, The Gouras Law Firm PLLC

When parents of minor or dependent children decide to dissolve their marriage, the court is required to enter a final parenting plan. The parties to the dissolution sometimes agree to which parent will be the primary residential parent. More often, the parties differ significantly as to where the children should reside. However, even if the parties can agree to where the children primarily reside, often the parties differ as to the time each will receive under the residential schedule or who should have decision-making and transportation responsibilities. When the parties differ the court looks to the guardian ad litem's report for guidance in making a final decision.

The phrase "best interests of the child" permeates all custody and residential time decisions. The statutory basis for the standard appears at RCW 26.09.002. The statute upholds that parents have the responsibility to make decisions and perform all customary parenting functions that are crucial to raising children. The relationship between the children and each parent should be fostered in a dissolution case unless that contact is inconsistent with the child's best interests. Any custody arrangement should provide as little disruption as possible to the interaction of each parent with the children. Practically speaking, there is no such thing as a "little disruption" when parents are divorcing. The process uproots children who are required to travel between the parents' homes on a regular basis. Nonetheless, the objective is to preserve the "status quo" for the sake of the children.

While the sanctity of the parent-child relationship is recognized in the law, the statutes provide for some balancing factors when parents disagree as to custody arrangements.

Under RCW 26.09.184, the stated objectives of a final parenting plan are:

1. To provide for the child's physical care. Baring 191 restrictions, this usually means that the parenting plan will divide the child's time between the parents in such a way as to foster continuing and consistent contact between the parent and child.

2. To maintain the child's emotional stability. The court may consider how frequent exchanges or extended residential time will affect the child.

3. To allow for a child's changing needs as the child changes and matures. This is a challenge as it requires the court to see into the future. The parenting plan should be flexible and anticipate that a child who is three years old when the plan is entered will have different needs at eight years old and thirteen years old and seventeen years old.

4. To provide for each parent's authority and responsibilities as to the children. The parenting plan will state the parents' decision-making authority and responsibilities with regard to notification in case of emergencies involving the child. It will also state where the child primarily resides and where he will be on each holiday and during each school break. Although judges encourage parties to be flexible in their application of the residential schedule, as a practical matter it is advisable to have a framework on which the parties can rely if a disagreement arises. Many judges will not approve plans that are too vague (including "reasonable days and times vs. specific days and times) as they are a hotbed for future conflict.

5. To minimize a child's exposure to harmful parental conflict. Ostensibly, if a parenting plan is well written there is less likelihood that the parties will argue over what a provision provides. Then again, when dealing with two parents who each claim to be "right" when opposed on a parenting issue, it is likely that the child will have some exposure to the conflict. The goal is to include workable provisions in the parenting plan which help to reduce tensions between the parents. That can mean something different in each case.

6. To encourage the parents to strive for agreements in parenting rather than court intervention. The courts encourage flexibility and require the parties to attend mediation if there are problems in implementing the parenting plan provisions.

7. **To protect the best interests of the child**. This phrase can be interpreted in a myriad of ways. Of course the best interests of a child are served when a child has a stable home and consistent guidance from parents.

The court may also take into consideration the cultural heritage and religious beliefs of a child when entering a parenting plan.

Two individuals experiencing the breakup of their relationship typically cannot agree as to what is in the children's best interest. Is a child's best interest served when the non-residential parent receives substantially more residential time with the children that the usual every other weekend and alternating holidays and breaks? It depends. That schedule may provide for the child's physical care (Factor 1) and foster frequent contact but how does that residential schedule affect the children's emotional stability (Factor 2)? Does it disrupt the child's ability to participate in after school sports? Sleep in his or her own bed? If so, is the disruption less

important than spending more time with that parent? What is the schedule that best serves the "best interests of the child"? Only the court can decide, but a judge will consider carefully the recommendations of a guardian ad litem. Those recommendations need to consider all of the statutes which apply to parenting.

When residential placement, or custody, is being decided by the court, the court is required to consider the factors set forth in RCW 26.09.187(3)(a)(i-vii). These factors include:

> (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.

This factor examines the relationship of each parent with the child. The court will want to know which parent performs daily parenting functions and to what extent. For instance, the mother may get the child up in the morning and feed her breakfast, and take her to school. Just as important, though, is that the Father volunteers at the child's school, attends parent teacher conferences and picks the child up from school. It is possible that the parties equally share the parenting responsibilities of the child. Since this factor is given the most weight the balancing of the remaining factors becomes even more important where both parents have significant or equal involvement with the child.

> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily.

This factor addresses whether the parties agreed to parenting roles. For instance, many families agree that one parent will stay home and raise the children while the other parent works outside the home to earn the family's income. If they had such an agreement it becomes a factor in determining custody arrangements

> (iii) Each parent's past and potential for future performance of parenting functions;

It may be that one parent was providing most of the care for a child during the marriage while the other parent helped after work and on weekends. That is the history of parenting in that family. However, circumstances may occur where the parent who used to provide primary care takes a full-time job or has a substance abuse problem which alters the potential for future performance of parenting functions. All of these facts need to be explored in determining custody arrangements in a dissolution case.

> (iv) The emotional needs and developmental level of the child;

Children have different needs at varying times. A parenting plan needs to address the needs of the child at his or her current developmental level.

> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his

> or her physical surroundings, school, or other significant activities;

A court is loathe to separate siblings in a dissolution proceeding. However, there is no prohibition in this regard so long as "the best interest of the child" is met with the custody arrangement.

> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule;

Many parents believe that a child should choose the parent with whom he wants to live. That is not the law. A child of 12 or older must consent to speak to a guardian ad litem but that does not mean that he or she should have the responsibility of choosing between his or her parents. It is a fact that teenagers tend to have more independence than younger children and a parenting plan should provide for flexibility for that child's preferences.

> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

This is a practical point. If a parent wants primary custody but works 10 hours per day and travels frequently, those factors impact his or her ability to be available for the child.

Factor (i) is given the greatest weight.

Shared Custody Arrangements

A shared parenting arrangement is where both parents share a substantially equal amount of residential time with the children. Until mid 2007, there was a presumption against shared parenting unless both parties agreed to that arrangement, had a satisfactory history of shared performance, were available to each other and the provisions were in the child's best interest. RCW 26.09.187 was modified effective July 22, 2007. Under the new law, unless RCW 26.09.191 restrictions apply,

> The court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.
>
> RCW 26.09.187(b).

Also, under new subsection (c), the statute provides that "residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur." Most parenting plans have a litany of "other" provisions which spell out each parent's responsibilities, requirements for notifications and the like. A customary provision would include a prohibition against making derogatory remarks about the other parent when the child is present.

Non-Residential Provisions

The parenting plan has many more facets than just the residential schedule. A guardian ad litem can also be asked for a recommendation on the following issues:

Decision making authority. (Paragraphs 4.1, 4.2, 4.3) Except where the court has found that a limitation under RCW 26.09.191 is warranted which allows one parent sole decision-making authority, a parenting plan needs to provide decision-making authority to "one or both parties regarding the children's education, health care and religious upbringing. " RCW 26.09.184(5) In many parenting plans the parties want to include more than just education, non-emergency health care and religious upbringing in this category. Other issues under this section include child care, extracurricular activity expenses, body piercing, permission to enter the military before age 18, marriage before age 18 and driver's license. A guardian ad litem's recommendations can be helpful on this issue as a GAL will have special knowledge of certain decisions where the parties experience difficulties.

Transportation arrangements: (Paragraph 3.11) This provision can cause headaches in implementation if not handled well. Many parenting plans provide that "receiving parent shall transport." That works if the parties live in the same county, but what if they do not? What if there are RCW 26.09.191 restrictions which prohibit contact? Does one parent have to handle all the transportation? Can the child be exchanged at school, daycare or activities? What if one parent is habitually late to the exchange? Recommendations by a guardian ad litem as to how to handle these problems can save the parties many problems in the future.

Dispute resolution: (Paragraph V) RCW 26.09.184 provides that every parenting plan shall make provision for dispute resolution "precluded or limited by RCW 26.09.187 or 26.09.191." A guardian ad litem can make recommendations on what type of alternative dispute resolution the parties use and in what instances (i.e., for disputes related to tardiness or no-shows, a child's participation in extracurricular activities, etc.). If dispute resolution is provided for in the parenting plan, the parties must use this process if a problem arises with regard to the implementation of the parenting plan.

Priorities: (Paragraph 3.9) If the "school schedule" conflicts with the "special occasions" schedule in a parenting plan, which schedule prevails? The Priorities section of a parenting plan can give guidance if it applies (some choose not to select priorities). A guardian ad litem's recommendations in this section may help the parties avoid conflict.

Judicial Information Search: Another new law which became effective in July 2007 requires the court to search the judicial information system (JIS) for information and proceedings which relate to parenting. Specifically, this means that judges and commissioners are looking for domestic violence, DUI and other criminal convictions which might impact parenting. If either

party has these convictions on their record the judge or commissioner examines the proposed final parenting plan to ensure that it addresses these concerns. RCW 26.09.182

PATERNITY CASES

Submitted by Carol Bryant, Attorney at Law

Overview

A parent-child relationship can be created between a child and a man in a number of different ways in this State (RCW 26.26.101): 1) The unmarried parents of a child may sign an acknowledgement of parentage and have that acknowledgement filed with the Department of Health. 2) A legal action can be filed requesting that the court establish that a man is the father of a child. 3) A child who is born to a married worman is presumed to be the child of her husband unless this presumption is rebutted pursuant to the law. 4) A child may be born as a result of in artificial insemination or surrogate parentage and be presumed to be the child of parties who signed a written agreement to the procedure. It is, actually, easier to create a parent-child relationship than to try to terminate such a relationship.

The Uniform Parentage Act (RCW 26.26) which governs **all** determinations of parentage in Washington was enacted in 2002 and was effective June 13, 2002. One of the biggest changes the new act made in the arena of paternity actions was to remove the child as a **necessary** party to a paternity case. Much of the paternity case law that developed up to that date has been codified in the law or no longer applies because the child is no longer a necessary party. There has not been much case law based upon the new Act.

Definitions

It is helpful that the new UPA includes a definitions section in RCW 26.26.011. The lack of definitions in the old law led to a lack of clarity and to disagreement as to the meaning of provisions in the statute. Some of the more important definitions now contained in the UPA are the following:

"Acknowledged father" means a man who has established a father-child relationship by signing a written acknowledgement of parentage (that meets certain requirements set out in RCW 26.26.305) which acknowledgement has been filed with the Department of Health.

"Adjudicated father" means a man who has been adjudicated by a court to be the father of a child.

"Alleged father" means a man who alleges himself to be, or is alleged to be the genetic father of a child, but whose paternity has not been determined. (The section then states what the definition excludes).

"Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. (A number of terms are included in the definition).

"Child" means an individual of any age.

"Presumed father" means a man who, under RCW 26.26.116, is recognized to be the father of a child until that status is rebutted or confirmed in judicial proceeding.

Overview of Paternity Case

A paternity action is to be filed in the county where the child resides or, if the child does not reside in the State, in the county where the respondent resides (RCW 26.26.520). Necessary parties to a paternity action are: the mother, a man "whose paternity of the child is to be adjudicated" and (if a surrogate parentage contract is at issue) a person intended to be a parent (RCW 26.26.510). "A man whose paternity of the child is to be adjudicated" includes a presumed father whose paternity of the child is sought to be disestablished.

Because a child is no longer a mandatory party to a paternity action, a guardian ad litem is not necessarily involved in every paternity action. The child can be made a party to the action (and as such must be represented by a guardian ad litem). The court is required to appoint a guardian ad litem to represent the best interests of the child if the court finds the interests of the child are not adequately represented (RCW 26.26.555(2)).

If the alleged father does not deny paternity, temporary orders can be entered for parenting and support. Otherwise upon paternity being denied an order compelling paternity genetic testing can be obtained. The testing used must be of a type that is reasonably relied upon by experts and performed by an accredited laboratory. Although it is customary for the alleged father, the mother and the child to be tested, it is possible to run the tests without the involvement of the mother. If the genetic test results in a probability of paternity of at least 99 percent (or a paternity index of at least 100 to 1) the man tested is rebuttably identified as the father of the child.

The final orders in a parentage action may include an award of back support but the statute limits the right to back support to fives years prior to the commencement of the judicial action (RCW 26.26.134). The order shall include a provision requiring the amendment of the child's birth certificate if necessary to add in the father's name and to change the surname of the child if ordered. The form of the order of child support entered must comply with RCW 26.23.050 and RCW 26.26.132. A parenting plan is not required in paternity actions unless requested by a party (RCW 26.26.130(7)) but the court will, at minimum enter terms regarding custody and visitation.

The court has the discretion to change the surname of the child if it determines that it is in child's best interest. The definitive case setting forth the analysis of a child's interests when it comes to surname is *Daves v. Nastos,* 105 Wn.2d 24, 711P.2d 314 (1985). Factors to be considered in analyzing what surname the child should have include: the child's preference, the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent, the length of time the child has borne a given surname, the degree of community respect associated with the present and the proposed surname and the difficulties,

harassment or embarrassment the child may experience from bearing the present or proposed surname.

Actions Based Upon Acknowledgements

A paternity acknowledgement which meets the requirements of RCW 26.26.305 is tantamount to a judicial establishment of parentage. These statutory requirements include that that the acknowledgement be in a record, be signed under penalty of perjury, state that the child has no presumed father and that there is no other acknowledged or adjudicated father, state if there has been genetic testing and if so, if those results are consistent with the acknowledgement, and state that the parties understand that the acknowledgement as the same effect as a judicial finding of parentage. The acknowledgement is void if there is a presumed father and that man has not signed the denial of parentage or if there is another acknowledged or adjudicated father

A party who has signed a paternity acknowledgement which is on file with the Department of Health may file an action for support or a parenting plan based upon the acknowledgement.

If a party who has signed an acknowledgement wishes to vacate that acknowledgement, they can only do so during a limited time period after the filing of the acknowledgement. Within **sixty days** of the filing of the Acknowledgement a party can file an action to **rescind** the acknowledgement. The action to rescind does not have to be for cause. If the affidavit has been filed for **more than sixty days** but **less than two years**, a signatory to the acknowledgement can file an action to **challenge** the acknowledgement. An action to challenge an acknowledgement must be based on fraud, duress or material mistake of fact. Either one of these actions requires all signatories to the acknowledgement to be made parties to the action. A signatory who has a support obligation will not have that obligation suspended without a showing of good cause. These proceedings are conducted in the same manner as an adjudication of parentage.

A minor can sign an acknowledgement without being represented by a guardian ad litem, and the acknowledgement will be valid under the law. That same minor, however, cannot file an action to rescind or challenge an acknowledgement or an action for support and parenting without being represented by a guardian ad litem.

Presumption of Paternity

A man is presumed to be the father of a child if: the father and mother are married to each other when the child was born; **or** the child is born within 300 days of the termination of the marriage; **or** the parents attempt to marry but their marriage is ruled invalid and the child is born during that invalid marriage; **or** after the child's birth the father and mother marry and the father voluntarily asserts his paternity (either by filing with the State Registrar of Vital Records to have his name put on the child's birth certificate or by a written promise to support the child as his own) (RCW 26.26.116).

Generally, there is no time limitation on when a proceeding to adjudicate the parentage of a child can be commenced. However, if the child has a presumed, acknowledged or adjudicated father, the statute does provide for such time limitations to disestablish paternity.

If the child has a presumed father, a proceeding to establish parentage in another man must be commenced by the time the child turns age two. RCW 26.26.530(1). An action to disestablish the parentage between a child and the child's presumed father may be commenced at any time, but only if the court finds that:

- the presumed father and the mother neither lived with each other or engaged in sexual intercourse with each other during the time the child was conceived; AND
- The presumed father never openly treated the child as his.

RCW 26.26.535(2).

If the child has an adjudicated or acknowledged father, an action by another individual to establish himself as the child's father must be commenced before the child is two years of age. RCW 26.26.540(2). RCW 26.26.540(1) makes it clear that the signatories to an acknowledgment of parentage can only rescind or challenge the parentage of a child within the time limits allowed under RCW 26.26.330 or 26.26.335.

In *In re the Parentage of M.S.*, 128 Wn. App. 408, ___ P.3d ___ (2005), the court held that the mother's former husband is an adjudicated father, rather than a presumed father and thus the mother's former paramour's petition to establish parentage was timely. The child (M.S.) was born in 2000. The mother, Shawn, was married to David and was having a sexual relationship with Hampson, the petitioner. In 2002, the mother filed for divorce. In 2003, David found out that he may not be the child's biological father. In 2003, Hampson filed a petition to establish parentage of M.S. Hampson dismissed the petition when he and the mother reconciled. In April 2003, the mother's divorce was final and provided that David have visitation rights and pay child support. In May 2004, Hampson again filed to establish parentage of M.S.

The court held that David is M.S.'s adjudicated father because he was involved in a dissolution proceeding and the court's final order provided that he must support the child. RCW 26.26.630(3)(b). When he and Shawn divorced, the court ordered David to pay child support for M.S. and he became her adjudicated father. Therefore, under RCW 26.26.540(2), Hampson has two years from the date of adjudication to commence his action. The divorce was final in April 2003 and he filed his petition in May 2004. Thus, the petition was timely filed. *In re the Parentage of M.S.*, 128 Wn. App. at 414.

Additionally, the court held that even if David were a presumed father, Hampson's petition was timely. The court stated that when the legislature shortens a statute of limitations, the time for bringing claims that accrued prior to the new law's enactment begin to run on the new statute's effective date. The new limitations period began to run on June 13, 2002, the statute's effective date, and Hampson had until June 13, 2004 to file his petition. He filed in May 2004 and thus his petition was timely. *In re Parentage of M.S.*, 128 Wn. App. at 415.

Although genetic testing can affirmatively resolve the issue of biological parentage of a child, biological parentage is not the exclusive goal in an action to disestablish the parentage of a presumed father. The law was crafted to protect the child against a circumstance in which that child would be bereft of the only person the child has been led to believe is his or her father. Thus, before the court can enter an order requiring paternity genetic testing (for the purpose of disestablishing paternity of a presumed father), the court is required to analyze a number of factors to determine if the testing is in the child's best interests. It is also mandated that in this proceeding the child be represented by a Guardian ad Litem. RCW 26.26.535(3). A motion to appoint a Guardian ad Litem for the minor child should be the first step after the filing of the petition to disestablish.

RCW 26.26.535(1) provides that a court may deny genetic testing of the mother, child and presumed father if the court finds that:

- The mother or presumed father have acted in such a way to make either of them estopped from denying parentage; and
- It would be inequitable to disprove that the presumed father is the father of the child.

In analyzing whether to deny genetic testing, the court is required to consider what is in the best interests of the minor child by considering the following factors:

- The length of time between the action to disestablish parentage and the time the presumed father knew he might not be the biological father;
- The length of time the presumed father had acted as the father of the child;
- The facts surrounding the presumed father's discovery of the possibility that he was not the child's biological father;
- The nature of the father-child relationship;
- The age of the minor child;
- The potential harm to the child resulting from disestablishing parentage;
- The relationship of the child to the alleged biological father;
- The extent the passage of time reduces the potential of establishing parentage and a support obligation in another man;
- Any other factors that may affect the equities of disestablishing parentage or the possibility of harm to the child.

RCW 26.26.535(2)(a-i). The investigation of the guardian ad litem appointed in such a case should focus on these factors and state whether an analysis of these factors supports paternity genetic testing.

If the court denies the request for genetic testing it must do so based upon clear and convincing evidence. RCW 26.26.535(4). Upon the denial of genetic testing, the court is required to issue an order establishing the presumed father as the father of the minor child. RCW 26.26.535(5). This requirement, that the court consider and make findings regarding these factors, codifies the case law developed in *McDaniels v. Carlson,* 108 Wn.2d 299, 738 P.2d 254 (1987), *In Re Marriage of T,* 68 Wn. App. 329,842 P.2d 1010 (1993); *In Re Marriage of Their,* 67 Wn. App. 277, 841 P.2d 794 (1992), and *In Re Marriage of Wendy M.*, 92 Wn. App. 430, 962 P.2d 130 (1998).

The final step in disestablishing the parentage of a presumed father is paternity genetic testing that confirms that he is not the child's father, or tests that confirm that another individual is the child's father. Pursuant to RCW 26.26.600(1) a presumed father's paternity cannot be disproved without either exclusionary genetic test results for the presumed father or positive genetic test results showing another man to be the child's father.

MODIFICATIONS OF PARENTING PLANS

Submitted by Michael Louden, The Family Law Group

Modifications in General: Modifications of parenting plans are governed by RCW 26.09.260. The statute provides for six different bases for modification. It is important to know on which basis the petition for modification is based, because the GAL's investigation and recommendations (and the court's authority) are constrained by the limits of the statute. If a court orders a GAL investigation for a minor modification of the residential schedule, then the GAL might exceed her authority if she investigated and reported on a possible major modification.[3]

A parenting plan may be modified in the following ways:

(1) a "major" modification, in which the primary residence of the child is changed, or the residential schedule is changed in a very significant way;[4]

(2) a modification to address necessary restrictions based on RCW 26.09.191;[5]

(3) a "minor" modification of the residential schedule which[6]

(a) does not exceed 24 full days in a calendar year,

(b) is based on a change of residence or work schedule of the non-residential parent, or

(c) is less than 90 overnights per year if the original order did not provide reasonable time to the nonresidential parent;

(4) a modification resulting from a relocation;[7]

(5) modification based on a failure or exercise residential time for a year or longer;[8]

(6) adjustments to nonresidential aspects of the parenting plan (such as decision-making and dispute resolution).[9]

Any modification of a parenting plan requires a substantial change of circumstances. For a major modification, the change must be in the situation of the nonmoving parent or child; for a minor modification, the change can be in the situation of either parent or the child.[10] A substantial change in circumstances must be a change occurring after the entry of the original decree or based on a fact unknown to or unanticipated by the trial court at that time. While a child growing older or starting school would normally be anticipated (and thus not a substantial change of circumstances), there is no "bright-line rule that ordinarily anticipated life events will always bar a finding of a substantial change of circumstances. The determinative considerations are whether the facts underlying the substantial change of circumstances existed at the time of entry of the prior or original plan or were unanticipated by the superior court at that time. RCW 26.09.260(1). If the underlying facts did not exist or the prior or original plan did not anticipate the substantial change in circumstances, the superior court may adjust the parenting plan. RCW 26.09.260(5)."[11]

Procedure: After filing, a party must seek a finding of "adequate cause." This is a determination by the court as to whether the party seeking modification of the parenting plan

---

[3] *See*, e.g., *In re Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006).
[4] RCW 26.09.260(2).
[5] RCW 26.09.260(4).
[6] RCW 26.09.260(5).
[7] RCW 26.09.260(6).
[8] RCW 26.09.260(8).
[9] RCW 26.09.260(10).
[10] *In re Marriage of Tomsovic*, 118 Wn. App. 96, 106, 74 P.3d 692 (2003).
[11] *In re Marriage of Hoseth*, 115 Wn. App. 563, 571, 63 P.3d 164 (2003), *review denied*, 150 Wn.2d 1011 (2003)

should be allowed to continue with the case. If not, the case is dismissed and no GAL is appointed. In most cases, a GAL will only be appointed after the finding of adequate cause has been made. In rare cases, the court may seek the GAL's input on the question of whether adequate cause should be found.[12] In either event, the GAL should be familiar with caselaw interpretations of the modification statute. "Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification."[13] Litigation over custody is inconsistent with the child's welfare. There is a high threshold for modification of parenting plans.[14] Adequate cause, therefore, requires something more than prima facie allegations that, if proven, might permit inferences sufficient to establish grounds for a custody change.[15] Since the litigation itself is inherently harmful, modification actions should not be allowed to continue just to investigate unfounded or baseless allegations.

One exception to the high threshold for modifications is the 50-50 parenting plan. Since these plans were considered exceptional under prior law, modification was allowed when the cooperative situation giving rise to the plan became unworkable.[16] The statutory restrictions against 50-50 plans having been eliminated in 2007, however, this principle may not apply in future modifications of 50-50 plans.[17]

Parties may stipulate to the existence of adequate cause.[18] If adequate cause has been found before the GAL's appointment, then the GAL would have no input on the question. If the GAL has been appointed prior to a finding of adequate cause, then the stipulation would require her agreement as well.

After adequate cause has been found, the court can move forward on the question of how and whether to modify the plan. Note that just because adequate cause has been found, the plan does not *have* to be modified. It may still be in the best interests of the child to maintain the old plan.

Major Modifications: While there are six bases for modification, the court will most often seek the input of a GAL in actions to change the primary residential care of the child (also called "major modifications"). There are four bases for major modifications: (1) agreement, (2) integration, (3) detriment, and (4) a conviction for custodial interference or multiple contempt findings. The first basis leads to no appointment of a GAL because nothing is contested. The last circumstance arises rarely. So usually, the GAL will have to investigate the questions of integration and detriment.

Integration occurs where the primary residential parent consents for the child to change residences on a permanent basis.[19] Where a temporary arrangement is made for the child to reside with the other parent because the primary parent needed medical care, this does not give rise to modification.[20] "'Consent' refers to a voluntary acquiescence to surrender of legal custody. It may be shown by evidence of the relinquishing parent's intent, or by the creation of

---

[12] An issue may be raised as to the court's jurisdiction to appoint a GAL prior to a finding of adequate cause. If the court lacks jurisdiction to proceed with the case, then it may also lack jurisdiction to appoint the GAL.
[13] *In re Marriage of Shryock*, 76 Wn. App. 848, 850, 888 P.2d 750 (1995).
[14] *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993).
[15] *In re Parentage of Jannot*, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002), *aff'd*, 149 Wn.2d 123 (2003).
[16] *In re Marriage of Stern*, 57 Wn. App. 707, 789 P.2d 807, *review denied*, 115 Wn.2d 1013 (1990).
[17] *See also Selivanoff v. Selivanoff*, 12 Wn. App. 263, 529 P.2d 486 (1974).
[18] *In re Marriage of Naval*, 43 Wn. App. 839, 719 P.2d 1349 (1986); *In re Marriage of Adler*, 131 Wn. App. 717, 129 P.3d 293 (2006).
[19] *George v. Helliar*, 62 Wn. App. 378, 814 P.2d 238 (1991).
[20] *In re Marriage of Taddeo-Smith*, 127 Wn. App. 400, 405-06, 110 P.3d 1192 (2005).

an expectation in the other parent and in the children that a change in physical custody would be permanent. The children's views as to where 'home' is, and whether the environment established at each parent's residence is permanent or temporary are significant in determining whether 'consent' and 'integration' are shown. While time spent with each parent is not determinative, it is a factor."[21]

When contested, the primary parent is strongly motivated to dispute any claim that she consented to integration of the child into the other parent's home. This author believes a relevant inquiry should be whether the *child* perceived the integration to be a permanent change in his or her living situation. Frequently (especially with older children), the parents agree that the child can live with the other parent on a temporary or trial basis. Just because a change in the child's primary residence has been accomplished in fact does not mean the parenting plan should be rewritten. Again, although adequate cause may have been found, the GAL must still engage in an independent analysis of the child's best interests.[22]

*A finding of **detriment** requires more than a showing of illicit conduct by the parent who has custody. There must be a showing of the effect of that conduct upon the minor child or children.[23] Detriment is a different (and less stringent) inquiry than parental unfitness.[24] Cohabitation or remarriage alone is not sufficient to establish detriment.[25] However, if the parent chooses to reside with (or even expose the child to) a sex offender, then this would certainly rise to the level of detriment (as well as allowing for modification under RCW 26.09.260(4)). If a parent commits a crime, then this does not necessarily put the child at a risk of harm; however, if the parent is going to jail for a long period of time, then detriment might lie.*

Relocation: If appointed to examine the question of relocation, the court – and thus, the GAL – must examine each of the eleven factors under RCW 26.09.520.[26] The court may not consider the question of whether the relocating parent would forego relocation if not allowed by the court.[27] In other words, for purposes of its decision, the court must assume that the relocating parent does, indeed, relocate, and ask whether it is preferable for the child to relocate as well, or remain with the other parent in a significant change from the existing parenting arrangement. If the relocating parent ultimately determines she will not relocate, then the court lacks the authority to modify the parenting plan (absent some other petition).[28]

Other Procedures: At times, a GAL may be asked to have a continuing role in a case, e.g., as a monitor of the parents' progress in treatment or services, or to make ongoing recommendations regarding expansion or reduction of residential time. While legally

---

[21] *In re Marriage of Timmons*, 94 Wn.2d 594, 601, 617 P.2d 1032 (1980).
[22] *Clark v. Gunter*, 112 Wn. App. 805, 51 P.3d 135 (2002).
[23] *In re Marriage of Frasier*, 33 Wn. App. 445, 450, 655 P.2d 718 (1982).
[24] *In re Marriage of Velickoff*, 95 Wn. App. 346, 354, 968 P.2d 20 (1998).
[25] *Wildermuth v. Wildermuth*, 14 Wn. App. 442, 542 P.2d 463 (1975).
[26] *In re Marriage of Horner,* 151 Wn.2d 884, 93 P.3d 124 (2004).
[27] RCW 26.09.530.
[28] *In re Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002).

permissible,[29] this puts the parenting plan in a state of flux, where the plans are intended to be permanent and not the subject of ongoing litigation. The GAL's ongoing determinations are not court orders, and are always subject to review by the court, and the GAL should make any "decisions" with appropriate recognition of this lack of ultimate authority.[30]

See RCW 26.09.260

RELOCATION CASES

Submitted by Douglas Becker, Wechsler Becker, LLP

Relocation cases are filed when a parent or non-parent who has the majority of residential time with the children intends to relocate the children outside their current school district (in the larger sense of a school district, not just the catchment area for a particular school).[31] The statutory law is contained in RCW 26.09.405-.909.

A relocation case can only occur after some kind of order concerning access to the children has been issued[32]. Such an order will typically designate a parent with whom the children reside the majority of the time ("the primary parent"). Cases of 50/50 parenting plans will be addressed below.

It isn't up to the relocating parent to file a case. The relocating parent gives notice to the non-relocating parent. It is then up to the non-relocating parent to file an objection. The official Objection to Relocation form is also a Petition for Modification of Parenting Plan. They are two sides of the same coin.

If the objecting parent doesn't object to the relocation itself, but only the terms of the parenting plan that will result from the move, the Objection to Relocation will request a minor modification of the parenting plan. Such a case would be investigated in the same way any minor modification would be investigated, so GALs in those cases are referred to that section of the Handbook.

This chapter will only deal with cases where the objecting parent does not want the children to be relocated. In that case, the Objection will request a major modification that reverses the primary parent. There is no such thing as a petition to block the relocation by maintaining the status quo. The Objection must include a viable proposal for where the children will live if the relocation is blocked. Here is why:

a. the relocating parent has a constitutional right to live anywhere they want;
b. the relocating parent cannot be questioned about whether they will "give up" the relocation if the child is prevented from moving—everyone has to take the relocating parent's intention to move as a given;
c. therefore, if the relocation of the *children* is prohibited, the only remaining option is to transfer their primary residence to the non-relocating parent.

---

[29] *In re Marriage of Possinger*, 105 Wn. App. 326, 19 P.3d 1109, *review denied*, 145 Wn.2d 1008 (2001).
[30] *In re Parentage of Schroeder*, 106 Wn. App 343, 22 P.3d 1280 (2001); *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 976 P.2d 173 (1999).
[31] RCW 26.09.450
[32] RCW 26.09.405

The reason why the GAL cannot ask the relocating parent if he or she would forgo the relocation is that the court is prohibited from considering such information under RCW 26.09.530. If the GAL obtains that information anyway, it is assumed to be a factor in the GAL's recommendation, even if it is never mentioned. If the GAL recommends the relocation be prohibited, the relocating parent will bring a motion to exclude the GAL's testimony and report on the grounds they are fatally infected with information the court cannot consider—by listening to the GAL, the court would be considering prohibited information without knowing it was doing so.

The exact same prohibition applies to asking the objecting parent whether he or she would relocate if the children were allowed to be relocated.

However, it's OK to ask both parents what their *alternatives* are if they lose.[33] The crucial distinction is what they could do, not what they would do. It would be smart to avoid "could" and "would" altogether and stick with "*what* are your possible alternatives if you lose the case." Some parents will have alternatives and some won't. Each parent can also discuss what the other parent's alternatives are, but you should stop them from discussing what the other parent's intentions are.

The statutes provide a presumption that the relocation will be approved.[4] That means the burden of persuasion is on the objecting parent. To overcome the presumption, the objecting parent must demonstrate "the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person."[34]

Obviously, the effect on "the relocating person" is affected by what the alternatives are, as well as the benefits of the relocation. But the major focus will be on the impact on the children, which is what the GAL is investigating. Examples of how the benefits to the relocating parent can be benefits to the children include better living conditions, maintaining the stability of the second family, support from and contact with extended family, more resources for college or private school, etc.

The "best interest" of the children is not a factor for deciding relocation cases.[35] That is due to the presumption favoring relocation. In determining whether the objecting parent has shown that the detriments outweigh the benefits, the court must consider all of the factors below and document its findings.[36] Therefore, GALs should frame their report around the statutory factors[37] (they are not listed in order of importance):

> (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
>
> (2) Prior agreements of the parties;
>
> (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

---

[33] RCW 26.09.520(8) & (9)
[34] RCW 26.09.520
[35] *In re Marriage of Momb*, 132 Wn. App. 70, 79, 130 P.3d 406 (2006); *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004)
[36] *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004)
[37] RCW 26.09.520

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

(8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

As is apparent, there is nothing important that won't fit under one of these factors. The court will make findings on *all* of these factors, so the GAL should address all of them as much as possible. In each individual case, however, some factors will be more important than others and the GAL should help the court identify those.

As an overall approach, it is handy to think of what is really being investigated. It is both the good and bad aspects of each parent as the primary parent *and* the good and bad aspects of staying in this community versus moving to another community. So it is two parties and two communities that are being investigated. If one parent and environment are better than the other parent and environment, the recommendation is easy. If the "better" parent has the "worse" environment, the question becomes whether changing primary parents outweighs changing environments.

Special cases include 50/50 parenting plans. Some courts won't apply the relocation statutes to 50/50 cases, but that decision will have been made before you begin your investigation. If the case is proceeding under the relocation statutes, the effect of a 50/50 parenting plan is to eliminate the presumption in favor of relocation.[38] Thus, both parents have an equal burden to prove their case.

Other special cases are relocations that occur in the middle of an action to create a parenting plan, such as a divorce or paternity action. In that case the standards for decision are not the relocation standards, they are the normal standards for a divorce or paternity case. However, in those cases the intention to relocate (or an actual temporary relocation) are factors that must be considered[39] under factor (v) of RCW 26.09.187(3): "The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities."

---

[38] Rep. Dow Constantine, JOURNAL OF THE HOUSE, 56th LEG. 551 (2000)

[39] *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469

Unfortunately, relocation cases have a higher than average chance of going to trial because they are inherently all-or-nothing. There's no easy way to adjust schedules that provide frequent or substantial contact with the non-primary parent and allocating most or all of the summer has its own problems. For that reason, a mediated settlement is difficult unless there's an unambiguous recommendation, if that is possible.

THIRD PARTY CUSTODY CASES

Submitted by Caroline Davis, Executive Director, King County Family Law CASA

Third party custody cases are filed by an individual or couple, who are not the biological parent, and are seeking primary custody of a child. The statutory law is contained in RCW 26.10. Typically these cases are filed by a person (it does not have to be a blood relative) who has had the child(ren) a significant amount of time and is seeking legal rights to obtain benefits or enroll a child in school or simply does not feel comfortable returning the child to the parents. One common scenario is a grandparent who has been asked to care for a child for longer and longer periods by one or both of the parents. Parents in these cases are often either homeless, mentally ill and untreated, or suffering from drug and alcohol abuse. But for the filing of the case and the existence of the third party, the case might have been a dependency matter.

Case law and statutory law do not match in third party custody cases so you must be familiar with the case law. The statute states that custody shall be based on "the best interests of the child." RCW 26.10.100. This is the same standard that exists in dissolution or paternity cases. However case law has repeatedly required a much tougher standard to be met by the third party custodian. The law favors the rights of biological parents over others.

> Under the heightened standard, a court can interfere with a fit parent's parenting decision to maintain custody of his or her child only if the nonparent demonstrates that placement with the fit parent will result in actual detriment to the child's growth and development The court in *Allen* rejected the "best interests of the child standard" because it did not provide proper defference to the fit parent.

Matter of Custody of Shields, 157 Wash. 2d 126, 144, 136 P. 3d 117 (2006).
[Note that RCW 26.09.004 (3) defines parenting functions in the context of care and growth of a child.]

The only time the best interests standard would be applied in a third party custody case is if both parties were not parents. See In re Custody of Brown, 153 Wn. 2cd 646, 105 P. 3d 991 (2005). In that case neither parent was asking for custody. Despite the parents asking one of the petitioners to care for the child, that person had no leg up on the other party seeking custody. Nor did it matter that one of the petitioners was a blood relative and the other was not.

The detriment standard is determined on a case by case basis. The amount of time the child has spent with the parent(s) versus the third party can be extremely relevant. As the GAL you should put together a time line of where the child has lived and with whom since birth.

The parent's ability to address the specific needs of that child may also be critical. The case of In re Marriage of Allen, 28 Wn. App. 637, 626 P 2d 16 (1981) which is frequently cited, involved a step mother who taught her deaf step child sign language and pressed hard for the school to provide the child with an education back in a time when that was not the norm. She also taught her own children sign language so they could communicate with the step child. When the biological father divorced the step-mother, she sought custody and was awarded the child.

The father had not learned sign language and although present in the home, was not able to meet the needs of this child. The father was not considered unfit but the court felt it would be detrimental to the child to live with him.

Third party custody cases require a threshold hearing before the case can move forward to trial. The requirement arose in the case of In re Nunn, 103 Wn. App. 871, 14 P.3rd 175 (2000) and has since been codified in law. See RCW 26.10.032 (2). The third party custodian must also submit to a criminal records check (as well as anyone in that household) and provide a release for any CPS records involving that adult. As the GAL you are going to want to see the criminal background check and get a release for all CPS records involving the child(ren) in the case as well as that adult. See RCW 26.10.135.

The Nunn case is also of interest as the guardian ad litem had applied the wrong legal standard, "best interests of the child." (A position you don't want to find yourself in.) In the Nunn case the aunt was battling the mother for custody. The court noted that the fact that an otherwise fit parent is angry towards the third party custody petitioner and may prevent the child from seeing extended family members related to that petitioner and may not trust the GAL, are not in themselves a basis for denying custody to a parent.

A recent case raised the term *de facto* or "psychological parent" which you may come across in pleadings or in your order of appointment. This term arose in Custody of Stell, 56 Wn. App. 356, 783 P. 2d 615 (1989) as well as Shields, cited above. It reappeared in the case of In re Parentage of L.B. 155 Wn. 2d 679, 122 P. 3d 161 (2005), cert. denied 126 S. Ct. 2021, 164 L. Ed 2d 806, case which involved two women who were same sex partners. While together they decided to have a child and one of the women got pregnant through artificial insemination. She gave birth and the other woman stayed home and helped to care for the little girl. After a few years, the women split up. The girl lived with the biological mother and visited the other woman for a time until the bio mom cut off the contact. The non bio mom filed, not for primary custody, but for the right to have an ongoing relationship with the child and she prevailed. The court deemed the non bio mom a "psychological parent" and noted that she had been invited to serve in the role of a parent by the biological parent and that the woman had in fact been in a parental role.

> To establish standing as a *de facto* parent we adopt the following criteria….:
> "1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. …. In addition, recognition of a *de facto* parent is "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."….
> We thus hold that henceforth in Washington, a *de facto* parent stand in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise…. As such, recognition of a person as a child's *de facto* parent necessarily "authorizes a court to consider an award of parental rights and responsibilities…. based on its determination of the best interest of the child."

In re Parentage of L.B., p. 708.

The appointment of a GAL in a third party custody case is set forth in RCW 26.10.130. There is authority to order fees for an attorney for a child (and presumably a guardian ad litem) in RCW 26.10.070. GAL's need to be aware that statutory law does allow a judge to interview a child in chambers, see RCW 26.10.120. The guardian ad litem needs to be ready to weigh in on whether or not appearing before a judge, even in chambers, is best for a child. In my experience judges rarely, if ever, will want to question a child in chambers and would not consider doing so unless the child is an older adolescent. Finally the judge is not bound by the GAL's recommendations, see In Re Custody of Brown.

If one or both parents are not awarded custody, they may be visitation granted to the parents. See RCW 26.10.160. Note that this statute mirrors RCW 26.09.191 but is not identical in that the provisions for substance abuse and mental health issues are not included. The duties of the third party custodian are laid out in RCW 26.10.160. Both parents can be ordered to pay child support to a third party custodian.

Although the statutory law, RCW 26.10.190, sets out a basis to modify third party custody cases in line with the standards under the dissolution law (RCW 26.09), there are no cases on this standard. I expect in the next year or two, case law will come down addressing the legal standard. Should a biological parent have an easier time modifying a third party custody case than a parent in a divorce or paternity case? Does it matter how long the child has lived in the care of the third party custodian? Is it better for a child to be with a parent ultimately if that parent takes the steps necessary to become an appropriate caretaker?

Knowing the current case law is absolutely critical! At least two of the major third party custody cases discuss actions of a guardian ad litem based on an incorrect legal standard or reliance on a case that was overturned. To keep up to date on new case law, sign up for automatic receipt of court cases using the information below:
http://www.courts.wa.gov/notifications/?fa=notifications.updateaccount

See Custody of Anderson, 77 Wn. App. 261, 890 P. 2d 525 (1995) for a case where there was not a sufficient showing of detriment.
Custody of Stell, cited above, deals with expert testimony on the issue of psychological parent.
R.R.B., 108 Wn App. 602, 31 P.3rd 1212 (2001) addresses the question of who has standing to file a nonparental custody case.

MOTIONS IN FAMILY LAW CASES

Submitted by Jennie Laird, Seattle Divorce Services

General Information:

While a family law case is pending, any party – including the Guardian Ad Litem – may bring a motion before the court for temporary relief. For instance, a party may make a motion for a temporary parenting plan and/or for temporary child support in the context of a dissolution case. In parenting plan modification and in third party custody cases, a motion for adequate cause is necessary to allow the petitioning party to proceed, and a motion for temporary orders often accompanies a motion for adequate cause so all necessary issues to provide stabilization for the parties are decided in one hearing.

A motion for temporary orders is also the method for requesting a court to order specific services for a parent or for both parents while a case is pending – such as a substance abuse

assessment, substance abuse treatment, domestic violence batterer's treatment, or other counseling or treatment services. Typically, a Guardian Ad Litem is appointed via a motion for temporary orders which includes a request for such appointment.

Specific Procedures:

The moving party in any motion must follow the Civil Rules and the relevant county's Local and/or Local Family Law Rules of court in setting the hearing and in submitting the motion materials to the other parties and to the court itself. Failure to follow the relevant rules may result in incorrectly filing the motion; in many counties, deviation from the procedural requirements for motion setting result in the hearing being "stricken" or canceled by the court itself.

Notice: "Notice" is a concept engendered in Constitutional law – every party to a legal action has the right to "notice and an opportunity to be heard" before relief is granted by the court. "Notice" on a pragmatic level means that the other party must be served all paperwork submitted for the hearing, including the document which reveals the day, date, time, and location of the hearing, within a certain number of days of the hearing itself.

Typically, all other parties (and the court) are entitled to at least six days' notice of a hearing. In many counties, the notice requirement for family law motions is longer than for a general civil motion. For instance, in Snohomish County parties are entitled to 12 days notice; in King County, parties are entitled to 14 days notice of any temporary orders hearing. The other parties and the court must receive the motion paperwork at least that many days (12 days in Snohomish, 14 days in King, etc.) prior to the date the hearing is set to take place. A county's Local or Local Family Law court rules usually contain the specifics regarding Notice, and should be consulted prior to filing any motion for temporary orders.

Because the concept of adequate "Notice" stems from a party's Constitutional right to participate in any legal action in which they are a party, failure to comply with a particular county's Notice requirements in setting a temporary orders hearing by motion will result in the hearing being stricken, or if the hearing proceeds despite such failure to comply, the relief ordered could be overturned in the future because of lack of notice to a party.

What constitutes adequate "Notice" may vary from county to county and may vary depending on what relief is requested in the motion itself. Personal service may be required for some motions; for others, personal delivery may be acceptable. In some counties, delivery of the motion materials to other parties by mail may be allowed. The Local or Local Family Law Rules for the relevant county should contain this information. If the materials are sent to parties by mail, some counties will require that three (3) additional days notice be factored in, to allow for the additional time that it may take for delivery to be accomplished. Again, the Local or Local Family Law Rules should contain this information.

What Documents Are Needed?: Typically, any motion would include the following documents: the Motion itself, which lists the relief requested and the basis for such requests; a Declaration supporting the motion (a narrative statement signed as sworn under the penalty of perjury) which includes the moving party's basis for the requests and any information the court should know in considering the motion; Declaration(s) from other witnesses, also supporting the moving party's assertions and providing evidence to the court regarding why the relief should be granted; proposed orders, including a proposed temporary parenting plan, proposed order of child support with worksheets, and a proposed temporary order which lists any/all other relief requested in the motion; for motions which include financial relief, a Financial Declaration with

supporting financial documents, so the court may review the specific financial situation of the moving party; and, a Note for Motion or Notice of Hearing, which documents the type of motion being brought as well as the day, date, time, and location of the hearing.

Who Makes a Motion?: Any party seeking relief may prepare and file a motion. Where a GAL has been appointed, the GAL may make a motion. For instance, if the GAL discovers information mid-investigation which is of great concern, such that the GAL believes whatever temporary parenting plan currently in place should be changed, the GAL may bring a motion to amend or change the temporary parenting plan based on that information. Or, if a GAL report is issued mid-case, either parent may wish to bring a motion to implement the GAL recommendations, if the recommendations are different than the "status quo" and if the trial date in the case is a significant distance of time in the future.

Responding to a Motion: All parties have the right to, and if they wish to dispute the motion they must, respond to the motion. A response to a motion typically includes a Declaration in Response, from the responding party, and explaining why the motion should not be granted or what other information the court should consider before making a decision; witness Declarations in Response from others who may have relevant information regarding why the relief sought should not be granted; a Financial Declaration and supporting financial documents if the motion includes financial relief; and proposed orders from the responding party's point of view (what parenting plan, order of child support, or other temporary order should be granted at the hearing, in the responding party's opinion).

There are deadlines for responding parties, to be found in the Local or Local Family Law Rules, as well. These deadlines can be very specific; for instance, in King County a responding party must submit the responsive materials to all parties and to the court by noon four (4) court days prior to the hearing. As with the initial motion documents, failure to meet such responsive deadlines may have serious consequences, including the court declining to consider late submissions.

After the Response: After the response, the moving party typically has the opportunity to submit materials in "Strict Reply" to the response. This is usually in the form of a Declaration from the responding party and/or from other witnesses, specifically replying to the information raised in the Response. Reply documents may not generally bring up "new" issues; rather, they are to "strictly" reply to the information in the Response only. There are deadlines for a Reply, as well; for instance, in King County, Reply documents are due to all parties and to the court by noon two (2) court days prior to the hearing.

Papers Due to or Filed With "The Court": In most counties, any documents submitted for motions must be filed with the court *and* an additional courtesy or "working" copy of the documents must be delivered to the courthouse for the Judge or Court Commissioner who will preside over the hearing. The Local or Local Family Law Rules of the county will contain this information. This requirement basically means that any party submitting materials—moving, in response, or in reply—to the court for a motion hearing must provide *two copies* to the court, often to be submitted to two different locations within the courthouse. The "working" copy is the copy specifically provided to the judicial officer who will preside over the hearing, so that she may read them in advance. Failure to follow this requirement may result in the motion being stricken, or the materials not being read by the court in advance.

Other Requirements: Many counties require the moving party to "confirm" the hearing at a specific point in the time line between filing the motion and the hearing itself. This information will be found in the county Local or Local Family Law Rules. This is usually

required in the form of a phone call to the court, at a specific number, at a specific day and time to let the court know that the hearing will, in fact, go forward. Failure to confirm in counties that require this will result in the motion being stricken, such that no hearing will take place.

The Hearing:

In many counties, the motion itself will be decided primarily on the basis of the written material properly submitted to the court in advance, according to the time lines mandated by that particular county. The hearing is a time for "oral argument," or a short verbal presentation which highlights the most important information submitted in the written materials, and reiterating the relief requested. In many counties, only the parties themselves (or, if the parties are represented, only the attorneys for the parties) may speak at the hearing. For a GAL, this is specifically important because a failure to submit information in writing (if responding to a motion) may preclude the GAL from submitting any argument or information orally at the hearing itself. In many counties, no testimony is taken by the judicial officer during the hearing (because all of the evidence should have already been submitted in the written materials).

The hearing itself may have time limits (for instance, King County limits oral argument to 5 minutes per side for general family law motions) which are also found in the relevant court rules for that county. The moving party presents first, and then the responding party. If there are multiple responding parties (such as the other parent and the GAL) the judicial officer will generally dictate who speaks when. Then, the moving party has a brief opportunity to reply after the responding party(ies) is/are heard from.

Usually, the judge or court commissioner presiding over the hearing will "rule," or state her decision verbally, immediately after all parties are heard from. If not, the judicial officer may set a time in the future when all parties must return to court to receive the ruling verbally, or she may indicate that she will send out an order reflecting her ruling. In many counties, when the judicial officer rules immediately following the parties' arguments, the orders reflecting that ruling must be filed that day. This often results in taking proposed orders from one party or the other and literally "marking them up" in handwriting, to make them reflect the terms dictated by the judicial officer. The orders are then signed by that judicial officer, and the parties are responsible for making multiple copies for all parties and filing the original in the court clerk's office.

In some counties, however, the expectation is that the parties will work on orders reflecting the decision after leaving the courthouse, and that the order will be submitted to the judge or court commissioner for signature at a later date. These procedures vary from county to county, and the Local or Local Family Law Rules may not specifically contain this type of detail. Having a conversation with other GALs, or with lawyers who practice in the relevant county, in advance of a hearing to discuss their experiences may help a new GAL learn what to expect.

Resources for Other Information:

Because the procedures from county to county can vary considerably, it may be helpful to seek out other GALs in the relevant county and ask to meet with or speak with them in advance of your first hearing. Listening to another's experiences can be quite helpful and may educate you so you know what to expect. Family law hearings are also generally public in nature, such that a new GAL could go to the courthouse during a time when family law hearings are being held and simply sit in the courtroom and observe other hearings. This may also be quite helpful, as a new GAL would not only see and hear the proceedings and therefore get an idea of what

issues are dealt with and how, but a new GAL would also see the very practical issues relating to hearings—such as where the various parties stand, which rooms the hearings are held in, whether orders are entered immediately following the hearing or whether the parties leave the courthouse without having orders entered—and hopefully feel more comfortable when his or her own hearing takes place.

County Local or Local Family Law Rules may be found online at the county Superior Court's website. Hard copies of the rules will also be found in your county's law library; they are sometimes for sale in your local Superior Court clerk's office.

More detailed information regarding what specific paperwork is required or needed when making a family law motion, and the types of family law motions, is also available online at www.washingtonlawhelp.org, in the "WA" section. County bar associations or legal services offices are also possible sources of additional written materials specific to your county's family law court procedures.

Practice Tip:

Statutes governing the five case types a Family Law GAL will encounter, including those cited in this chapter, may be found at http://apps.leg.wa.gov/rcw/default.aspx?Cite=26 . It is crucial that the GAL become familiar with these statutes in order to gather relevant information for the court.

CHAPTER 4
FAMILY LAW GUARDIAN AD LITEM INVESTIGATIONS

FAMILY LAW GUARDIAN AD LITEM INVESTIGATIONS

Submitted by Honorable Paul Bastine and Honorable Tracy Waggoner

INVESTIGATION

"It has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior courts about the best interests of the children, do their important work fairly and impartially. Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interactions of courts and GALs and our Supreme Court adopted the GALR. These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues. To that end, GALR 2 articulates the general responsibilities of GALs. As relevant here, it states:"

> [I]n every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below[:] - . (b) Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom. - . (f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith. (g) Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties. - (o) Perform duties in a timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

Bobbitt v. Bobbitt, 2006 App. Slip - 31997-7, Division II (Citation pending).

I. PLANNING AN INVESTIGATION

A. REVIEWING THE ORDER APPOINTING GUARDIAN AD LITEM

Superior Court Guardian ad Litem Rule 4(1) As an officer of the court, a guardian ad litem has only such authority conferred by the order of appointment.

When beginning a guardian ad litem investigation, the GAL should first review the Order Appointing Guardian ad Litem. That order will contain many important provisions. Among others, the order contains the following:

1. The order defines the scope of the guardian ad litem investigation;
2. The order defines contains deadlines for the oral and written reports;
3. The order contains provisions regarding payment of guardian ad litem fees; and
4. The order contains provision regarding discharge of the guardian ad litem.

The Order Appointing Guardian ad Litem may differ from county and it is important that the GAL become familiar with the order issues in the county in which the appointment is accepted.

Whenever possible, the GAL should be involved in the entry of the Order Appointing Guardian ad Litem. It is important to review the order before it is entered. In particular, any questions regarding the scope of the investigation should be answered before entry of the order. If possible, the GAL should be the last person to sign the order before it is entered so that all disagreements between the parties have been resolved before the GAL signs the order.

Once the Order Appointing Guardian ad Litem is entered, the GAL should make several copies for the GALs file as copies will often need to be sent out with requests for information.

Scope of Investigation

> Superior Court Guardian ad Litem Rule 2(1)(j) Limit duties to those ordered by court. A guardian ad litem shall comply with the court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment.

The scope of the GALs appointment is set forth in the Order Appointing Guardian ad Litem. The scope can be as broad as a "full investigation" or as narrow as "investigate allegations of domestic violence". A GAL should never conduct an investigation beyond the scope within the order. If, in the course of the GAL investigation, the GAL becomes concerned that the scope should be expanded, a request should be made to the court to expand the scope of the investigation.

In such event, the GAL should inform counsel about the concerns that have been raised that may warrant expansion of the GAL's scope of appointment. Ideally, that will then prompt one or both of the attorneys to request a court order expanding the scope. If the parties are not represented by counsel or no action is taken by their counsel, the GAL should ask the Court for direction.

Exceeding the scope of the investigation can have repercussions, including disregard of the conclusions and recommendations made, as well as a challenge to the

level of immunity granted to the GAL as part of the investigation. See chapter(s) on GAL Quasi-judicial Immunity.

Due Dates

Superior Court Guardian ad Litem Rule 2(1)(I) Timely inform the court of relevant information. A guardian ad litem shall file a written report with the court and the parties as required by law or court order or in any event not later than 10 days prior to a hearing for which a report is required. The report shall be accompanied by a written list of documents considered or called to the attention of the guardian ad litem and persons interviewed during the course of the investigation.

Superior Court Guardian ad Litem Rule 2(1)(o) Perform duties in timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

A GAL should always be aware of the due dates within the GAL report as well as deadlines imposed by statute. Pursuant to statute, the GAL must provide recommendations to the parties and their attorneys sixty days prior to trial. Failure to provide a report to the parties at least sixty days prior to trial is an automatic basis for a continuance of the trial date. The Order Appointing Guardian ad Litem, or other court order, may require an oral or written report sooner than sixty days prior to trial.

There are occasions when the order issued by the court contains a due date that is less than sixty days prior to trial. In that event, the GAL should treat the statutory requirement of sixty days prior to trial as the actual due date. The court cannot shorten the time imposed by statute, absent agreement of the parties. The parties and their attorneys may agree to a due date that is less than sixty days prior to trial. In the event that the attorneys or the parties do reach such an agreement, the GAL must make sure that an order is entered with the court.

Provision of Payment of Fees

It is also important to resolve any issues concerning the language regarding payment of GAL fees before the order is entered. In cases where payment is being made by the county in which the orders have been issued, often the individual county requires specific findings and specific provisions placed within the order. The GAL should make sure that the parties and their attorneys have included the appropriate findings and provisions.

For private pay cases, if the GAL is requiring payment of the GAL retainer before the investigation begins, that provision should be clearly set out in the Order Appointing Guardian ad Litem. However, be advised that once the order is entered, the GAL should take steps to ensure that the parties and the court are kept up to date regarding the status of a party's failure to pay and the delay in the start of the GAL investigation. The court then has the option of compelling payment, obtaining payment via other means and/or discharging the GAL. Any delay in the start of a court-ordered GAL investigation is an important issue that should always be brought to the attention of the parties and the court.

Discharge Provisions

The Order Appointing Guardian ad Litem often contains provisions regarding the triggering event for the GAL's discharge. For example, in a dissolution case, the order may contain a provision discharging the GAL upon entry of a final Parenting Plan. The GAL should always be aware of what event results in the discharge of the GAL. Other than issues relating to the payment of fees, a GAL should take no action in a matter after the GAL has been discharged. Thus, it is important to know what triggers that discharge.

B. REVIEWING THE COURT FILE

> Superior Court Guardian ad Litem Rule 4(1)(g) Access to court files. Within the scope of appointment, a guardian ad litem shall have access to all superior court and all juvenile court files. Access to sealed or confidential files shall be by separate order. A guardian ad litem's report shall inform the court and parties if the report contains information from sealed or confidential files. The clerk of court shall provide certified copies of the order of appointment to a guardian ad litem upon request and without charge.

After review of the Order Appointing GAL, the GAL should then read the court file. A GAL should never rely on one party or the other to provide copies from the court file to the GAL. To avoid any questions or concerns on that issue, the GAL should obtain the file directly from the court. The court file will not only provide information regarding the current case and the status quo, it often provides historical information useful to the GAL. In reviewing the court file, the GAL should make note of the following:

1. All court dates and notices;
2. Any other cases or proceedings mentioned;
3. Names of any individuals mentioned, other than the parties, who may need to be interviewed or investigated;
4. Names of any professionals who have been involved with the children or the parties;
5. The allegations raised by the parties within the pleadings;
6. Each parties request for relief; and
7. Any potential conflicts.
8. Consider what records are involved and applicable statutes.

Court Dates and Notices

> Superior Court Guardian ad Litem Rule 2(1)(l) Appear at hearings. The guardian ad litem shall be given notice of all hearings and proceedings. A guardian ad litem shall appear at any hearing for which the duties of a guardian ad litem or any

issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed. In Title 11 RCW proceedings , the guardian ad litem shall appear at all hearings unless excused by court order.

Superior Court Guardian ad Litem Rule 4(1)(e) Participate in all proceedings. Consistent with rule 2(l), a guardian ad litem shall participate in court hearings through submission of written and supplemental oral reports and as otherwise authorized by statute and court rule.

The GAL should never assume that the parties and/or their attorneys have advised the GAL of all court dates and notices. When reviewing the court file, the GAL should note any dates for upcoming hearings, the status conference date, the parenting conference date, the pre-trial date and the trial date. The GAL should also always obtain and keep a copy of the Case Scheduling Order.

Orders within the court file may also require the GAL to do something specific as part of their investigation. For example, the court may direct the GAL to review an exchange of the children or to conduct a home visit prior to an upcoming hearing. The GAL should make note of all such orders and comply fully with the court's orders.

Other Proceedings

Petitions for Dissolution, Petitions for Legal Separation and Petitions for Modification contain provisions in which the parties are to disclose any other legal and non-legal proceedings in which the children at issue have been involved. These may include dependency proceedings, protection order proceedings, custody proceedings in other counties or states, etc. Whenever possible, the GAL should review the files for any proceedings that have been disclosed.

Other Individuals

In reviewing the court file, the GAL should make note of the names of any individuals mentioned by the parties who would appear to have information relevant to the GAL investigation. This may include current spouses, significant other, parents, siblings, friends, landlords, former landlords, employers, former employers, etc. Ultimately, the GAL may not contact each and every individual mentioned, however, it is important to note those individuals so that a determination regarding future contact by the GAL can be made.

Professionals and Professional Organizations

The GAL should also note the names of any professionals and or professional agencies that have had contact with the children and/or the parties. This may include social service organizations, drug and alcohol treatment facilities, counselors, physicians, psychologists, psychiatrists, teachers, etc. The GAL may need to send a request for

release of records, or a request for an interview, to one or more of these professionals or organizations during the course of the GAL investigation.

Allegations Raised in Pleadings

To the extent that the allegations raised by a party are relevant to the scope of the GALs investigation, the GAL should note all allegations made by a party in the pleadings in the court file. It is important to have this information in mind before conducting interviews with the parties

Each Parties Requests for Relief

Likewise, it is important for the GAL to review the file and make note of what each party is requesting and where the differences are in their respective proposals. Although the GAL is not required to recommend the proposal made be either party, the GAL should have in mind what the parties are requesting when conducting the investigation

Potential Conflicts

> Superior Court Guardian ad Litem Rule 2(1)(e) Avoid conflicts of interests. A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential conflict or impropriety. A guardian ad litem shall advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests.

Any issues of potential conflict should be raised as soon as possible in order to avoid delays in the GAL investigation. To that end, a GAL should review the file carefully to determine whether any conflicts exist. Any conflicts, no matter how minor, should be disclosed to the parties, their attorneys and to the court. In order to avoid future problems as to any such conflicts, the GAL should obtain a waiver of the conflict signed by the parties, their attorneys and the court. In obtaining such a waiver, the GAL should never accept the signatures of the attorneys on behalf of their clients but should require the signature of the clients themselves.

Consideration of what records are involved and applicable statutes

The following check-list was prepared by attorney Mark Iverson and the Honorable Nancy Bradburn-Johnson, King County Superior Court Commissioner, and included in the chapter authored by them in the Family Law Deskbook. The Chapter is entitled "Guardians ad Litem and Court-Appointed Special Advocates". When preparing for an investigation, the GAL should use this summary when considering what records should be obtained and the applicable statutes relating to those records.

√ Adoption Records:
Chapter 26.33 RCW; WAC 388-70-480

√ Chemical dependency treatment records:
RCW 70.96A.150; 42 C.F.R. Sec 2; 42 U.S.C. sec 290dd2; CH. 18.205 RCW

√ Child Abuse Prevention and Treatment Act:
42 U.S.C. Sec 5101; 45 C.F.R. Sec 1340.14

√ Child Abuse and Neglect Records
CH 26.44 RCW; WAC 388-15-132/143

√ Counseling Records
RCW 18.19.060,.180

√ Criminal Records
Criminal Records Privacy Act, CH 10.97 RCW

√ Department of Social and Health Services or supervising agency records
RCW 13.34.090; RCW 13.50.100(4)

√ Domestic violence records
RCW 70.123.075

√ Education Records
20 U.S.C. Sec 1232g; 20 U.S.C. Sec 1415; RCW 28A.600.475; RCW 26.09.225; RCW 26.19.090

√ Health care records/information
Medical Records - Health Care Information Access and Disclosure Act - CH 70.02 RCW; RCW 26.09.225; RCW 5.60.060

√ Hospitals
CH. 70.41 RCW

√ Juvenile Offenders
CH. 13.50 RCW

√ Juvenile Sex Offenders
RCW 13.40.215-217; WAC 388-70-700

√ Involuntary Mental Illness (Adult)
CH. 71.05 RCW

√ Minor Mental Health
CH. 71.34 RCW; RCW 13.50.100

√ Physicians
CH. 18.71 RCW

√ Psychological Records
RCW 18.83.110

√ Public Disclosure Act of 1972
CH 42.17 RCW

√ Sex Offenders

RCW 4.24.550

√ Sex Offender Treatment Providers
CH. 18.155 RCW

√ Sexually Transmitted Disease-related and Aids-related Information
RCW 70-.24-015; WAC 246-100-011(33)

THE GAL'S ROLE

When planning an investigation, as well as throughout the investigation, it is important for a GAL to remember the GAL's role. Within the scope and direction of the court, the GAL functions as an observer and reporter. The GAL is not appointed to personally correct the deficiencies the GAL observes in one or both parents or households. The GAL is not appointed to personally provide food or diapers, to personally arrange for needed services from community organizations, etc. . The GAL is not appointed to provide personal advice regarding the parties parenting of their children such as whether or not the GAL agrees with the parents approach to discipline. The GAL is appointed to gather information and report it to the Court, along with the GALs observations, conclusions and recommendations.

> In effect, [the GAL] acts as a neutral adviser to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court.
>
> Fernando v. Nieswandt, 87 Wn. App. 103 (1997)

II. MAINTAINING RECORDS OF AN INVESTIGATION

A. MAINTAINING THE GUARDIAN AD LITEM FILE

> Superior Court Guardian ad Litem Rule 2(1)(p) Maintain documentation. A guardian ad litem shall maintain documentation to substantiate recommendations and conclusions and shall keep records of actions taken by the guardian ad litem. Except as prohibited or protected by law, and consistent with rule 2(n), this information shall be made available for review on written request of a party or the court on request. Costs may be imposed for such requests.

The GAL must maintain a separate file for each GAL case. Because of the volume of information received as part of the GAL investigation, it is important for the GAL file organized and up to date. The GALs file is subject to discovery by the attorneys and parties and failure to appropriately maintain the GAL file may compromise the GAL. All documents, notes, orders, letters and releases should be maintained in a secure manner at all times.

The GAL should take notes outlining conversations with parties and others in each investigation. The notes should be dated and kept as part of a file. In addition, the GAL

should keep copies of any letters written, as well as copies of pleadings, reports, photographs, and other correspondence. Things which cannot go into an actual file, such as DVD's, should be marked with the file name and number and stored in a secure place.

As previously discussed, the role of the GAL is to gather information not give out information. To that end, the GAL should never release information to any person absent a court order. Should a request be made to the GAL for a release of information from an attorney for the parties, the GAL should obtain an order specifying what will be released and directing that the party and their attorney be restrained from disseminating the information released to them.

B. CHECKLISTS

As the GAL requests more information and there are more requests for information pending, it is important to set up a system in which the GAL can note the date that the request for information was made, the information requested, the date of any follow-up requests and the date that the information was received or the request was denied.

III. ACCESSING INFORMATION AND RECORDS

RCW 26.09220 (2): In preparing the report concerning a child, the [GAL] may consult any person who may have information about the child and the potential parenting or custodian arrangements.

A. CONTACTING THE PARTIES/PARTY QUESTIONNAIRES

> Superior Court Guardian ad Litem Rule 2(1)(k) Inform individuals about role in case. A guardian ad litem shall identify himself or herself as a guardian ad litem when contacting individuals in the course of a particular case and inform individuals contacted in a particular case about the role of a guardian ad litem in the case at the earliest practicable time.

After the Order Appointing Guardian ad Litem has been entered, the GAL should then send a letter of introduction to the parties including the GAL's name, professional address and professional telephone number.

Included with the letter of introduction should be the GAL's questionnaire. All GAL's should have a standard questionnaire that is sent to each party to an action. That questionnaire should be completed by the parties and returned to the GAL before the initial GAL interview with that party, whenever possible. The questionnaire should be comprised of three parts. The first part should request specific information such as:

1. The personal information for each party such as name, address, telephone number, social security number, birth date, driver's license number, any other names under which the party has been known, etc;

2. The parties current and previous places of employment;
3. The names and addresses of school attended by the children;
4. The names and addresses of any professionals seen by the parents or the children;
5. The dates of any arrests or criminal convictions of either party

The second portion of the questionnaire should include open-ended questions that allow the party to provide what information the party believes to be relevant. For example, in a dissolution/custody proceeding, the GAL questionnaire may ask each parent to describe, from that persons perspective, each parent's day-to-day involvement in parenting functions, each parent's strengths and weaknesses as a parent; and to identify any concerns the party may have regarding the other parent.

The last portion of the questionnaire should include a request for the names, addresses and telephone numbers of other individuals the parties believe the GAL should contact during the GAL investigation. It is often necessary to limit the number of requests to avoid receiving a large number of references. As the GAL should always contact each reference, either via a written reference questionnaire or directly, limiting the number of references requested will help to manage the investigation. The GAL should recommend that the party provide the names of individuals who are familiar with the parties and the children.

The GAL should advise the parties that at a questionnaire will be sent to each person identified, giving that person a chance to state whatever information the person feels would be useful to the GAL investigation. The person will also be told that they are not required to respond to the GAL but that any information provided to the GAL by that person is not confidential and can be released to the parties, counsel or the court. (Superior Court Guardian ad Litem Rule 2(k) A guardian ad litem shall advise information sources that the documents and information obtained may become part of court proceedings.)

Following a review of the questionnaires, a GAL will often call the reference for additional information, especially if it appears that they have knowledge of the matter.

The party questionnaire is a useful tool in many ways:

1. It provides a resource for the GAL for contact information for parties, collateral sources and professionals;
2. It allows the GAL to learn information directly from the parties themselves and to compare it to information received from the other party and the court file;
3. It serves as a useful outline for the subsequent interview with the parties.

B. INTERVIEWING THE PARTIES

> Superior Court Guardian ad Litem Rule (4)(1)(a) Access to party. Unless circumstances warrant otherwise, a guardian ad litem shall have access to the persons for whom a guardian ad litem is appointed and to all information relevant to the issues for which a guardian ad litem was appointed. The access of a guardian ad litem to the child or alleged incapacitated person and all relevant information shall not be unduly restricted by any person or agency. When the guardian ad litem seeks contact with a party who is represented by an attorney, the guardian ad litem shall notify the attorney in advance of such contact. The guardian ad litem's contact with the represented party shall be as permitted by the party's attorney, unless otherwise ordered by the court.

The GAL should always conduct separate interviews with each party. During those initial interviews, the GAL should not allow any other person (parties friends, family, etc.) to be present. Prior to interviewing the parties, the GAL should advise any attorney representing that party that an interview will be conducted and give that attorney an opportunity to be present.

Regarding that issue, whenever possible, the GAL should obtain stipulation from counsel prior to the start of any investigation that the GAL may interview the parties without prior notice to the parties attorneys. However, in all cases where one party is the subject of a pending criminal action, the GAL should never discuss the facts, circumstances and allegations surrounding that action with the party without their attorney present.

The GAL investigation should take place in the office of the GAL whenever possible. To avoid any question of fairness, the GAL should conduct the initial interviews of each party in the same location. It is not recommended that the GAL conduct an interview in a public or informal setting, such as a restaurant. The GAL investigation is a professional matter and should be handled professionally at all times.

During the interview, the GAL should ask any questions that have arisen after reviewing the court file and the questionnaire completed by that party. The GAL should not share the questionnaire of the other party with the party being interviewed. The questions asked by the GAL should be limited to those issues relevant to the scope of the GALs appointment.

It is recommended that the GAL take notes during the interview. All notes taken should be maintained as part of the GAL's file.

Regarding further discussions of interviewing parties please see Chapter(s) on Interviewing.

C. INTERVIEWING CHILDREN/OBSERVING CHILDREN

As part of the investigation, the GAL may also interview the children of the parties. See Chapter on Interviewing.

Outside of direct interviews with the children, the GAL investigation will also present opportunities for the GAL to personally observe the children such as during home visits in each parties home or when the GAL views an exchange of the children between the parents. In such situations, the GAL should take careful notes of the GAL's observations of such issues as the children's interaction with each parent, the children's interactions with siblings and other significant persons in their lives, the children's activities while in the home, etc. The GAL should also note any comments made by the children during such observations that are relevant to the investigation.

D. GATHERING INFORMATION FROM COLLATERAL SOURCES

As part of the GAL investigation, the GAL may seek information from collateral sources. What collateral sources may be contacted vary from case to case. In seeking information from collateral sources, the GAL must always remember that the role of the GAL is to gather information, not provide information.

> Superior Court Guardian ad Litem Rule 2(1)(n) Maintain privacy of parties. As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem. A guardian ad litem shall maintain the confidential nature of identifiers or addresses where there are allegations of domestic violence or risk to a party's or child's safety. The guardian ad litem may recommend that the court seal the report or a portion of the report of the guardian ad litem to preserve the privacy, confidentiality, or safety of the parties or the person for whom the guardian ad litem was appointed. The court may, upon application, and under such conditions as may be necessary to protect the witnesses from potential harm, order disclosure or discovery that addresses the need to challenge the truth of the information received from the confidential source.

Collateral sources will often request information from the GAL. Absent a court order, a GAL cannot provide information regarding the investigation to collateral sources. When requested, the GAL can provide a copy of the Order Appointing Guardian ad Litem.

> Superior Court Guardian ad Litem Rule 4(1)(f) Access to records. Except as limited by law or unless good cause is shown to the court, upon receiving a copy of the order appointing a guardian ad litem, any person or agency, including but not limited to any hospital, school, child care provider, organization, department of social and health services, doctor, health care provider, mental health provider, chemical health program, psychologist, psychiatrist, or law enforcement agency, shall permit a guardian ad litem to inspect and copy any and all records and

interview personnel relating to the proceeding for which a guardian ad litem is appointed.

Beyond family members and friends, there are some agencies that are contacted more frequently as part of GAL investigations. Those include:

1. Law Enforcement;
2. Department of Corrections;
3. City, County, State and Federal Courts;
4. Child Protective Services;
5. Daycare providers
6. Schools;
7. Healthcare providers;
8. Treatment providers and centers;
9. Cultural Resources
10. Other third parties

Law Enforcement

In almost every case (again depending upon the scope of the GAL appointment), it is important to review police records and associated reports. In order to request such records, the GAL should send a letter and request for the record to the police records department along with a copy of the Order Appointing Guardian ad Litem.

At a minimum, requests for records are generally sent to the county in which each party lives and works, as well as any counties or states either party has lived or worked in during the last five years. Addresses for police records in different states and counties are easily found on the internet. Additionally, requests for records should also be submitted to any county or state identified by either party as a county or state in which police records will be found concerning the parties or individuals at issue.

Generally, law enforcement will send the GAL a listing of arrests (RMS), which are often in the code used by the particular department, on each person requested. This usually includes the date of arrest, reason for arrest, incident/report number, and the incident disposition (guilty, not guilty, not charged, not adjudicated, etc.)

From the RMS list provided, the GAL can request copies of the individual police incident reports identified. Depending on the number of reports identified, the GAL should usually request all of the reports. At a minimum, the GAL should request all reports regarding drug or alcohol offenses, all reports regarding crimes of violence, all reports regarding crimes against children and all reports regarding crimes charges as felonies. When the incident reports are received, the reports may be partially redacted, (blacked out). Generally, law enforcement redacts only that information required by statute such as names and birth-dates. In reviewing all police reports, it is important for the GAL to note that the reports are the written statements of the particular law enforcement officer

and may not have been proven in court. The GAL should take steps to investigate the outcome of the charges that stemmed from the police report and whether a party agreed, as part of the criminal proceeding, that the law enforcement officers report was accurate.

When reading the reports, the GAL should take specific care to note any reports that reference the children that are the subject of the GAL investigation. For example, were the children present at the time of a drug-related arrest, a domestic violence incident, etc.

As part of the investigation, the GAL may want to request information regarding the number of calls law enforcement has made to a particular address. For example, if there are allegations of drug activity, the GAL will want to find out if law enforcement has a history of drug related calls to the parties address. If there is an allegation of a history of domestic violence, the GAL will want to find out if there has a history of law enforcement calls to the address for that reason. For such information, the GAL can request a Calls for Service for an address. This requires a GAL Order and for one of the parties to be linked to a particular address. The GAL will get a listing of all of the calls to an address, with dates, whether a report was written or not.

The Washington State Patrol is another resource for law enforcement reports. Sometimes on a listing of arrests, WSP will be noted as the agency having possession of the written report. If this is the case, contact the WSP with the date of arrest and report number, and a report will be provided. A copy of the GAL Order is necessary for this report.

Another avenue to get records from the WSP is via the WATCH system on the internet. With a person's name and birthdate, via the WSP website, the GAL can request criminal conviction history with related information about incarceration data. A release or a GAL Order is not needed to request this information. In that respect, the WATCH system is an additional avenue to investigate the backgrounds of other collateral individuals such as one parties significant other.

Additional information may also be available to the GAL from local COPS programs and volunteer precincts. With a release, volunteers will often talk with GALs about various calls and problems with homes in their area. Often this is information about suspected "drug houses" based on neighbor complaints or police calls.

Information regarding registered sex offenders can also be found on the internet. In Washington sex offenders by county can be found on at www.wasapc.org on the sex offender links. Additionally, most other states have a similar list that can be used for this information.

DOC Records

If a party has been incarcerated, often a GAL can access part of the their DOC records by sending a request to the prison along with a GAL Order. The records may include some criminal history, infraction data, and courses or programs the person has completed while

incarcerated. If a party is currently incarcerated or recently released, the GAL may be able to talk to the parties' counselor at the facility.

If a party is on probation or community custody, a GAL can speak with that party's PO or CCO. Generally this person can tell the GAL with what conditions the party must currently comply and whether the party is in compliance with those conditions.

Other Court records

There are other records available for the GAL in the courthouse and online. Washington Courts Online (www.courts.wa.gov/) gives a history of any filing in a Washington court. Using the first and last name of the party, the GAL can obtain a listing, by county, of each case by name and case number. This is invaluable when looking for information regarding significant others or persons related to the case but for whom the GAL has no release.

Other court files can hold valuable information for the guardian ad litem as well. These include criminal files and civil files, such as earlier dissolutions, for parties and other involved persons. Most of the time court files are open to the public and may be located by case number or the persons name.

There is also the possibility of juvenile court records in the form of criminal records, truancy records, or a dependency. A GAL will usually need a court order specifically allowing a review of these records.

Child Protective Services.

CPS records can contain much information including information on calls to CPS regarding a family, information resulting from full investigations of a family and information relating to active or closed dependency actions. This information requires a request for information along with a GAL order. In order to obtain the most comprehensive reports, the names of the parties and the children must be included. The records should be requested from the county in which the family now lives as well as any counties or states where the families have lived for the last several years.

Following a request for information, a GAL will generally receive one of several reports from CPS:

1. A statement that there are no records in the statewide system regarding the family or that the records have been destroyed;
2. A statement that the letters have been sent to a retention center and will be forwarded at a later date, generally 30-60 days;
3. A statement that the matter is open and assigned to a caseworker; or
4. A copy of the CPS file.

If a case is open to a caseworker, generally the GAL will contact that caseworker for information on the case and copies of the file. A GAL should interview the caseworker regarding the case, whenever possible . If there is a dependency or has been a dependency, a GAL can seek to review the dependency file via a court order, as discussed above.

When reviewing CPS records, there will be a number of redactions, sometimes which include an entire redacted page. These redactions include referent names, and information outside of what a GAL can get with the Order Appointing Guardian ad Litem. CPS records contain a number of things, usually beginning with a referral to CPS, where information is taken from the referent and assigned a risk tag. Some referrals are noted as information only, while some are investigated immediately. The records may include notes of interviews, phone calls, and interviews with interested persons. The child may be interviewed and a transcript may be included. Following a referral, there is generally a summary page, which lists whether the allegations are "founded" "unfounded" or "inconclusive."

Schools

The GAL should always contact the children's schools. Generally it is optimal to talk with a child's teacher and perhaps a school counselor or administrator if they have been involved with the child.

Once the individual school is identified, the GAL should send a copy of the GAL order and a letter requesting information regarding the child, to the principal of the school. Some schools will then allow the GAL to conduct interviews via telephone while others request that the GAL come to the school in person. Teachers and staff may be interviewed individually or they may meet with the GAL as a group. In higher grade levels, when there are multiple teachers, it is often better to schedule a conference with all teachers and staff at one time.

In addition to an interview, a GAL will generally review records from a school. These include grade/progress reports and attendance records as far back as possible. These can often form a baseline for how a child is doing in school both when the family was intact and at present. A GAL is also interested in any disciplinary or behavior records for each child as far back as possible for the same reason. In addition, schools also have various testing for children, including the WASL records, IEP testing, ADHD questionnaires, and others. A GAL should always ask if there is testing data available. Lastly, a GAL should ask if there are any clubs or activities, through the school, in which the children are participating. Especially in at the grade school level there are a number of divorce groups that children participate in which can be a wealth of information.

In addition to the actual school, a GAL should find out if a child participates in a school before or after school program. If so, the staff should be interviewed and records should be reviewed.

Daycare Providers

A GAL should speak with any daycare provider and review any relevant records. This would include a regular daycare center as well as an occasional babysitter. Relevant records to review might include sign in/sign out sheets, disciplinary notices, and accident reports.

Children's Medical Professionals

Regarding a child's primary physician, a GAL generally does not need all of the information contained in a child's medical chart. Unless there is a specific allegation, such as medical neglect, talking with a physician or nurse is often a better avenue. It is often less expensive for the parties and the GAL gets more useful information.

If records are sought, it is prudent to ask if the records are handwritten or typed and what the chart contains, so as to pare down what it requested. When requesting and reviewing charts, it is often to address issues relating to allegations of medical neglect, what a parent said to a physician during office visits, which parent brought the child to exams, whether or not there was follow through with medical advice, or exactly what maladies the child has suffered from.

In addition to the primary physician, there child may have also seen a specialist, been taken to an Emergency Room or admitted to a hospital. The GAL should also take steps to request those records.

Health care providers often require payment for records and interviews. In the event that payment is required that is not covered by the fees previously paid to the GAL, a letter should be sent to the parties and/or the attorneys requesting payment. In the event payment is not forthcoming and the GAL believes the records are important to the investigation, the GAL should petition the court for instructions on how to proceed.

Further for children over the age of twelve, RCW 26.09.220(2), the child will need to sign the Order Appointing Guardian ad Litem consenting to the release of records or a separate release provided by the healthcare provider.

Children's Mental Health Professionals

There are several types of children's mental health professionals that a GAL might come into contact with. First, a child may be seeing a counselor for therapy, either individual or as part of family therapy. In that case, a GAL will always want to speak to the therapist about the child, relevant issues, and their progress. Depending on what records are available, a GAL will also want to get therapy records, as these often include intakes, summaries, testing, impressions, what has been discussed, and any "no shows" or cancellations.

Second, the child may have seen a mental health professional for testing purposes, such psychological testing, ADHD testing, occupational/physical or educational testing. In these cases, it is advisable to request the records and then speak with the tester while reviewing the records.

Third, it is possible that a child has been in a psychiatric facility or triage for mental health testing or problems. Again, it is often advisable to request records but attempt to pare them down. In situations like this there is often psychological testing which is important to review.

Further for children over the age of twelve, RCW 26.09.220(2), the child will need to sign the Order Appointing Guardian ad Litem consenting to the release of records or a separate release provided by the healthcare provider.

Parent's Physician or Mental Health Provider

Generally, a GAL does not review a parties' medical or psychological file without a specific purpose. These records cannot be reviewed by a GAL with just a GAL Order, as that does not provide releases for a parents' records. As such, in order to review these, a separate release by a parent is needed. Providers might include a parties' primary physician, specialist, hospital records, psychiatric/triage records, therapist/psychologist records, and pharmacy records. In most cases, the GAL will not ask to review the routine records of the parties primary physician.

There are various reasons that a GAL might request to review a parties' records. Some of the most common are when there are issues of substance abuse, drug seeking behavior, or mental health problems.

Other Medical Providers

In addition to what is stated above, there are other medical providers that may have relevant information to the case, both in regard to the child and the parties. These include dentists, chiropractors, physical therapists, occupational therapists, and paramedics/ambulance. Generally these are not routine contacts for a GAL, rather they are possible sources of information in some specific cases.

Drug and Alcohol Testing and Treatment

If a party has undergone drug or alcohol evaluation, testing or treatment in the recent past, the GAL will want to review all records and evaluations. It is important for the GAL to review not only the final report provided as part of the evaluation process but also the information provided by the party to the evaluator. Many of the evaluations are based solely on the self-reported information of the party. If the party is not truthful when providing information to the evaluator, the conclusions reached may be affected. The GAL should also review any testing, such as a MAST or SASSI, which contributed to the evaluation.

Other Third Parties

Every case is individual and presents different questions. Depending on the information needed, there are a myriad of sources other than has been presented above. Generally these are not relied upon in every case, but can be useful when necessary. These sources might include talking with employers, landlords, and neighbors. Perhaps reviewing any newspaper articles that apply to your case and "googling" the names of the parties. In terms of older children, they might have a listing in "my space" or similar sites might be useful.

Cultural Resources

In some instances it may be appropriate for the GAL to seek information from cultural resources specific to the cultural heritage one or both parties. For example, in families with Native American ancestry, the GAL may decide to seek information from the particular tribe.

Significant Others

Significant Others are generally married to or in a relationship with one of the parties. Often they live together. If a significant other resides in the home, spends significant time with the child, or is in more than a casual dating relationship with a party, the GAL should interview and request information regarding that person.

If a significant other signs a release, a GAL can get conviction data and CPS information regarding that person. In addition to that, even without a release, a GAL can get information from Washington Courts Online regarding past court filings, have a conviction check via the WSP, review the WSP sex offender website, and review relevant court files, perhaps from a previous divorce.

Should a significant other refuse to sign a release after being requested to do so, the GAL should consider recommending that the individual have no contact with the children until a release is provided.

IV. CONDUCTING VISITS

In each case, a GAL usually visits each of the parties' homes when the children are present. The GAL may conduct announced visits and unannounced visits. Generally, unannounced visits are done when there is a specific purpose, such as checking to see if a visit is supervised, if a person is present who should not be, or the condition of the home at the time of the visit. In most cases, the GAL will not conduct unannounced visits.

At a home visit , the GAL tours the home, especially the child's room, and notes any issues. The GAL may review whether the home condition is sanitary, whether it is safe for the age of the children, whether there are appropriate furnishings, toys and clothing for the children. A home visit is also an opportunity to meet the child in their own home and to observe them in that environment.

A GAL needs to be careful to have home visits of approximately the same length with each parent and should, whenever possible, conduct the visits at approximately the same time of day. The GAL should always avoid such activities as eating dinner, watching a movie, etc. The home visit should be treated as a professional matter at all times In addition, a GAL should not discuss the case at all during the home visit or allow either parent to do so.

Following a home visit, it is helpful to write a brief synopsis of the home visit to be kept in the file. This would include the GAL's impressions or anything else of importance which would later be used for the GAL report.

Other "Visits"

There are other situations in which the GAL may have contact with the parties on an unannounced basis. For instance, a GAL may, unbeknownst to the parties, watch an exchange of the child if it is done in a public place or watch the parents interact at a child's baseball game in a public park.

V. REQUESTING FURTHER INFORMATION

> Superior Court Guardian ad Litem Rule 2(1)(h) Make requests for evaluations to court. A guardian ad litem shall not require any evaluations or tests of the parties except as authorized by statute or court order issued following notice and opportunity to be heard.

Depending on the facts of the case, the GAL may request that the parties do things, such as subject themselves to psychological testing, as part of the GAL investigation. This may be done by agreement or may be ordered by the court. Although the GAL may request such additional information, the expense to the parties may be prohibitive.

VI. MAINTAINING CONFIDENTIALITY OF REPORTS AS REQUIRED, INCLUDING THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA).

As discussed above, the GAL's role is to gather information through an appropriate investigation. In gathering that information, the GAL is also required to maintain the information in a confidential manner and is prohibited from inappropriately disclosing that information. For the integrity of the investigation and the protection of the GAL, in almost all circumstances, the GAL will want to request an order allowing the release of information before releasing information to the parties, counsel or third parties, outside of the GAL report. The GAL should further request that any person receiving the information pursuant to the court's order should be restrained from sharing that information with anyone else.

The GAL report is also considered a confidential document and the full report should always be filed in the confidential portion of the court file. Any summary reports filed in the public access portion of the court file should not contain any information of a confidential nature.

HIPPA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, was enacted on August 21, 1996. The purpose of the act is to maintain the privacy and security of health information. HIPPA sets standards for the exchange and security of healthcare information.

RCW 70.02 Medical Records Health Care Information Access and Disclosure contains the following findings at RCW 70.02.005:

> (1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests. . . .
>
> (4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

In dealing with medical records in particular, it is imperative that the GAL maintain the confidentiality of those records in compliance with all state and federal regulations. The GAL should not discuss such records or release information from such records to any party, attorney or third party without a court order. As discussed above, the GAL should also require that the court order prevent the persons receiving the information from further disseminating that information.

In order to ease access to such information, the GAL should also request that the parties, and children over the age of 12, sign the release used by their individual healthcare provider and direct that the GAL may have access to the records. In many circumstances, healthcare providers will not accept the Order Appointing Guardian ad Litem, even with the parties and children's signatures, as a sufficient release.

VII. MAINTAINING FAIRNESS AND THE APPEARANCE OF FAIRNESS

> Superior Court Guardian ad Litem Rule 2 (b) Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.
>
> Superior Court Guardian ad Litem Rule 2 ©) Professional conduct. A guardian ad litem shall maintain the ethical principles of the rules of conduct set forth in these rules and is subject to discipline under local rules established pursuant to rule 7 for violation.
>
> Superior Court Guardian ad Litem Rule 2(e) Avoid conflicts of interests. A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential conflict or impropriety. A guardian ad litem shall advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's

responsibilities to another client or a third person, or by the guardian ad litem's own interests.

Superior Court Guardian ad Litem Rule 2(f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

It is crucial that the GAL maintain fairness and the appearance of fairness in every case. In order to do this, the GAL must remain unbiased in all areas, including their investigation, communication and reporting,.

A. FAIRNESS IN INVESTIGATION

In order to be fair and appear fair in an investigation, the GAL must treat both parties in the same fashion. To the extent possible, the GAL investigation of each party should parallel the investigation of the other party. This includes providing both with the same questionnaire at the beginning of the case, interviewing both for about the same amount of time (to the extent possible) and requesting basic information about both parties in the same manner, such as from the police and CPS. The GAL should request the same number of references from each party and, whenever possible, contact the same number of references for each party.

As the investigation progresses, it is normal that the GAL may have to spend more time investigating issues on one side rather than the other. For instance, one parent may have a large number of police or CPS records that must be reviewed while the other has none. In such circumstances, the GAL should be prepared to clearly articulate why the additional time was needed on one side rather than the other.

The GAL may also run into a scenario in which one party tries to communicate with the GAL more frequently than the other. In this situation, the GAL should give both parties parameters regarding routine, non-emergency contacts, such as an opportunity to provide a weekly update, so that both parties feel they are being heard but one party is not allowed to dominate the

There may be cases in which a party does not participate at all or only marginally participates. For instance, a party might not complete a questionnaire or give names of references despite repeated requests. In these cases, the GAL should contact the party, in writing, to explain why it is important for the GAL to have this information and again ask for the missing information. Depending on to what extent information is not provided, the GAL may choose to continue with the investigation as normal to the best of the GAL's ability, noting the absence of information in the report. If the parties are represented by counsel, the GAL should alert counsel, again in writing, of the lack of information. If the lack of information is significant, such as a party refusing to participate at all, the GAL should ask the court, via a Petition for Instructions, how to proceed.

In order for an investigation to be fair, a GAL must separate the concept of the payment of their fees from their investigation and functioning as the GAL. If a GAL begins an investigation, they must begin it on both sides, without consideration of whether one party has or has not paid their fee. This holds true throughout the case, as a GAL must remain unbiased no matter which party has paid what amount. The issue of fees should be a completely separate issue to be taken up with the court directly.

B. FAIRNESS IN COMMUNICATION

The GAL should be fair in their communication to both parties and to counsel. If a Any time an attorney or a party attempts to discuss the case with the GAL, other than a party providing information for the investigation, both attorneys or parties should be given an opportunity to be present. If that is not possible, the communication should be shared with the other party or attorney immediately thereafter. Any communications regarding the case initiated by the GAL should be treated in the same manner: an attempt should be made to involve both parties or attorneys at the same time. If not possible, the GAL should provide the same information to the other side immediately thereafter.

The GAL should not have discussions with the case with any judicial officers involved in the case outside of the presence of the attorneys or parties. Such ex parte communication is a violation of Superior Court Guardian ad Litem Rule 2(m).

The GAL needs to be professional in their conversations with the parties and all other persons involved in the investigation.. A GAL investigation is a professional matter and should be treated as such. The GAL should never attempt to introduce personal discussions, such as their own personal experiences, family life, etc., into conversations with the parties. The GAL should never discuss the opposing party with the other party unless it is to ask specific questions as part of the investigation. Above all, the GAL should remain calm and courteous in their communications, despite hostility from the parties or their attorneys.

The GAL should avoid appearing “friendly” with one of the parties. This would include things such as giving out a home or cellular phone number when the other party does not have it, attending social events with one party, giving gifts to one of the parties, etc. Even an act such as providing a necessity (such as food or diapers) to a party that lacks such a necessity can create a perception in the other party that the GAL is biased. It is especially important not to appear “friendly” with one of the parties when both parties are present, such as in the courthouse. In these situations, it is often best to sit or stand away from both parties and counsel.

C. FAIRNESS IN REPORTING

The GAL should be unbiased in their reporting of information, both orally and in their report. This means reporting everything regarding both parties, both the good and the bad. Being unbiased and fair does not mean the GAL should not form opinions and conclusions, as that is part of the GAL’s job, rather it means that the GAL needs to report all of their information, whether it supports their conclusion and recommendation or not.

VII. FOLLOWING LEADS WHILE AVOIDING DISTRACTIONS

From the beginning of the case, the GAL should have a picture of the steps that need to be done in order to complete their investigation. Throughout the investigation, the GAL should keep in mind the scope of the appointment and any subsequent directions given the court. However, by their very nature, investigations have a way of drawing the GAL in various directions as new, and sometimes very unexpected, information arises.

Petitioning for Instructions

> Superior Court Guardian ad Litem Rule 2(1)(j) Limit duties to those ordered by court. A guardian ad litem shall comply with the court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment.

A GAL needs to remain within the scope set out in the Order Appointing GAL. However, should information arise that is outside that scope but that the GAL believes needs to be investigated or the investigation may be taking longer than anticipated, the GAL may bring a Petition for Instructions asking the court how to proceed. (May need to meld this paragraph and the next one somehow.)

A timely GAL investigation is crucial to the resolution of any contested matter. However, there are circumstances that will arise beyond the control of the GAL that will effect the timeliness of the investigation. Additionally, during the course of the investigation, issues and questions will arise that the GAL must answer before completing the investigation. In such circumstances, the GAL should timely petition the court for instructions on how to proceed. By doing so, the GAL can stay within the scope of their appointment while still doing a thorough investigation.

IX. UNDERSTANDING, SUMMARIZING, AND INCORPORATING FINDINGS FROM EXPERT REPORTS, INCLUDING DNA EVIDENCE

In the course of an investigation, the GAL will review a significant number of reports from professionals, including substance abuse reports, medical reports, psychological reports, and various educational reports.

When a report is received, the GAL should carefully review it to make sure that they understand all of it. They should make careful note of the date the report was done, who wrote the report, what data was reviewed in order to formulate the report , when the data was collected and any conclusions made. Many reports have various codes in them which will need to be deciphered.

When using reports, in many cases it is advisable to speak with the author of the report rather than simply relying on the report itself. This is especially true if the GAL is unfamiliar with that type of report or the report contains unfamiliar language or data. In addition, it is often necessary to speak with the writer of the report regarding the data that was used. This is especially true if the report is based on self - report, as it would be important to know what questions were asked and what a party reported to the writer in order to gauge how accurate the report is. Lastly, speaking with the writer can often illicit additional information not contained in the report such as impressions of a party or statements made that were not included.

The GAL will summarize and incorporate reports into their oral and written reports. Generally the entire report will not be put in the report verbatim, but it will state that a report was written and was reviewed in its entirety the GAL, and pertinent parts, often which are the summary and/or conclusions, are put into the GAL report.

In an investigation it may sometimes be necessary to request and review DNA information. Due to changes in Washington law regarding establishing paternity, the use of DNA evidence has decreased in family law matters. Whenever the GAL is asked to review a DNA report, the GAL should always contact the testing facility to discuss how the DNA samples were obtained and how the identities of the involved individuals were verified. The GAL should also request that the facility provide verification regarding the chain of custody of the samples provided. Most importantly, the GAL should make sure that the GAL has a complete understanding of all terms within the report.

X. WORKING WITH OTHER PROFESSIONALS

It is rare for a GAL to be investigating a case in which there are no other professionals involved with the family. Invariably, persons such as teachers, daycare providers and counselors are involved with the family on a day to day basis. The GAL will have contact with these individuals throughout the investigation and may have multiple contacts as through updates and additional inquiries. In addition to initiating contact with these professions, the GAL should also provide the GAL's contact information so that if something happens that should be brought to the GAL's attention, the GAL can easily be reached.

Even though there are professionals working with the family, the GAL still must keep all information confidential in regard to their investigation. However, circumstances may arise in which the GAL believes that it is necessary to share information with a professional.

In that event, the GAL should obtain a court order, whether by agreement or hearing, before releasing the information

XI. ADDITIONAL RIGHTS AND POWERS

Superior Court Guardian ad Litem Rule 4(1)(h) Additional rights and powers under RCW 13.34 or RCW 26.26. In every case in which a guardian ad litem is a party to the case

pursuant to RCW 13.34 or RCW 26.26, a guardian ad litem shall have the rights and powers set forth below. These rights and powers are subject to all applicable statutes and court rules.

(1) File documents and respond to discovery. A guardian ad litem shall have the right to file pleadings, motions, notices memoranda, briefs, and other documents, and may, subject to the trial court's discretion engage in and respond to discovery.

(2) Note motions and request hearings. A guardian ad litem shall have the right to note motions and request hearings before the court as appropriate to the best interests of the person(s) for whom a guardian ad litem was appointed.

(3) Introduce exhibits and examine witnesses. A guardian ad litem shall have the right, subject to the trial court's discretion, to introduce exhibits, subpoena witnesses, and conduct direct and cross examination of witnesses.

(4) Oral argument and submission of reports. A guardian ad litem shall have the right to fully participate in the proceedings through submission of written reports, and, may with the consent of the trial court present oral argument.

CASELAW EXAMPLE

The investigation completed by any guardian ad litem is subject to review not only at the trial level but also at the appellate level. Failure to comply with GALRs and to conduct an appropriate investigation may result not only in discipline of the GAL but also in the reversal or remand of a trial court that relied on the GALs recommendations. The following case is one such example.

Bobbitt v. Bobbitt, **2006 App. Slip - 31997-7**, **Division II** (Citation pending).
www.legalwa.org

Factual History

The mother (Esser) and father (Bobbitt) shared joint residential time with their 11-year-old son (K.B.). The son resided with the mother from Tuesday through Saturday each week and with the father from Saturday to Tuesday each week.

In February 2003, the mother moved to modify the Parenting Plan alleging 1) that the son had been integrated into her family with the father's consent, in substantial deviation from current Parenting Plan; 2) that the current Parenting Plan was detrimental to the son's physical, mental and emotional health; and 3) that the advantages to modifying the Parenting Plan outweighed any harm that may result from modifying the Parenting Plan.

The court appointed the GAL on March 20, 2003. Pursuant to the fee arrangements, the parents were required to equally split the GALs fees, which were set as follows: $150 per hour for normal working hours, $175 per hour for after hours; $50 per hour for the GAL's staff and $25 for "file set up costs". The local rule in the county in which the order was issued set $75 per hour as the presumptive hourly rate for GALs. The parties were required to split the initial retainer of $1,500.00.

The father delayed in scheduling an appointment with the GAL, in providing any written materials to the GAL and delayed paying his share of the GALs retainer due to financial difficulties. On August 7, 2003, the father borrowed funds and paid his share of the retainer. The following moth, the father requested an appointment with the GAL.

Initially, the father was scheduled to meet with the GAL in October 2003. The GAL subsequently canceled that appointment, stating that she had to check with the attorneys in the case regarding its status. The GAL stated that a message was left for the father regarding the cancellation. The father appeared for the appointment but the GAL refused to meet with him, stating that the appointment time had already been filled. The GAL filed a declaration in November 2003 setting forth the above and stating that she had still not met with the father and that neither the father, nor is attorney, had signed the "contract requested based on the stipulated order appointing" the GAL. At trial, the GAL testified that she refused to see the father because she had no contact with anyone regarding the case for five months and needed to check with counsel to determine what more she should do, if anything.

Although the GAL conducted 18 interviews with the mother, the mother's witnesses and other individuals involved with the child between April 29, 2003 and February 2004, the GAL refused to interview the father or his witnesses. On February 18, 2004, the fat her moved to remove the GAL, alleging that her failure to investigate his side of the case violated the order appointing her as well as Superior Court Guardian ad Litem Rule 2. The motion was denied and fees were assessed against the father.

The modification action proceeded to trial on May 25, 2004. The GAL testified and her report was admitted into evidence over the father's objection. The trial court found that the child had been integrated into the mother's home with the father's consent and that the existing parenting plan was detrimental. The court adopted the GAL's findings and incorporated her report by reference into the final order. The mother was awarded primary residential placement of the child and the father's visitation was limited to supervised visits. Back child support and attorneys fees were also assessed against the father.

On November 22, 2004, the GAL filed a motion requesting the unpaid GAL fees from the father. The court entered a judgment against the father in favor of the GAL even though the GAL refused to interview him or his witnesses. The father Bobbitt appealed, arguing that "the trial court abused its discretion in admitting the GAL's report and testimony and by denying his motion to remove the GAL and to appoint a replacement GAL. "

APPELLATE COURT ANALYSIS

Standards of Review

The appellate court ruled that the decision whether or not to remove a guardian ad litem from an action is within the discretion of the trial judge and will not reversed absent a showing by the appealing party (in this case the father) that the trial court abused its discretion.

Likewise, the appellate court ruled that the admission of evidence is also within the discretion of the trial court and will not be revered absent a showing the court abused its discretion.

Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Court's Analysis Re: Duties of the Guardian ad Litem

The appellate court analysis on this issue is set forth below, verbatim:

> Bobbitt filed a motion to remove the GAL in February 2004. The court denied the motion and did not require that the GAL meet with Bobbitt or his references until he paid the GAL's fees. CP at 524. The court ordered the GAL to observe supervised visitation between Bobbitt and K.B. CP 524. An interview with the GAL was left to the GAL's discretion. But the judge advised that the decision regarding the parenting plan for K.B. would be based on K.B.'s best interests, not on the GAL's report. Ultimately, a different judge heard the trial, admitted the report and incorporated its recommendations into the final ruling.
>
> Bobbitt argues that there were four reasons why the first judge should have removed the GAL and appointed a new one: The GAL (1) failed to report the child's expressed preferences regarding the parenting plan as required by RCW 26.12.175(1)(b) and the order appointing her; (2) did not represent the child's best interests when she refused to interview Bobbitt and his identified collateral contacts; (3) did not maintain independence, objectivity, impartiality and the appearance of fairness; and (4) gave advice to Esser. Bobbitt relies on the GALR, which define the role and manner of performance for GALs, to show that the GAL did not meet the expected standards of impartiality during her investigation.
>
> It has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior courts about the best interests of the children, do their important work fairly and impartially. Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interactions of courts and GALs and our Supreme Court adopted the GALR. These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues.
>
> To that end, GALR 2 articulates the general responsibilities of GALs. As relevant here, it states:
>
>> [I]n every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below[:] - . (b) Maintain independence. A guardian ad litem shall maintain independence, objectivity

> and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom. - . (f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith. (g) Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties. - (o) Perform duties in a timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.
>
> GALR 2 (emphasis added).

The evidence shows that Esser's attorney wrote a letter to the GAL asking her to conceal information from Bobbitt about an upcoming motion. The GAL's failure to share this information with Bobbitt violates the appearance of fairness and she failed to treat Bobbitt with the respect due him as K.B.'s interested parent. GALR 2(b), (f). In addition, the GAL refused to meet with Bobbitt or to interview his references despite continuing the investigation and contact with other witnesses and despite knowing that he wanted to engage in the investigatory process well before trial. The GAL continually focused on payment of her bill rather than an investigation that would allow her to hear both sides of the story about K.B.'s parenting issues. In a letter to Bobbitt in December 2003, she states that she is not "clear on why it is [her] responsibility to call [Bobbitt] to set up an interview." CP at 194. The GAL also wrote that Bobbitt must "bring [his] bill current prior to the interview." CP at 194. This and subsequent letters recited the amount due from Bobbitt for his half of the investigation despite her refusal to interview him or his witnesses. She refused to be deposed by Bobbitt's counsel until Bobbitt paid an outstanding fee of $1,200 plus $450 for a deposition. According to the GAL's letters, the amount Bobbitt owed increased from a little over $600 to over $1,200 between January 16 and February 4, 2004.

The GAL's refusal to interview Bobbitt violated GALR 2(b), (f), (g), and (o), resulting in Bobbitt's well-founded concerns which he brought to the trial court's attention in his February, 2004 motion. But when the trial court learned of the nature of Ferguson's investigation it reminded the parties that its decision would not depend on the GAL's report but on its considered opinion of what was in K.B.'s best interests after hearing the evidence at trial. The court dismissed Bobbitt's complaints as typical dissatisfaction with a GAL who disagrees with one parent's position. The trial court also imposed CR 11 sanctions of $750 against Bobbitt for bringing the motion.

The trial court did not err in refusing to remove the GAL, but in failing to order the GAL to conduct a proper investigation according to the GALRs.9 Furthermore, had the trial court directed the GAL to comply with GALR 2 to contact all parties and maintain an appearance of fairness, the appearance of partiality toward Esser and Bobbitt's concerns

may have been avoided. But we do not hold that the trial court abused its discretion in refusing to remove the GAL because the court knew that the GAL still had adequate time to contact Bobbitt and his collateral contacts before trial and also knew that the investigation had involved impartial third parties to date.

Following the trial, the court agreed with Bobbitt that "the guardian ad litem probably could have done some things better." RP (6/1/04) at 581-82. The trial court specifically noted that (1) "it would have been important for the guardian ad litem to talk to [K.B.] about his preferences and his feelings regarding residence and where he would like to stay"; (2) "it would have been important for the guardian ad litem to talk to Mr. Bobbitt"; (3) "it would have been important for the guardian ad litem to get a report from the counselor directly to the judge . . . rather than filter what the counselor had said"; and (4) "it would have been important for the guardian ad litem to have more contact and more recent contact with [K.B.] tha[n] I have in the report." RP at 582. Yet the trial court concluded that the GAL reached the right conclusions about what was in K.B.'s best interests.

Bobbitt relies on In re Guardianship of Stamm v. Crowley, 121 Wn. App. 830, 91 P.3d 126 (2004), to challenge "the impact [the GAL's] actions and inactions had on the litigation of the case and the resulting influence she had on the trial court." Appellant's Br. at 19. But Stamm is inapposite. Stamm involved a GAL appointed under chapter 11.88 RCW when children petitioned for guardianship of their father and the case was tried before a jury. Stamm, 121 Wn. App. at 832-34. At trial, the GAL described her role as the "eyes and ears of the court," testified about Stamm's alleged incapacity, and stated that she had found certain witnesses "to be credible." Stamm, 121 Wn. App. at 840. Division One of this court held that the GAL had improperly testified about witness credibility and had improperly aligned herself with the trial court to bolster her assessments, which created a substantial likelihood of affecting the jury's verdicts. Stamm, 121 Wn. App. at 840-41, 844.

In contrast, this case involves a GAL appointed under chapter 26.09 RCW to conduct an investigation in a parenting plan modification proceeding, which is heard without a jury. As noted in Stamm, a significant difference exists between a bench trial and a jury trial in that "there would be no occasion for such a description [of the GAL's role] in a bench trial, for a judge has no need to be told the GAL's role, and it has great capacity to mislead a jury." Stamm, 121 Wn. App. at 841. The court further reasoned, "Judges understand that the GAL presents one source of information among many, that credibility is the province of the judge, and can without difficulty separate and differentiate the evidence they hear." Stamm, 121 Wn. App. at 841.

Here, despite the deficient GAL performance, the totality of the record supports the conclusion that the trial judge independently evaluated the evidence. Both judges who heard Bobbitt's concerns about the GAL's performance articulated their independent assessment of the evidence and their proper focus on K.B.'s best interests.

Thus, we hold that despite the GAL's failure to abide by the rules that require (1) contact with all parties; (2) that all parties be treated with respect; (3) timely performance of a parenting investigation; and (4) independence, objectivity and the appearance of fairness, the trial court's findings of fact support its conclusion that the parenting plan was properly modified to make Esser the primary residential parent. And Bobbitt has failed to challenge any of the trial court's findings of fact, thus they are verities on appeal. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

Furthermore, although the trial judge admonished the GAL for not asking K.B. about his residential preferences, K.B. had not personally expressed his parenting plan preferences to the GAL. According to the GAL, K.B. mentioned his parenting plan preferences to a counselor after "[h]e had already been primed by his father. He knew my name. He knew what I was supposed to do. And he said, - I want you to tell her that I want to live with my dad.' That is not exactly what I would call an independent process by the child."10 RP (5/25/04) at 120. The GAL further testified that she does not ask children which parent they want to live with because it puts the child "in the middle of a contested situation like this one." RP at 121.

Accordingly, we hold that the trial court did not abuse its discretion in denying Bobbitt's request to remove Ferguson as the GAL and to appoint a new GAL in February 2004.

GAL Fees And Costs

The father also challenged the award of fees and costs to the GAL. The appellate court analysis on that issue is set forth below, verbatim:

Because Bobbitt did not pay one-half the GAL fees at the close of the custody action, the GAL filed a motion and declaration seeking a judgment against him for the remaining $4,070.74 of her fees. The court granted the motion. Bobbitt appeals the trial court's award of these fees. Esser11 argues that the trial court had no discretion to refuse to award the fees to the GAL, relying on RCW 26.12.175(1)(d) that states, "[t]he court shall enter an order for costs, fees, and disbursements to cover the costs of the guardian ad litem." We disagree with Esser's limited interpretation of the statute and we grant Bobbitt's request for relief from the judgment.

The trial court retains the discretion to evaluate the fees and costs requested by the GAL and enter an appropriate order. In fact, the order appointing the GAL states that the trial court shall make such an award only after considering the GAL's accounting for the time and costs.
The record contains a copy of the GAL's "Contract to Pay Fees and Costs" signed in December 2003. This agreement sets fees and costs considerably in excess of the amount available to GALs without such an agreement. But the order appointing Ferguson states:

PAYMENT OF FEES AND COSTS
The guardian ad litem fee is $per panel guidelines per hour up to $_____ (handwritten interlineation as follows: on agreement based on stipulation) the maximum the guardian ad litem may charge without additional court review

> and approval.
> The fees and costs of the guardian ad litem paid as follows:
> [X] 50% by father and 50% by mother.
> . . . .
> The total amount awarded shall be at the discretion of the court up to the maximum amount allowed after the guardian ad litem files an itemized statement of time with the court, along with a specific request for fees and a proposed Order.
> CP at 9-10 (emphasis added).

It appears that the trial court awarded the GAL's requested fees solely based on her itemized statement of time spent investigating this matter and on the signed agreement. But the order appointing the GAL expressly reserves the trial court's discretion over GAL fees. The trial court heard the entire trial and should have considered the total fees charged and the nature of the work performed, including the GAL's failure to meet with, contact, or interview Bobbitt and his collateral sources before it awarded the fees. In fact, although the court expressly acknowledged the shortcomings of the GAL's work, it did not enter findings of fact and conclusions of law addressing Bobbitt's arguments about the GAL's investigatory shortcomings in its award of fees. Instead, it simply imposed 50 percent of the charged fees and costs on Bobbitt. Given the dispute and the evidence of the GAL's violations of GALR 2 such findings were necessary here. The trial court was not bound by the parties' stipulation to fees and we reverse and remand for hearing on the GAL fees.

CHAPTER 5
INTERVIEWING ADULTS AND CHILDREN IN FAMILY LAW GAL INVESTIGATIONS

INTERVIEWING ADULTS AND CHILDREN IN FAMILY LAW GAL INVESTIGATIONS

Submitted by Joseph Shaub, JD, LMFT and Karin Ballantyne, MSW

With the many tasks attending an effective investigation (review of court documents, meeting with parties, parent child observations, collateral contacts) perhaps the most critical element is the interview with each parent and the child. It is in the course of this process that the GAL can employ all of their skills - analytical, observation and intuitive - to arrive at a more rounded conclusion about the people whose family lives are being evaluated. Not only is information transmitted by what is said in the interview, but also by what is *not* said and *how* it is said and not said (nonverbal clues). Certain skills in the interview process are second nature for the therapist GAL and may require a bit more conscious attention by the attorney GAL. At the same time, the analytical skills which notice inconsistent responses during a lengthy interview may come more easily to the attorney GAL. A comfortable facility with the stages and approaches to adult and child interviewing will afford the GAL with a rich and useful pallet with which to describe a particular family.

THE ADULT INTERVIEW

The investigation usually is commenced by asking the parents to fill out a detailed questionnaire. This questionnaire can provide a volume of background information that will serve as a helpful platform for the interview.

There is a divergence of thought regarding the composition of the parent interview. Some practitioners recommend that, if at all possible, the parents be interviewed together initially. It is thought that the self censorship or heightened stress and emotionality of this approach is outweighed by the valuable information received through observing the parents' interaction. As there will also be individual meetings, this initial interview as the advantage of economizing time in exploration of various historical facts of the marriage and separation (if it has occurred). It should be noted that, while this approach is recommended by Dianne Skafte in her excellent book, *Child Custody Evaluations - A Practical Guide* it is generally not done in this jurisdiction. Should you have the occasion or interest in conducting a conjoint interview, some of the following comments may be helpful (as they will be equally useful when considering individual meetings with each parent).

Of course, to make this approach worth the effort, one must be reasonably aware of the basics of non-verbal communication and process (vs. substance).

A Note on Non-Verbal Communication: Jay Haley, one of the original theorists in the field of family therapy once said, "You cannot *not* communicate." By this, Haley suggested that virtually everything is communication. We may not know precisely *what* is being communicated but everything is a clue to be explored immediately or at a later time. Parents who are participating in an interview as part of a process to determine their future relationship with their children are quite naturally going to be experiencing a good deal of stress. How are they displaying this stress? A number of questions the interviewer may want to consider include:

How does the party dress? Does s/he come late or early to the meeting? Are they either particularly formal or informal in meeting you? Is there stress expressed through a hostile air? Are they able to maintain eye contact with you, or on the flip side, is their eye contact overly long and intense? (Therapists often say that the way you react to a client is diagnostic. This means that if you can sufficiently clear yourself of preconceptions, doubts and your own emotional "baggage" going into a meeting and maintain a position of relaxed curiosity, then your reaction to an interviewee will in some way reflect how this person is presenting themselves to the world. If their presentation makes you uncomfortable, this may be indicative not so much of your anxiety but rather of their affect.) Does s/he speak quickly? Do they describe things with precision or elliptically?

A Note on *How* the Subject Responds: The subject has in all likelihood never undergone an interview like this in their lives - in which they are asked to recount very sensitive and intimate details of their lives in a context in which they are being evaluated by a third party for the purpose of determining a vital interest (their future relationship with their children). Thus, it is to be anticipated that subjects will provide responses that are marked by emotionally loaded shorthand expressions, vague references and/or offhand or brief responses which either deny or minimize a sensitive area. It is critical that you be alert to these less-than-complete or responsive statements.

It will be often notable that subjects will describe their family of origin experience as very good or loving or free of conflict. These rather idyllic descriptions will seem inconsistent with the later events or emotional development of the subject. As will be discussed in a later section, in order to obtain the information essential to your task, you will need to circle back and re-ask a question (perhaps with a different focus) if you have concerns about inconsistent or incomplete history provided by the subject.

A Note on Process: Lawyers can often become very focused on the content of people's statements or complaints. Questions arise: "Is this true or false? What really happened? Whose fault was it?" However, oftentimes, the concentration on the content of an interaction diverts us from the rich information to be gained through observation of process. How do people interact? Does one speak while the other sits back silently, their face tight with stress? Do they look at one another when they speak? Does one exercise more power in the relationship and thereby dominate the exchanges? (If so, the exploration of the source of that power will be a fruitful exercise - is it imposed through physical or emotional intimidation, money, relationship with the children, sex? Sometimes each person attempts to exercise their own power in a relationship with one controlling the money and the other controlling the relationship with the children. If that is the case, what do people say that may give hints into this process?) In a dual session some of the questions may include: Does one person react when the other says something...by a sound or a change in their body posture? Does one continually override or interrupt the other? Does a parent who may appear even tempered in an individual meeting (or be describe as such by collaterals) react explosively in response to comments by their spouse? Does one parent seem to express more anger at the other or is one more consciously concerned with the well-being of the children than the other?

Question Construction: Generally speaking, questions may either be open or closed-ended. Each has its particular function and value in the interviewing process. Open ended questions are those which ask for broad, general information, allowing the subject to organize their response in their own way. "Tell me about how you and your spouse met," or "What was it like growing up I your home as a child?" are examples of such open ended questions. Closed ended questions are more focused and seek to elicit specific kinds of information. "Did your spouse ever strike you," or "What residential schedule have you and your spouse followed since the separation?" are examples of closed ended questions. Each has its benefits and limitations.

Try sitting down with someone and asking them about a past event in their lives (an auto accident for example) and ask only open ended questions. Such an exercise will may only last 3 minutes, but it will provide a visceral example of the limitations of such questioning when you want to get down to specific details that are of interest in your inquiry. With open ended questions, the subject of the interview exercises greater control over the subject and direction of the inquiry. You will likely experience considerable frustration as you will want to focus in on certain subjects, but the open ended restriction prevents you from doing this. Now try the same exercise using only closed ended questions. Now the control over the agenda shifts to the questioner. The subject may wish to convey information that he/she believes is important, but with the use of closed ended questions, only, this become difficult, if not impossible. Learning to appropriately utilize and balance these two different questioning styles is an essential skill for the effective interviewer.

As a rule, you will want to begin the interview (and subsequent areas of inquiry) with open ended questions. You can obtain a treasure of information by how these questions are addressed by the subject. How do they organize their thinking? (Do they seem to be organized and sequential in their expression or disjointed and haphazard?) Do they respond appropriately to your question or do they use the inquiry as an invitation to bring up areas of vital interest to them? What is of paramount importance to the subject (i.e., what do they tend to raise early and often in response to open ended questions?)

One hazard of the open ended question is that the interviewer can lose some control over the direction and length of the interview, so care must be taken in reining in the subject at times. This is one area where the closed ended question can be quite valuable. Usually the balance of commencing a subject area with an open ended question and then focusing down on the details with closed ended inquiries is the most useful approach.

It is important in asking an open-ended question that you not follow up your question with a number of suggested responses (eg., "How did you feel when he left? Angry? Frightened? Sad?"). Let the question stand on its own and be aware that the way the subject responds is always information you can use in your assessment.

Attorney GAL's may have to work to develop their listening skills. Lawyers are educated and trained to be issue spotters. We evolve our theory of a case and then seek the facts which are relevant to this theory. In our search for what we believe is relevant, we may overlook or disregard information that is freely given (or hinted at) by the subject. A good rule for lawyers to be aware of is that you should not cut a subject off if they are responding to a question because

you have the next question ready to go. Let the subject finish what they have to say and be alert to tones of voice, changes of body posture or verbal asides. (Of course, there may well come a time that you have to cut off an answer because you have a particularly long-winded or disorganized subject and the interview needs to be tightened up in order to be completed, but that is a different matter.)

Therapist GAL's will have to be continually aware that this is not a therapeutic setting. Much of what you do quite naturally to convey empathy in the process of constructing a bond with a client must not be utilized in this interviewing arena. The objective nature of your role most be continually borne in mind and communicated to the subject. Empathic feedback, so normal in the therapeutic context, must be avoided. One commentator has recommended that eye contact should be minimized and note-taking emphasized. There is a risk for the therapeutically oriented interviewer that a perceived bond by the subject will result in a serious, adverse reaction and expressions of betrayal if the observations and recommendations are not favorable to that person.

CONDUCTING THE PARENT INTERVIEW

(The remainder of this section will assume that the parents are being interviewed separately.) Each Parent Interview should last about 1 ½ hours. You should commence your session with a brief introduction that sets the context of the meeting. Key elements of your introduction should include:

- Your name and profession;
- The fact that you have been appointed by the Court to conduct an investigation and draft a report providing recommendations for the residential arrangement and other parts of the parenting plan in the action;
- The clear notice that nothing that is said in the interview and nothing that is learned in the course of the investigation will be confidential (coupled with a statement that the party may refuse to answer any question you ask, but that only with full and accurate information can you do your work);
- A brief summary of the process which includes initial interview with each parent; an interview with each child; observation of each parent with the child(ren); contact with others that each parent (or the GAL) believes will provide a fuller picture and drafting of the report.

After the introduction, you will want to address the following general areas in your interview:

Family of Origin: In order to arrive at a rounded, consistent picture of this person before you, you will need to understand their early life experiences. Early life experiences are essential guides to understanding a person's present attitudes and coping mechanisms. Further, we must be aware that any information which a subject may perceive as being less than adulatory is threatening, so you may need to go back over these areas a second or even third time with more specific inquiries if you are to obtain the information. Questioning may proceed along these lines:

- Tell me where you grew up.

- Did you have any siblings? (If so, where were you in the birth order and how much time separated you?)
- How would you describe your mother? How would you describe your father?
- What did you father do for a living? Did your mother work when you were a child? If so, what did she do?
- How would you describe your parents' relationship?
- How did you get along with your siblings?
- Were there any difficulties while you were growing up with your family? (Note: This is a very important inquiry. The subject may initially deny any problems, even though her father got drunk every night and was horribly abusive (for example). It may take some circling back into this area with more specific questions a little later on (as you will see below)).
- Did your parents stay together? How would you describe the divorce? (Again, be mindful that you don't suggest a menu of answers to questions like these.) What was the residential arrangement? Did either parent remarry? What was your stepmom/stepdad like? How was your life after the divorce?
- What kind of discipline did you get from your mother/father?
- Did any of the siblings get punished less or more than any other?
- Were you spanked? Hit? Yelled at frequently?
- Did either of your parents have a drinking problem? How did you know when you were a kid that they had a drinking problem?
- Did you ever experience physical, emotional or sexual abuse as a child? (If so, ask them to describe it.)
- How was school for you? Do you remember anything particularly fondly about your school experience? Were there things you particularly didn't like about school?
- Would you say that you were the kind of kid that had a lot of friends, or were you more of a loner?
- What sorts of things did you enjoy doing when you were young?
- How would you describe your teenage years?
- What was the greatest benefit of growing up in your particular family?
- What was the most negative thing?
- How would you describe your family's financial circumstances when you were a child?

- What kind of relationship do you have now with each of your parents? Each sibling?

Education and Work History: Outside of our intimate relationships, this is the area we apply ourselves. A brief history in this realm give the interviewer information about the subject's capacity for diligence, drive for achievement and stability, among other things. Questions may include:

- After high school what did you do?
- (If further education) How far did you go in school?
- How would you describe the experience?
- Did you have any special achievements?
- Did you have any particular difficulties?
- What words or phrases would your friends in school use to describe you?
- Did you work during school (high school and after)?
- Did you have extracurricular activities? What were they?
- What was your living situation in school?
- How was school paid for?
- (Turning to employment) What was your first job and how did you get it?
- Briefly trace your employment history. (Note whether periods are omitted or given notable short shrift.) *For each job....* Did you like this job? If so, what did you like about it? If not, why not? Why did you leave?
- What are your career goals?
- Is there some other occupation that you would have liked to get into? What has kept you from that?

Relationship History: The relationship you are exploring for this evaluation is probably not the only one experienced by the subject. Some exploration into the other intimate relationships experienced by this person may reveal patterns and persistent attitudes about intimate relationships that will provide useful information.

- Did you date when you were in high school?
- Did you have a girl/boyfriend? How long did the relationship last? What was he/she like?
- Have you had any significant relationships as an adult before you were married?
- Were you ever engaged?
- Did you have any children before you were married? If "yes" do you maintain contact with the other parent? What is your relationship with him/her?
- For each prior relationship: What sorts of things would you have conflict

about? How did you deal with the conflict? How did he/she deal with the conflict? (Note whether there is a pattern of difficulties in either areas of conflict or how the conflict is dealt with.)

- Why did the relationship end?
- Were there problems in any relationship over drinking or any kind of abuse?
-

Current Marriage: This is where you begin to explore the current relationship. You will want to be particularly sensitive to any distortion occasioned by the emotional reaction to the (ex)spouse.

- Let's talk for a moment about your current marriage. How did you meet your (ex)spouse? (In the actual interview, you will want to use the other person's first name. Since this other person may not yet be an "ex" spouse, for the purpose of these questions the term "spouse" will be utilized.
- When did the two of you meet?
- What first attracted you to him/her?
- How long before you became sexually intimate?
- How long was it before you decided to get married?
- Whose idea was it, first, to get married?
- How did your family feel about your getting married?
- How did his/her family feel?
- What was your wedding like?
- How was your relationship like before you/your spouse became pregnant?
- Was this a planned pregnancy? If not, how did you feel about this? Your spouse?
- How did the pregnancy go? How was the delivery?
- When was the first time you felt that the two of you had serious problems in your relationship? What happened? What did you do about it?
- Have you and your spouse had any kind of counseling? When? With whom? What was the outcome?
- Did your relationship change after the birth of your first child? (Again, it

is good to use the actual names.) How?

- Describe your relationship with your first child. What was he/she like as a baby? As a toddler?
- What is most enjoyable thing about being a parent?
- What is the hardest part?
- How did your spouse take to being a parent?
- Was your next child planned? What was your reaction when you learned that you/your spouse was pregnant? Was your spouse's reaction?
- Did you ever discuss how many children you wanted to have? If you disagreed, how did you deal with the disagreement.
- What was the next child like as a baby? As a toddler?
- Same for the subsequent children. Be sure be clear on when each child was born - the time distance between each child.
- Did you/your spouse ever get pregnant other than these times?
- What is (child's name) like now?
- How is s/he dealing with the divorce?
- Returning to your relationship with your spouse, what have been the issues you have fought about the most? What does he/she say? What do you say?
- How do you fight?
- How do you resolve your differences? (Do you feel you actually resolve your differences?)
- Is there anything that makes your fights worse (looking for drug or alcohol use, involvement of family members, etc.)?
- In the last few years, how has your spouse taken to being a parent? You?
- How have the two of you shared parenting responsibilities?
- Are you happy with your role? Your spouses? What would be different?
- What have the schedules with the children been like?
- How have you and your spouse differed about parenting (diet, bedtime, discipline, etc.)

Separation: These questions explore the problems in the relationship.

- What led to the break-up?
- Usually when a marriage ends, one person withdraws emotionally from the marriage first and the other one feels left. Which are you? Explain why you feel that way. (This is a very important line of inquiry. It is oft-stated in the literature on divorce that one person withdraws emotionally from the marriage before the other and their emotional experiences of this process are dramatically different. One is the "leaver" and their emotional reaction may be expected to be one of relief and/or guilt at breaking up the family. The other is the "left" and they may have been living in a state of denial about problems in the marriage, so when that denial is shattered, they are much more likely to experience deep anger, betrayal and grief over the end of the marriage. These emotional reactions to the separation will likely color each person's view of the other and their own responses to the process.)

How did you/your spouse convey that the marriage was over?

How did you/your spouse respond?

Are you still living together? If not, when did you separate? Who left? Where did s/he go to live? How was it determined that s/he would be the one to move out? What was the process of their moving out like?

How did you tell the child(ren) you were getting divorced?

Have either of you been involved romantically with someone else? If you, when did this start and what were the circumstances? Does your spouse know? How did he/she find out? If your spouse, how did you find out? When did this relationship start?

What problems have you and your spouse had since the separation?

Post-Divorce Parenting: Here you can explore in greater detail the pattern of parenting since divorce and the desires/expectations of each parent.

- For each child, what kind of person is he/she?
- Were there any problems with the pregnancy?
- Has he/she had any developmental difficulties? What has his/her doctors or teachers said about this?
- What are this child's strengths? What are this child's difficulties?

- How does she/he relate to her/his siblings?

INTERVIEWING CHILDREN

Introduction

Interviewing children may be the most challenging and difficult part of conducting a custody evaluation. The evaluator must be educated about the effectiveness of various interview protocols and know which formats are known to provide the most information, cause the least trauma to the child and yield the most reliable information. Interview techniques should vary according to the age, development of the child and the specifics of the case. Some children should not be interviewed by a general practice evaluator particularly if there are allegations or knowledge about acts of sexual or physical abuse and if they have already been or will be interviewed by child expert interviewers. Knowledge of child development is absolutely necessary to conducting interviews of children. Differences in children's cognitive gains, their perceptions about time, their ability to consider abstract thought and their emotional need to protect parents or perform for adults means that the interviewer must carefully craft the way that questions are posed as well as know how to interpret the answers. A different vocabulary should be used for younger children so that the child understands the question; as well, the interview should be aware of the child's own vocabulary so that answers are understood and interpreted correctly. Children should be asked if they understand posed questions as they may not tell the interviewer that they don't understand the question.

This section is not meant to be a comprehensive coverage of the subject of child interviewing; it does not include a complete review of pertinent literature regarding interviewing children as there is simply too much to cover. Whole chapters of books have been dedicated to the subject of child interviews as part of child custody evaluations. What is covered in this section are a few research based principles of child interviewing as "the most productive and helpful interviews are likely to be those that integrate information from both forensic practice and research findings" (Daniel J. Hynan, 1998). A suggested list of questions is included for young children (Appendix A) and for adolescents (Appendix B) as well as a useful "Guidelines for Talking with Children", (Appendix C). A review of child interview literature reveals information about cases which require the use of "expert child interviewers" such as police, sexual assault units at hospitals or highly trained mental health professionals. There is a great deal of literature by professionals ranging from family therapists and psychiatrists to child welfare and police department personnel who have written extensively about interviewing traumatized children who are thought or known to be victims of sexual or physical abuse. Specific interview guidelines are necessary when the child has experienced trauma or been sexually abused. A reference at the end of the section lists a few articles about this specialized type of interviewing.

A review of the literature regarding interviewing children can be intimidating in that experts don't necessarily agree on one methodology. Bricklen (1995) goes as far as to say that interviewing children is often iatrogenic because it can inadvertently encourage members of the family to make negative statements that exacerbate conflicts. He suggests a reliance on tests he has developed for custody evaluations. It does not appear from a general literature search that

most professionals agree with Bricklen. Interviews that have been the subject of research regarding the validity of responses and score fairly well are the: Open-ended questions interview, Structured interview, Step-Wise Interview, Cognitive interviews (encompassing four interview techniques),the Allegation Blind interview (reported to yield higher disclosure rates about specific events) and Truth Lie Discussions, to name a few.

In this section the reader will find a consideration of the goals of the interviews and information on the Step-Wise interview, chosen because it is simple to understand, accessible to beginning interviewers and is a safe approach in that there are careful distinctions between open ended versus leading questions. Developed by John Yuillie and his colleagues, it is meant to minimize any trauma the child may experience during the interview, maximize the amount and quality of the information obtained while minimizing any contamination of that information. Difficulties in interpreting children's statements increase the challenges of conducting these interviews and information will be given about how to interpret answers.

Goals of the child interview

Let's first discuss the factors to be considered when focusing on the best interests of children, our goal in formulating custody recommendations. We conduct interviews to establish: the wishes of the parents; the wishes of the child; the interactions of the child with the parents, siblings, and other relevant individuals; the child's adjustment to the home, school and community; the mental and physical health of all involved parties: and other issues that may be seen as important in individual cases. Parental absence and the effect on the child, economic hardship, poor parental adjustment and parenting practices, life stresses and interparental conflict are factors important to consider when formulating interview questions. Put another way, the evaluator wants to know about the child's social functioning, temperament, emotional functioning, mental health, general functioning, their experience of the divorce and how the current situation is working for them. A list of questions is appended (Appendix A and B) that covers these areas of interest.

Protocols for interviewing

Evaluators are encouraged to interview the child during home visits with each parent and after the parent/child observation. If necessary, the child can also be brought to the evaluator's office for follow up interviews or to clarify their perspective or if the evaluator feels the need to get to know the child better. It is important to interview the child alone. The parent might remain in the room for a discrete period of time in order for a child to become comfortable, (usually necessary for young children) but the questions could be limited to neutral questions during that phase of the interview. More critical questions should be asked when the parent is not in the room. A neutral location in the home is best, rather that the child's bedroom. If a child is estranged from a parent, the interview could take place in the evaluator's office or a neutral location such as the children's area at a local library or coffee shop.

Formulating the interview

Most writers agree that it is extremely important to set up the interview so that the child feels comfortable and rapport can develop. The evaluator should begin by asking if the child understands why they are being interviewed. Many children need the distraction of being able to draw or play during the interview. Materials should be available and the room set up so that even small children can sit and draw or play. The better the rapport, the more likely it is that the child will be forthcoming. One way to develop rapport and ease a child into an interview is to begin with neutral questions requiring very short answers such as "What school do you go to? What is your favorite subject? Do you have hobbies? What kinds of things do you like to do on the weekends? With small children in particular, questions that are neutral should be interspersed with questions that are likely to be experienced as more intense so that children don't tire or become adversely affected by the interview experience.

The focus here will be on the Step-Wise Interview as it is easiest to utilize and has the widest applicability. For a detailed explanation of this technique, see the article, "Forensic Interviews and Child Welfare", December 2002, found in the reference section. A chart showing application of this type of interview is shown as Appendix D. The Step-Wise interview begins with a "rapport building phase" by asking questions about the child's interests. The rules for the interview are discussed (e.g., "If you are unsure about an answer, please say so." The interviewer then introduces a "topic of concern" such as "Do you know why we are here today?" The evaluator then moved to "questioning." A reliance on open ended questions will serve an evaluator well in that they elicit longer, more detailed and more accurate responses than other types of "interviewer utterances by school age and adolescent children". Open ended questions are not as helpful for young children who need a bit more specificity or simplicity. In general, questions should begin with questions such as "How do you get along with your daddy/mommy?" Questions begin as open ended; then specific. This technique can be used for topics during an interview that require special care. More neutral questions can be interspersed with use of the Step-Wise interview. Even if the evaluator is aware that there is an issue with one parent, the child should be asked about the issue as it exists with either parent. For example, if the evaluator believed that the children might have seen parent A being aggressive toward Parent B, the interviewer would ask about each parent being aggressive.

Length of the interview

The length of the interview depends on the age of the child, their verbal skills and comfort level. The evaluator can continue with the interview as long as the child feels like talking but should end the interview when the child becomes fidgety, tired, disengaged or say they want to stop. Some general guidelines are:

3-4	10-15 minutes or as long as they are interested
5-7	15-30 minutes
8-11	15-40 minutes
11-15	30-60 minutes
15-18	45-60 minutes

Understanding the answers children give during interviews

The evaluator must be cautious about bold statements made by children, particularly if they are unsolicited, use language that is above the child's developmental level or that mimics the same wording as the parent has used. One expert described a case where a child had spontaneously indicated a desire to maintain the status quo regarding the visitation schedule. The evaluator was criticized for not considering this statement more strongly. However, other experts cautioned that a child who volunteers information "may be subject to parental influence to create an impression for the evaluator that is not based on actual parent-child interactions". (See Daniel J. Hynan's article, "Interviewing Children in Custody Evaluations" found in the October 1998 issue of the Family and Conciliation Courts Review.) An excellent chapter in Dan Saposnek's book, "Mediating Child Custody Disputes" describes the various responses of children to the initiation of divorce and loss of a non-residential parent and how children might become "*innocent and functional contributors"* to the disputes as a part of a dysfunctional family system and to address their needs. Statements then need to be evaluated by reflecting on the "function" of the child's statements. One should consider if child's comments were made in an attempt to bring mom and dad back together or in order to show loyalty to one parent, to be fair to both parents or in order to help one parent.

How to know if a child has been coached (Dr. Naomi Oderberg)

One evaluator tells of a case where she was interviewing a six year old boy in "a two mom family". At the first mom's house the child behaved normally; then at the other mom's house, the first thing he said to the evaluator was, "I want to live with my mom all the time and just visit my mommy." If the child spontaneously tells the evaluator where they want to live and the language and other information suggests that they may be influenced, there are a couple of strategies to determine if that is so:

- Look for developmentally appropriate language
- Descriptions that appear to be from a child's point of view
- Encourage spontaneous disclosures which are more trustworthy.
- Look for the presence of peripheral details when describing an event.
- Look for child language that mirror's the parents. I sometimes hear the same phrase coming out of a child as I did during a parent interview. This usually tells me the child is being exposed to more information than they should be.

When Not to interview a child

Lauren Flick, a psychologist who has completed over 3000 interviews with children, described the problem with multiple interviews of a child as follows: "If the interviewer is the first person to speak with a child about an event, the event is like a design at the bottom of a swimming pool filled with clear water – it is easy to read. Each subsequent interview about an alleged event clouds the water and if a child has spoken to a principal, the police and their parents before the evaluator talks with them, it is very difficult to see the design (event) clearly." (North Carolina Child Welfare Notes). If sex abuse has been alleged, the child should be interviewed by a police expert interviewer who has learned special skills, by Child Protective Services or by a response

team who also has received advanced training. An evaluator who has not been trained for this specialty and/or had supervision in conducting interviews could pollute the information by asking leading questions at the wrong time, misunderstand answers or formulate questions in a manner that is too intense and thus traumatizing for the child. Some psychologists or other professionals by virtue of extensive training and practice can be considered as "expert child interviews"; however, there is no exact certification or standard so one should be cautious about choosing to utilize their services.

Dr. Andy Benjamin writes on page 190 in his book, "Family Evaluation in Custody Litigation", co-authored by Jackie K. Gollan, "Typically a young child is not interviewed individually or asked about his or her preferences for placement or visitation. This is to protect the child from feeling responsible for any outcome associated with the evaluation."

Clearly there is a range of thoughts about interviewing children. All of the literature reviewed seemed in agreement that children should never be asked which parent they want to live with. While some professionals believe that only testing can provide accurate information, others believe that proper questioning, after establishing rapport with a child, yields much information necessary to formulating evaluations. Others feel that observing parents and children provides enough data for their evaluations. They don't want to burden children with believing that something they said during the interviews caused harm to a parent. Loyalty issues and distress about discussing painful family matters often place limits on obtaining accurate information. Evaluators can easily misunderstand children if they are not trained properly or follow the guidelines of research based methodology. Lastly, information given by children must be considered in conjunction with other data in the evaluation.

APPENDIX A
Sample Questions for Children's Interview
(Courtesy of Dr. Naomi Oderberg)

Questions are to be tailored for each family (i.e. two biological parents, adopted parents or sibs, step parents or sibs, grand parents, same sex parents, etc.). To simplify, I'll be using the terms mother and father

Ice Breakers/ Learning about the Child's Life
First questions are neutral, getting a general view of child's life

I'm looking for whether the child has interests, is engaged in their lives, is sociable or are they withdrawn, not finding pleasure in things, under-stimulated. For teens, lack of interests could also be a cue for regular marijuana use.
What school do you go to? What grade are you in? What do you like best/least about school? What is your favorite subject? How are your grades? What's it like to show your parents your report card?

Do you have any hobbies? What kinds of things do you enjoy doing on the weekends? Which chat rooms do you visit? How many hours of TV/computer/text messaging/video games watch/do each day? What's your favorite TV show/video game? Do you have any after school activities? Are you on any sports teams?

Peers
Who do you usually play with/hang out with? Do you have a best friend? Do you see each other outside of school/religious activity/sports team, etc.?
Who do you hang out with at recess? **You get a great feeling for their social situation and how they feel about themselves from bringing recess up. It's one of the most important parts of school for elementary age kids.**

Finding Out About Home
Give me an example of what a normal day would be like with dad/mom? **From morning until night, ask for details and questions about who is in a care giving role. Asking about parts of the day that will tell you about routines and consistency.** Who wakes you up in the morning? Makes breakfast? How do you get to school?

What kind of chores do you have at mom's/dad's? **Are they being given appropriate levels of responsibility.**
What do you talk about at dinner time? What does your family do after dinner? What time do you get ready for bed? Who helps you/puts you to sleep? What are your bedtime routines?

How much homework do you usually have? Who helps you with it? How do you like working with Mom/Dad? What happens if you do an especially good job? What happens when you're not trying very hard? **This is another very telling area for eliciting information about the parent/child relationship. Are there power struggles going on? Can parent and child work cooperatively or collaboratively?**

I ask about Discipline. Is it consistent, benevolent, predictable or rigid, harsh and inconsistent?
What are some of the rules your dad's/ mom's house? What happens if you break a rule? What happens when you get in trouble? What kind of consequences/punishment/discipline do you get from your mom/dad?
Tell me about a time when you think you were unfairly punished.

What's the worst trouble you've ever been in?
Is corporal punishment is used: Who disciplines you? What do they spank you with a hand or an object? On a scale from one to ten, with one being "it's nothing" and ten being "it's really bad," how much does it hurt?

What's something your mom/dad do if they want to give you a special treat or surprise? **End on a more positive note and then go to a more neutral topic after this section.**

Self

Looking for self concept/self esteem. Name three things you like about yourself. If you could change one thing about yourself, what would it be? What kinds of things are you good at?

I**n general we're looking for anxiety symptoms, ability to regulate affect and manage feelings and sooth oneself.** Give me an example of a couple of things that make you happy? Sad? Angry? Excited? Frustrated? How do you get yourself to feel better when you're down? Have you been worried about anything lately? Tell me about that.
Who do you talk with about your worries/problems/need help? **This can give you insight into how the child relates to his/her parents.** What's it like to walk into a room full of new people

Siblings

I'm looking for the degree of conflict, what the distribution of power is between sibs, what are patterns in the sibling relationship that may reflect the parental relationship.
I'm particularly interested in finding out if one sibling is being mean, attacking, devaluing of another sibling. If there are conflicts, do the parents intervene or not?
How do you get along with your brother/sister? What do you like about your sister/brother? What annoys you most about him/her? How often do you fight? What happens when you fight? Tell me about a time your bro/sis helped you

Current Parent/Child Relationship
Tell me three words that describe your mom/dad? What is one of your favorite things about him/her? If you could change something about your dad/mom, what would it be? What does your mom/dad do that is most annoying? Nicest thing? What do your friends think about your mom/dad?

What do you like to do with your mom/dad? Do you have family traditions? What are they? Do you feel your mom/dad treats you with respect?

Do you talk to mom/dad when you are at dad/mom's? How often does your mom/dad call you? How often do you call her/him? **You want to try to find out if parent's calls are interfering with visitation or if they are being monitored.** Where is your mom/dad when you're on the phone with dad/mom?

Ask about residential time with each parent. What do you do? Where do you go? Who's usually there? **Is it Disneyland dad/mom or do they have their own normalized routine.** What kinds of things are similar at your mom/dad's house? What kinds of things are different?

If you were having a problem with some kids at school, who would you talk with? If you were upset, angry, sad, scared…who do you like to talk with? **Teens are more likely to say friends but usually don't exclude parents all together. If little kids don't mention parents, I wonder why.** Who do you talk to when you feel sad, angry, upset, scared…? Is s/he helpful? Ever Have nightmares? Who do you ask for when you wake up at night?
Who takes care of you when you are sick? Does either of your parents participate at school/sports?

How do you know when your mom/dad is sad/happy/worried/frustrated/angry/excited? What happens when you get mad at your dad/mom? How does your family resolve conflict?

If you were on an island and could only pick one person to be with you, who would it be? What if you could have two people with you? Who else would you want to be there? **It's really interesting. There are times when kids who are in high conflict families only want their friends on the island and no parents, or they leave siblings off the island, or leave one parent off. Then you can explore this further. Another one is:** If you had three wishes what would they be? What would you do with a million dollars? If you had a magic wand and could change anything you wanted, what would you change? What would you change about your family, mom/dad, yourself?

The Divorce
Do you remember what it was like when you were all living together? How old were you when your parents separated/divorced? What has changed since the divorce? Why do you think they separated/divorced? How did they get along before they separated?

Who told you about the separation? What did they say? **What happened the day your mother/father left?** How do you feel about it now? What kinds of things are better since the divorce? Worse?

Parents' Relationship
How do your parents get along now? How does your mom/dad feel about your dad/mom? What gives you that impression? If you could change something about the way they treat each other, what would it be?

What kinds of things does your mom/dad say about your dad/mom? Do you ever hear your dad/mom talking on the phone to someone else about mom/dad? What have you heard?

Transitions can be a really stressful time for children: What is it like when you go from mom's home to dad's home? How do you feel about it? Is there anything that makes you uncomfortable during transitions?

Residential Arrangement

What is your schedule with mom/dad? How is that for you? What is it like going back and forth? What happens if you're at your dads but you've left something you really need at mom's? Are there any particular things you always take with you? Ask if they can take their stuff back and forth or have to keep toys and games at one home.

If you could change something, what would it be? For older children I'll ask if they have any ideas about how to make the schedule work better, particularly if they have indicated that there are any problems or areas of discomfort.

How is your mom when you're at your dad's? What does your mom do when you are at your dad's? Do you worry about your mom/dad when at your dad's/mom's? If a parent is not regulating their affect well, are depressed, anxious, personality disordered you may get a positive response.
Is the schedule always the same? What kinds of things come up that change the schedule? What happens if it's time to be with your dad but you have a ball game/party/play date to go to?

Closing up the Interview

Try to allow at least 5 or 10 minutes to neutralize the situation and help the child get contained if the interview was difficult for him/her. It's helpful to go back to some general, neutral questions. What is your week going to be like this week? Do you have any special plans? Have you seen any good movies lately? What are you planning to do after you're done here? Talk about pets or other topics you've found the child brightens up about.

Is there anything else you would like me to know (to talk with me about**)? Praise the child and thank them for their participation. Try to leave on a positive note.**

APPENDIX B

The Adolescent Interview
From Appendix H in Dr. Benjamin, Dr. Gollan's book
Family Evaluation in Custody Litigation

School History

Where do you go to school? What grade are you in? Who are your teachers? Do you like school? What aspects do you like and dislike of school? How do you do academically in school? What is your GPA? Do you complete homework? In what ways has each parent helped you with your school work and grades? What would people in school who knew you say to describe you? Do you have as many friends as you would like? Extra curricular activities? Do you work after school? Any significant events happen during your time in school? When have your parents met your teachers? What do they say about them? What do they say about you? Have you spoken with other school professionals? What do they say about you? Do you have any learning problems, including difficulties with attention, concentration? Have you had any problems or bad experiences at school? Have you been abused, bullied, or harassed while at school? Do you have any disciplinary problems? Behavioral problems with teachers or peers? How has each parent responded to these problems?

Family Questions

How well are the current living arrangements with your parents working in your view? What works? What doesn't work? What are your specific daily schedule and routine in both of your parents' homes? Does either parent give different attention or guidance in the particular areas of your routine? What do you do for fun? How often do you play with your siblings? Any problems or concerns? How much quiet time do you need in the course of the day? What type? What kind of activities do you do with each parent? How much time do you spend with your parent each day? What kind of play do you engage in with each parent? What kinds of games do you select? How has your relationship changed with each parent since they separated? What works? What doesn't work? Where and when do you make transitions from one house to another? What works? What doesn't work? What kinds of behavior does each parent engage in to make you mad? Sad? Happy? How about your behaviors that make each parent mad? Sad? Happy? What kinds of topics does each parent talk to you about, either in person or by phone? What are the hot issues that usually produce arguments between your parents? Please discuss the worst fight you saw them in? (Use the allegation form in Appendix F) For each of the child-related and adult-related allegations raised by each party, ask the teen to describe two of the worst examples of each allegation he or she may have witnessed or endured.

APPENDIX C
Guidelines for Talking with Children

Phonology

- Speak to the child using proper pronunciation. Do not use baby talk. Do not guess what a child might have said. If a comment is uninterpretable, ask the child to repeat the comment.

- Remember that the child may pronounce words differently than an adult would. If there might be another interpretation of what the child said (e.g., *body* or *potty),* clarify the meaning of the target word by asking a follow-up question (e.g., "I'm not sure I understand where he peed. Tell me more about where he peed.").

Vocabulary

- A word might not mean the same thing to the child and the interviewer. Instead, the child's usage may be more restrictive (bathing suits, shoes, or pajamas may not be *clothes* to the child; only hands maybe capable of *touching);* more inclusive *(in* might mean *in* or b*etween);* or idiosyncratic (i.e., having no counterpart in typical adult speech).

- Avoid introducing new words, such as the names of specific persons or body parts, until the child first uses those words.

- The ability to answer questions about the time of an event is very limited before 8 to 10 years of age. Try to narrow down the time of an event by asking about activities or events that children understand, such as whether it was a school day or what the child was doing that day. Even the words *before* and *after* might produce inconsistent answers from children under the age of 7 (e.g., "Did it happen before Christmas?").

- When the child mentions a specific person, ask follow-up questions to make sure that the identification is unambiguous.

- Beware of *shifters,* words whose meaning depends on the speaker's context. location, or relationship (e.g., *come/go, here/there,a/the,* kinship terms).

- Avoid complicated legal terms or other adult jargon.

Syntax

- Use sentences with subject-verb-object word orders. Avoid the passive voice.

- Avoid embedding clauses. Place the primary question *before* qualifications. For example, say "What did you do when he hit you?" rather than "When he hit you, what did you do?"

- Ask about only one concept per question.

- Avoid negatives, as in "Did you *not* see who it was?"

- Do not use tag questions, such as "This is a daddy doll, *isn't it?"*. Be redundant. Words such as *she, he, that,* or *it* may be ambiguous. When possible, use the referent rather than a pointing word that refers back to a referent.

- Children learn to answer *what, who,* and *where* questions earlier than *when, how,* and *why* questions.

- Avoid nominalization. That is, do not convert verbs into nouns (e.g. "the poking").

Pragmatics

- Different cultural groups have different norms for conversing with authority figures or strangers. Avoid correcting a child's nonverbal behavior unless it is interfering with your ability to hear the child or otherwise impeding the interview.

- Language diversity includes diversity in the way conversations are structured. Be tolerant of talk that seems off topic and avoiding interrupting children while they are speaking.

- Children may believe that it is polite to agree with a stranger. It is especially important to avoid leading or yes-no format questions with children who might always be expected to comply even when adults are wrong.

From: Poole, D.A. and Lamb, M.E. (1998). *Investigative Interviews of Children*. Washington, DC: American Psychological Association. PP 1

APPENDIX D

A Continuum of Types of Questions To Be Used in Interviewing Children Alleged to Have Been Sexually Abused

Kathleen Coulborn Faller, MSW, PhD

	Question Type	Example	Child Response	
Open-Ended	A. General*	Do you know why you came to see me today?	To tell you about my daddy.	More Confidence
	B. Focused	How do you get along with your daddy?	OK, except when he babysits for me.	
		What happens when he babysits?	He plays a game with my hole.	
		What does he use to play with your hole?	His "wiener."	
	C. Multiple Choice	Does he play with your hole with his finger, his "wiener," or something else?	He used his "wiener."	
		Did he say anything about telling or not telling?	Don't tell or you'll get punished.	
		Did you have your clothes off or on, or some off and some on?	I took my pants off.	
	D. Yes-No Questions	Did he tell you not to tell?	Yup.	
		Did you have your clothes off?	No, just my panties.	
	E. Leading Questions**	He took your clothes off, didn't he?	Yup.	
Close-Ended		Didn't he stick his "wiener" in your hole?	Yup.	Less Confidence

*Children usually are not very responsive to general questions. **Not appropriate when interviewing children.

Source: Faller, K. C. (1993). Child sexual abuse: Intervention and treatment issues. Washington, DC: USDHHS Administration for Children and Families. Online <http://www.calib.com/nccanch/pubs/usermanuals/sexabuse/index.cfm>.

To ... of Health & Human Services does not discriminate on the basis of race, color, national origin, sex, religion, age, or disability in employment or the provision of services. 3,400 copies printed at a cost of $3,974 or $1.16 per copy.

References

Benjamin, G. Andrew; Gollan, Jackie K., "Family Evaluation in Custody Litigation", 2002, pgs. 190, 211-214.

Children's Services Practice Notes, North Carolina Division of Social Services and the Family and Children's Resource Program, "Practice Notes", Volume 8, No. 1, December 2002.

Cronch, Lindsay, E., et al, "Forensic interviewing in child sexual abuse cases; Current techniques and future directions," University of Nebraska, www.sciencedirect.com; September 2005.

Gardner, Richard A. M.D., "Family Evaluation in Child Custody Mediation, Arbitration, and Litigation, 1989, pg. 260-282.

Hynan, Daniel J., “Interviewing Children in Custody Evaluations”. Family and Conciliation Courts Review, October, 1998.

Saposnek, Donald T., “Mediating Child Custody Disputes”, 1998. pgs. 155-168

CHAPTER 6
REPORT WRITING FOR FAMILY LAW GUARDIANS AD LITEM

REPORT WRITING FOR FAMILY LAW GUARDIANS AD LITEM

Submitted by Jorene Moore

INTRODUCTION

Your report to the court is one of the most important documents in a court file. Once filed, it becomes a permanent part of the record. Information contained in your report may be used at trial and you may be called to testify about information contained in your report.

Your report should be factually based, with opinions clearly stated as such and support by the facts and your observations. Your report should be written in a respectful manner toward each individual and include a balance of information provided by each party.

Reports need to address the best interests of the child and should focus on the best interest standard.

(PLEASE NOTE: RCW CITES IN THIS SECTION ARE EXCERPTS AND MAY NOT INCLUDE THE CITE IN ITS ENTIRETY – PLEASE REFER TO THE RCW FOR THE FULL TEXT.)

Before beginning your report, review **RCW 26.12.175** paying particular attention to your role as defined in this section: ***(emphasis added)***

(1)(a) The court may appoint a guardian ad litem to represent the interests of a minor or dependent child when the court believes the appointment of a guardian ad litem is necessary to protect the best interests of the child in any proceeding under this chapter. The family court services professionals may also make a recommendation to the court regarding whether a guardian ad litem should be appointed for the child. The court may appoint a guardian ad litem from the court-appointed special advocate program, if that program exists in the county.

(b) Unless otherwise ordered, the guardian ad litem's role is to investigate and report factual information to the court concerning parenting arrangements for the child, and to represent the child's best interests. Guardians ad litem and investigators under this title may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties. If a child expresses a preference regarding the parenting plan, the guardian ad litem shall report the preferences to the court, together with the facts relative to whether any preferences are being expressed voluntarily and the degree of the child's understanding. *The court may require the guardian ad litem to provide periodic reports to the parties regarding the status of his or her investigation.* ***The guardian ad litem shall file his or her report at least sixty days prior to trial.***

BEFORE BEGINNING YOUR REPORT

- Carefully review the order appointing to set the parameters of your report and check with the court about whether or not they wish to have the analysis and recommendation sections included (see below).
- Identify the nature of the case and the statutes applicable to the type of action for which you are being asked to provide services.
- Check with the court about their expectations and any requirements for the report format as major titles may differ (see templates--) and styles may differ slightly
- Practice Tip: Counties may differ in their expectations. Be sure to get advice from an experienced GAL in the county where the report will be filed.

WHAT TO INCLUDE/EXCLUDE IN YOUR REPORT

Your report should have clear and distinct sections to identify information. Ideally, you will use the same format for each type of case. Organization of your report is a key factor in comprehending the totality of the information you present to the court and the parties. Your headings should be clearly identifiable and the information contained in each section should reflect the heading.

Nature of the case

- Include or identify the case type (dissolution, third party custody, etc).
- Include date of appointment, due date for initial or next report, and next court date.
- Include the issues to be investigated per court appointment and requisite statutory requirement.

Background and Current Information

- Include a concise factual summary of the case.
- Describe how the case came to be at the point where it is currently.
- Include all related previous court dates and/or court proceedings.
- Include pivotal events including changes in custody, orders affecting the children and life circumstances significant to the parenting of the children.

Information for the Report

- List all contacts, interviews and meetings including date, time and location.
- List all files and/or documents reviewed and the source of the information.
- List all reports, consultations, and additional media reviewed.
- List all databases reviewed (Judicial Information System, SCOMIS, etc.).
- Practice Tip: Separate party contacts, interviews, etc., from collateral contacts and separate professional collateral contacts from other collateral contacts.
- Practice Tip: If you format this section as a list, you will be able to more easily extract it in the public version of your report as required by GR22 (described in later in this section).

Primary Contacts, Interviews, and Meetings

- Describe each Primary Contact (Primary = contact with the parties & children)

- Include the date, time and place of each contact.
- Practice Tip: It helps to arrange the information into groups (i.e. describe all the contacts with Mother, then all the contacts with Father, then all the contact with the Child, etc.)
- Practice Tip: Include factual observation without interpretation in this section: i.e.: the mother was slurring her words and staggering as she walked instead of mother was drunk—or there were dirty dishes piled high on all kitchen surfaces and roaches running throughout rather than the kitchen was filthy or unfit.

Collateral Contacts, Interviews and Meetings

- Describe each Collateral Contact (Collateral = contact with anyone besides the parties and the children)
- Include the date, time and place of each contact and the relationship of the contact to the parties/children.
- Collateral Contacts should be used to offer information of a professional nature (e.g., doctor, therapist, police officer, etc.) or to offer additional information relevant to the case.
- Practice Tip: It helps to arrange the information into groups (i.e. describe all the contacts with the grandmother, then all the contacts with the uncle, then all the contacts with the teacher etc.)
- Practice Tip: Include factual observation without interpretation in this section-- i.e.: the grandmother reported; the uncle reported, the teacher reported. Try to use quotes when possible.
- Practice Tip: Consider obtaining written information (e.g., reference forms) from non-professional contacts (e.g., family members, friends and neighbors) to review to determine if their information is pertinent and if further contact is warranted.

Analysis of the Information

- Describe your overall interpretation of the events and information related to each primary and collateral contact.
- The facts and your observations must be the basis of your analysis.
- Highlight pivotal interactions, events or documents that stood out as having a particular impact on your recommendation.
- Practice Tip: Good idea to arrange your written analysis by contact, as in previous sections.
- Practice Tip: Most courts want your analysis, but not all. Be sure to check with your county to see if this section should be excluded.

Recommendations

- Based upon the facts discerned by your investigation and observations, list your recommendations in a numerical format.
- Be sure to refer to the facts and observations you have listed above in your analysis.
- Practice Tip: Most courts want you to list your recommendations, but not all. Be sure to check with your county to see if this section should be excluded.

REVIEW OF TEMPLATES FOR FIVE CASES:

You are not required to provide a full legal analysis of each legal element as you are not expected to practice law. However, GALs need to understand the elements the court is required to weigh so you tailor investigations and include information to help the court weigh the necessary factors.

RCW 26.09.002 sets forth policy that is a good foundation for any action: ***(emphasis added)***

"Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. ***In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities****. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm."*

Basic dissolution (RCW.26.09)

- A basic dissolution case is one in which the parents of the child(ren) file for divorce and are unable to agree on the parenting plan for the child(ren).
- They may have been required to participate in mediation prior to the appointment of a GAL or mediation may have been waived due to other factors such as domestic violence.
- Your report is focused on what is in each child's best interest given the overall circumstances of the case.
- The court will enter a final parenting plan consistent with the objectives listed below. Your report should carefully examine the objectives and provide clear information to the court as to how you considered each objective.
- Your report should clearly identify allegations made by either parent or revealed by your investigation that would, if founded, create restrictions to the parenting plan under section RCW26.09.191 (excerpt below).
- Your report should identify whether elements founded in your investigation constitute a basis for mandatory or discretionary restrictions and your recommendation as to the nature of the restriction.

RCW 26.09.184 lists the following objectives of a final parenting plan in a dissolution case:

(1) OBJECTIVES. The objectives of the permanent parenting plan are to:
(a) Provide for the child's physical care;
(b) Maintain the child's emotional stability;
(c) Provide for the child's changing needs as the child grows and matures, in a way that

minimizes the need for future modifications to the permanent parenting plan;

(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;

(e) Minimize the child's exposure to harmful parental conflict;

(f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and

(g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

RCW 26.09.187 identifies the following areas in a parenting plan: DISPUTE RESOLUTION PROCESS; ALLOCATION OF DECISION-MAKING AUTHORITY; RESIDENTIAL PROVISIONS and provides explanation of the requirements of each area and should be reviewed carefully prior to making recommendations regarding a parenting plan.

RCW 26.09.191 identifies restrictions that are required if certain elements are found:

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under: ... (see full text of 26.09.191 for detailed description of offenses and requirements.)

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section, a parent's child means that parent's natural child, adopted child, or stepchild.

Modification (RCW 26.09.260)

- Modification actions are initiated by at least one party indicating their permanent parenting plan is longer effective due to a change in circumstances.
- Prior to filing a modification action, parties should follow the procedures indicated in their parenting plan under the "dispute resolution" section.
- A major modification of a parenting plan must meet certain criteria as listed below before the matter may move forward.
- Your report should reflect your assessment of how the criteria is or is not met if a court determination has not been established prior to your appointment or if specifically requested in your appointment.
- Once it is established that the criteria is met, the legal elements for determining how the parenting plan should be modified are largely the same standard as used in the initial determination under RCW26.09: the best interest of the child standard.

RCW 26.09.260 identifies criteria for modifications of parenting plans:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW

26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

Nonparental custody case (RCW 26.10)

- A child custody proceeding is commenced in the court by a person other than a parent, filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.
- In preparing the report concerning a child under this cause of action, you may consult any person who may have information about the child and potential custodian arrangements.
- You may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if the child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent.

- The court shall determine custody in accordance with the best interests of the child standard.

RCW 26.10.130 IDENTIFIES THE CIRCUMSTANCES THE INVESTIGATION AND REPORT FOR NON-PARENTAL CUSTODY CASES:

(1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodian arrangements for the child, or may appoint a guardian ad litem pursuant to RCW 26.12.175, or both. The investigation and report may be made by the guardian ad litem, the staff of the juvenile court, or other professional social service organization experienced in counseling children and families.

Relocation (RCW 26.09.405-26.09.560)

- If the parent with whom the child resides a majority of the time proposes to relocate, they must notify the other parent.
- If the non-residential parent objects to the relocation, they must file an objection with the court, thus commencing this action.
- The statute is clear (as listed below) that there is a rebuttable presumption that the intended relocation of the child will be permitted.
- The eleven (11) factors listed below in RCW 26.09.520 should be reviewed and clearly addressed in any appointment under relocation.
- The factor listed in RCW 26.09.530 below may not be considered as a factor in your report.

RCW 26.09.520 IDENTIFIES THE BASIS FOR DETERMINATION FOR RELOCATIONS:

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

(1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

(2) Prior agreements of the parties;

(3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

(8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

RCW 26.09.530 STATES THE FACTOR NOT TO BE CONSIDERED IN RELOCATION ACTION:

In determining whether to permit or restrain the relocation of the child, the court may not admit evidence on the issue of whether the person seeking to relocate the child will forego his or her own relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted. The court may admit and consider such evidence after it makes the decision to allow or restrain relocation of the child and other parenting, custody, or visitation issues remain before the court, such as what, if any, modifications to the parenting plan are appropriate and who the child will reside with the majority of the time if the court has denied relocation of the child and the person is relocating without the child.

Paternity (RCW 26.26)

- This action is reserved for determination of paternity. However, on the same basis as provided in RCW 26.09, the court shall make residential provisions with regard to minor children of the parties, except that a parenting plan shall not be required unless requested by a party.
- Paternity may be determined by genetic testing or an acknowledgment of paternity as described in RCW 26.26.300.

- If a report is requested regarding parenting issues, the same provisions as set forth in RCW26.09 should be used to determine the best interests of the child standard.

RCW 26.26.555 INDICATES ONE WAY A GAL IS APPOINTED IN PATERNITY ACTIONS:

(1) A minor child is a permissible party, but is not a necessary party to a proceeding under RCW 26.26.500 through 26.26.630.
(2) If the child is a party, or if the court finds that the interests of a minor child or incapacitated child are not adequately represented, the court shall appoint a guardian ad litem to represent the child, subject to RCW 74.20.310 neither the child's mother or father may represent the child as guardian or otherwise.

REPORT FORMAT REQUIREMENTS UNDER GENERAL RULE 14

- Reports filed in any court in Washington must comply with the formatting requirements set forth in GR 14.
- Reports may be rejected if they do not meet requirements.

GR 14 states the following regarding format requirements:

(a) Format Requirements. All pleadings, motions, and other papers filed with the court shall be legibly written or printed. The use of letter-size paper (8-1/2 by 11 inches) is mandatory. The writing or printing shall appear on only one side of the page. The top margin of the first page shall be a minimum of three inches, the bottom margin shall be a minimum of one inch and the side margins shall be a minimum of one inch. All subsequent pages shall have a minimum of one inch margins. Papers filed shall not include any colored pages, highlighting or other colored markings.

FILING REQUIREMENTS UNDER GENERAL RULE 22 AND FILING PROCEDURES

- There are specific rules which govern reports filed with the court.
- You must file two 2 reports: The original full report (i.e. the sealed document) and the limited report (i.e. public document).
- The public document as expressed in the rule below shall be a simple listing of m*aterials or information reviewed; individuals contacted; tests conducted or reviewed; your conclusions and recommendation*. This list may be directly extracted from your report.
- The public document should not include your analysis or details of your investigation.
- The sealed document must be filed with a coversheet designating it is a sealed document. Most courts have a standard coversheet. Check with your court.
- You should check with the court to verify filing procedures and locations. Generally, the Clerk's office handles the official records for the Court.

- Additionally, the Court may require a "working copy" be delivered directly to the judge.
- You should comply with any deadline ordered by the Court for the report, in addition to the statutory requirement of 10 days prior to court appearance or 60 days prior to trial.
- Review GR 22 regarding the filing of GAL reports; specifically section e(2) which governs the specifics of the Public and Sealed Document.

GR 22 states the following regarding GAL reports:

e(2) Reports shall be filed as two separate documents, one public and one sealed.

(A) Public Document. The public portion of any report shall include a simple listing of:
(i) Materials or information reviewed;
(ii) Individuals contacted;
(iii) Tests conducted or reviewed; and
(iv) Conclusions and recommendation.

(B) Sealed Document. The sealed portion of the report shall be filed with a coversheet designated:
"Sealed Confidential Report." The material filed with this coversheet shall include:
(i) Detailed descriptions of material or information gathered or reviewed;
(ii) Detailed descriptions of all statements reviewed or taken;
(iii) Detailed descriptions of tests conducted or reviewed; and
(iv) Any analysis to support the conclusions and recommendations.

(3) The sealed portion may not be placed in the court file or used as an attachment or exhibit to any other document excerpt under seal.

DISTRIBUTING THE REPORT

- Each party (if pro-se) or their attorney (if represented) get a copy of the report. A copy is filed with the Court through the usual means. Additionally, depending on the court's request and/or practice, you may be requested to file a copy with an individual judge.
- If CASA or another GAL appointed, they also get a copy.
- No copies are given to anyone besides those listed above without authorization from the court.
- Practice Tip: It is recommended that you not tell parties about your opinions, analysis or recommendation until you release the report.
- Practice Tip: Send the report to all at the same time—don't send to one party first.

APPENDIX A
REPORT TEMPLATE FORM FROM
KING COUNTY FAMILY LAW CASA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

IN RE THE CUSTODY OF::	)	Case No.:
	)	
_____,	)	REPORT OF GUARDIAN AD LITEM
	)	
	)	**CASA NO.:**

PERSONS INTERVIEWED REGARDING THE SITUATION:

List all the people interviewed and how they are connected to the case

Bobby Jo Smith	Mother
Bily Bob Smith	Father
Jimmy BoJangles	Teacher

DOCUMENTS REVIEWED:

List all documents

BACKGROUND INFORMATION:

The story goes here, but try to keep it short

CURRENT SITUATION OR ISSUE TO BE INVESTIGATED:

Mention the case type here- Dissolution, Third Party Custody?

Quote the Order Appointing in this Section, as it sets out the current issues for the GAL to investigate.

ASSESSMENTS, OBSERVATIONS, INTERVIEW SUMMARIES:

Observations of the GAL are provided in this section
Use neutral language without judgment-

For example:

Do not write: The parent was drunk.

Write: The parent opened the door, then stumbled several times. The parent's speech was slurred. There were 8-10 empty beer cans on the coffee table and the room smelled of beer. The parent nodded off to sleep twice during the conversation.

CONCLUSIONS OR SUMMARY OF CRUCIAL POINTS

Make sure to facts and incidents described above

For example: The home visit (date) where the parent nodded off twice during the conversation, while the child played in the bedroom, raised concerns about alcohol abuse and safety. A child the age of 3 is not safe when the parent repeatedly falls asleep unaware of the child's activities.

RECOMMENDATIONS:

Bullet points:
Based on the information provided above, the Guardian ad Litem respectfully recommends the following:

1. The parent complete an alcohol assessment
2. Visits be supervised by a family member

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this ____ day of_____, 2008.

FAMILY LAW Guardian ad Litem: _____

QUALIFICATIONS:
Family Law GAL Training
Bachelor of Science Degree, University, 1990
Juris Doctor Degree, University 1995

APPENDIX B
REPORT TEMPLATE FROM
KING COUNTY FAMILY COURT SERVICES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
FAMILY COURT SERVICES

Party Name,	)	**S.C. No.**
Petitioner,	)	
	)	F.C.S. No.
	)	
	)	**MODIFICATION OF**
Party Name,	)	**PARENTING PLAN**
	)	**Trial Date:**
Respondent.	)	**Pretrial Conference:**
	)	
_____	)	

RE: The Welfare of the
Minor Child:

Child's name and **DOB:**

I. NATURE OF THE CASE

II. BACKGROUND AND CURRENT INFORMATION

III. INFORMATION FOR THE REPORT

IV. RE: MOTHER (this section is self-reported)

V. RE: FATHER (this section is self-reported)

VI. RE: MINOR CHILDREN

VII. COLLATERAL CONTACTS

VIII. ANALYSIS OF INFORMATION:

IX. RECOMMENDATIONS

Respectfully submitted,

_____
GAL
Date:

CHAPTER 7
CHILD DEVELOPMENT

CHILD DEVELOPMENT

Submitted by Wendy Hutchins-Cook, Ph.D., ABFP/ABPP and
Maureen A. Conroyd, LCSW, BCD

INTRODUCTION

The best interest of a child is, in large part, determined by understanding the developmental needs of the child reflected by their stage of development. Within this context, the quality of the parents' strengths and weaknesses, as well as, their capacity to meet the needs of their child at each stage of development is to be examined.

Using a child developmental framework, this chapter will present the issues that surface due to family disruptions that occur during marital dissolution, paternity, and third party custody cases. Significant issues related to family disruption and the impact on the child are addressed in this chapter. This information may also be applicable to other aspects of family law.

OUTLINE

- Bonding and Attachment
- Developmental Tasks
- Grief and Loss
- Parental Conflict
- Special Needs Children
- Effect of an Absent Parent
- Introduction of New Relationships
- Blended Families
- Child and Family Therapy
- Communication with Children
- Residential Schedule: Developmental Framework

BONDING AND ATTACHMENT

Bonding is a hormonal process that begins at birth. It is the physiological and emotional readiness to become attached. Bonding between father, mother, and infant is developed through touch and social responsiveness.

Secure attachment occurs as the infant's physical, social and emotional needs are consistently met by the parent. The parent is sensitive and responsive to the infant through verbal and non-verbal communication which is provided in a consistent manner.

Insecure attachment occurs when a parent is insensitive or unresponsive to a child's needs. The parent may also be deficient in providing warmth and nurturing to the child. Environmental conditions, such as family instability, high conflict, poor communication, or family violence may distract the parent from attending to the child in a sensitive and responsive way.

COMPETENCY IN DEVELOPMENTAL TASKS

Major developmental theorists, such as ERIK ERIKSON, provide a description of the main tasks that a child must accomplish in order to move forward in their development. Erikson also provides a perspective on culture as it relates to the child's developmental tasks. "Each individual's life cycle unfolds in the context of a specific culture. While physical maturation writes the general time table according to which a particular component of personality matures, culture provides the interpretive tools and the shape of social situation in which the crisis and resolutions must be worked out."

INFANT TO 24 MONTHS**:** DEVELOPMENT OF SECURE ATTACHMENTS.

In this phase, an infant distinguishes between significant adults who care for them. They learn dependency and stability through their relationships. This is their foundation of learning to trust.

Key factors of this developmental stage are:

Developing trust occurs within a consistent, stable environment.
Developing secure attachments continues through reciprocal and trusting interactions.

For example, as the child cries, coos, or fusses, the parent is attentive and responds to baby's needs by providing affection and physical care.

Emotional attachments are based on continued frequent and appropriate social interactions. Attachment to each parent is formed by the first 6-7 months. Based on the development of primary attachment to parent(s), the infant is capable of forming multiple attachments. Infants with secure attachments have the foundation that enables them to explore their environment, engage in social interactions, and to soothe themselves.

TODDLER 2 YEARS-5 YEARS: DEVELOPMENT OF AUTONOMY

In this phase, the toddler learns to exercise their independence and begins to learn self control. This increases their confidence to function independently.

Key factors of this developmental stage are:

Increased physical mobility and social interaction
Increased independence and self-awareness
Interest in exploring their world
Continued development of attachment
Development of language and motor skills

For example, the child develops competency in crawling, toddling, walking, toilet training, and responding to limits.

Continued availability, sensitivity and responsiveness of the parent(s) is essential to develop these child competencies. The role of each parent is essential to the degree that each parent has been a part of the routine caregiving. The increased challenge of developing these competencies may create stress for the toddler who then seeks comfort and proximity to the parent(s). The security within the parent relationship creates a safe haven, thus begins their ability to self-regulate, develop empathy and self-esteem. These children develop resilience.

When a child has an insecure attachment, they have no safe haven. A parent who is ambivalent, inept, inconsistently responsive, or rejecting of the child creates mistrust in that relationship. If the attachment continues to be impaired, the child responds with confusion and fear. This may affect their ability to form social relationships and to regulate their attention, behavior and emotions.

For example, a parent distracted by chemical dependency, patterns of violence, or untreated mental illness may be unable to attend to or meet the needs of the child.

IMPORTANT CONSIDERATIONS:

- A toddler needs safety, protection, adequate nutrition and a schedule for eating and sleeping.
- A toddler's secure attachment may be affected by parental conflict, lack of continuity of care, inconsistent schedules, interruption of parental contact, frequent change of caregivers or extended travel time between homes.
- Be aware of cultural factors regarding family traditions and expectations.

2 TO 3 YEARS OF AGE: DEVELOPMENT OF AUTONOMY

In this stage there is a continuation of the development of autonomy with special attention to the toddler learning to separate and master separation anxiety.

Normal separation anxiety characteristic of this age includes: temper tantrums, clinging, crying, hiding and refusal to separate. Normal separation anxiety should not be misconstrued as an indicator of a deficient attachment or that something is wrong with the other parent.

Key factors of this developmental stage are:

- Increased sense of autonomy and independence.
- Increased self-assertion. For example, it's the 'I'll do it' stage, i.e., dressing, toilet training, feeding, with frustrations expressed through temper tantrums.
- Increased acquisition of language.
- Increased tolerance for separation from the attachment figures.

IMPORTANT CONSIDERATIONS:

Evaluate each parent's ability to tolerate and manage this stage of development.

3 TO 5 YEARS OF AGE: DEVELOPMENT OF INITIATIVE

During this phase, the child initiates and becomes purposeful in their activities. There is increased tolerance for separation from attachment figures. The child learns to develop peer relationships, and gender and racial identity are becoming established.

Key factors of this developmental stage are:

- Increased need for socialization with peers.
- Beginning of internalization of self-control.
- Increased language skills facilitates independence, social interactions, and expression of the child's feelings and needs.
- Cognition is literal and concrete.

IMPORTANT CONSIDERATIONS:

- Either a "lassaiz faire" (permissive) style or authoritarian style (overly restrictive) of parenting may impair the child's mastery of these tasks or may affect the self-regulation of their attention, behavior and emotions.

6 TO 11 YEARS OF AGE: DEVELOPMENT OF ACADEMIC SKILLS AND SOCIAL RELATIONSHIPS

During this phase, the child develops competencies in academic skills, peer and social relationships. They have achieved a greater tolerance for separation; can distinguish between reality and fantasy; and develop sexual identity.

Key factors of this developmental stage are:

- Increased independence in their social and physical world which allows separation from the parent for longer periods of time.
- Development of relationships outside of family, e.g., peers, teachers, coaches.
- Mastery of skills learned through social interactions with friends and through extracurricular activities.
- Development of morals and values.
- Learning discipline and co-operation.
- Cognition characterized by black/white thinking, fairness.

IMPORTANT CONSIDERATIONS:

- Self-esteem is a sense of who they are as a competent individual. This is learned and reinforced primarily through parent and peer interaction.
- Extracurricular activities are essential for the child's self-esteem.
- Gender and cultural identification continues to develop.

12 to 18 YEARS: DEVELOPMENT OF SEPARATION AND INDIVIDUATION

During this phase, the adolescent searches for their own autonomy by developing a strong sense of personal identity. During this transition to adulthood, they gradually separate from their parent(s) and family to align themselves with their peers.

Key factors of this developmental stage are:

- Developmental tasks of 6 to 11 years continue to be significant.
- Gender identification.
- Acceptance of physical changes.
- Focus on their sexuality.
- Accepting responsibility and consequences for their own decisions and behavior.
- Preparing to be involved in adult relationships.
- Increased internalization of self-control.

IMPORTANT CONSIDERATIONS:

Younger Adolescents 12-14 Years. There are certain social and behavioral characteristics that are prominent in this stage.

- Self-identity question: Who Am I?
- Frequent changes in social groups.
- Testing authority and limits.
- Contrary, emotionally reactive and moody.
- Wide range of physical development.
- Impulsive behavior and short-term gratification are pervasive.

Older Adolescents 15-18 Years. There are certain characteristics that are prominent in this stage.

- Self-identity question: What Will I Become?
- Acceptance of responsibility in various aspects of their life, including academics, work, volunteer service, and social relationships.
- Increased capacity for decision-making and accepting responsibility for these decisions.
- Increased independence may lead to increased risk to their health and safety.
- Parental involvement shifts from direct control to guidance of the adolescent.

SYMPTOMS OF GRIEF AND LOSS

The symptoms of grief and loss are often present in children when they experience a significant loss of relationship, whether through death, divorce, estrangement, relocation or abandonment. Multiple changes in the child's life also evoke similar reactions. Children experience loss through a change of home, neighborhood, school, daycare, friends, and their community. Although critical decisions need to be made at the time of divorce regarding property, financial assets and lifestyle, it is important to consider the child's adjustment to change and loss. The introduction of a "significant partner" of the parent at this time may also complicate and intensify their grief.

It is normal for children to evidence symptoms of grief and loss during family disruption. Each child's temperament and stage of development will have an impact on how they respond and adapt to loss. Too many changes in a short period of time may overwhelm the child's ability to adapt and cope. The greater the intensity and the longer the duration of grief symptoms may suggest that the child is experiencing undue distress. It is necessary to examine the parents' ability to be flexible and adaptive in their acceptance of their child's symptoms of distress.

SYMPTOMS OF GRIEF IN CHILDREN

Normal symptoms of grief are demonstrated in each phase of development.

Birth to 3 Years of Age:

- Changes in eating or sleeping habits.
- Increased crying, whining, clinginess.
- Increased fears, anxiety, anger.
- Inability to be soothed.

3 to 5 Years of Age:

- Behavioral problems.
- Social withdrawal – non-responsive.
- Physical or verbal aggression.
- Somatic complaints: headache, stomachache, constipation.
- Regression: baby talk, bedwetting.
- Overly compliant: "too good".
- Acting out: destructive behavior, temper tantrums.

6 Years to 12 Years of Age:

- Anxiety.
- Depression.
- Somatic complaints.
- Physical or verbal aggression.

- Change in social or behavior patterns.

13 Years to 18 Years of Age:

- Includes symptoms of distress as previously identified.
- Intensified behavior problems which may place the youth at risk: drug and alcohol, sexual acting out, anti-social activities.

IMPACT OF PARENTAL CONFLICT ON CHILDREN

When the families' equilibrium is disturbed by divorce, remarriage or relocation, it can take as long as two years for the family to stabilize. Often during this period of time, the parents are distracted and the social-emotional needs of the child may be compromised. The history of parental conflict may have preceded the separation/divorce and have negatively impacted the child. The degree of parental hostility and the intensity of anger displayed during the family disruption may be an indicator of the harmful environment within which the child has lived prior to the parental separation. Failure to protect the child from this aggression may suggest to the child that the parent is unavailable to them or out of control.

Parents in distress may not be sensitive to the child's inclination to absorb information containing negative attitudes, derogatory remarks or blaming statements about the other parent. Children have a literal understanding of parents' statements and expressions about the other parent: "we have no money for food", "she/he won't ever be back", "we'll be out on the street", "she's a witch", "he's a jerk." Consider the parents' ability to change this behavior. If a child has a conflict with divided loyalty, is the parent contributing to this issue or helping resolve this issue with the child? This is fertile ground for the child's rejection of one parent.

There are several ways children are exposed to negative information. They may listen to conversations between parents and/or between their parent and a friend or relative. In addition to eavesdropping, children might investigate legal documents that are available to them or that can be accessed on the computer. Although some adolescents may feel "entitled" to this information, it is the parents' responsibility to maintain good boundaries and protect their child/adolescent from this source of negativity.

Destructive parental conflict might be demonstrated in the following manner:

- Family violence.
- Parental threats, excessive control, and intimidation.
- Issues of divided loyalty.
- Aligning with one parent and rejecting the other parent.
- Use of child as message bearer.
- Use of child as parental confidant.
- Volatile behavior during the exchange of the child.
- Spreading gossip and rumors about the parent.
- Parent(s) acting out behavior at the child's extracurricular activities.

- Attempts to create an "alliance" with the caregivers, relatives, coaches and school community. This is detrimental to the other parent's participation in the child's life and seriously affects the child.
- Lack of parental communication about their child.
- Lack of sharing pertinent information or lack of shared decision-making regarding medical-dental care, school or extracurricular activities.

The impact of these types of destructive parental conflict will intensify the grief experienced by the child and manifest itself in cognitive, social, emotional and behavioral problems. Characteristic developmental responses of the child to parental conflict may include the following:

Toddler:

- Does not understand the content of conflict.
- Responds to the expressed feelings and the mood of the parent.
- The primary emotional response is fright.

Preschooler:

- Beginning to understand the content of parents' argument.
- May believe that what they hear is true ("Daddy/Mommy is bad").
- Typical response is worry.
- May feel responsible for divorce or conflict due to egocentric thinking.

Younger Elementary:

- Often feel in the middle of parents' conflict (parents may expect child to take sides).
- May be questioned about the other parent and not have the ability to refuse to respond.
- Often will tell each parent what the child thinks he/she wants to hear thereby provoking additional conflict.

Older Elementary:

- Increased interest in determining parental fault.
- May have detailed knowledge of disputed adult issues such as finances, extramarital affairs, etc.
- May actively seek information about disputed adult issues and reach erroneous conclusions.
- May judge parental behavior negatively and refuse to visit the parent, talk to them on the phone, or invite them to their events.

Adolescent:

- Less predictable response to conflict.
- May lead to high risk acting out behavior.
- May show renewed interest in non-primary parent after years of estrangement.
- May be unable to separate from family or may separate from family prematurely.
- May exploit parental conflict for their own purpose.

SPECIAL NEEDS CHILDREN

A comprehensive assessment of a family with a special needs child would include an understanding of the impact of the needs of the child on the parent, as well as the siblings. An evaluation of the financial, physical, social, and emotional impact both short and long term needs to be considered. Often these children require continued medical, dental, educational or therapeutic interventions to maintain their health. Financial or child-care assistance is frequently needed to offset the myriad of demands made upon the parent. This might include, for example, taking time off work for medical/dental or therapy appointments; respite care for the child or babysitters for the sibling(s).

Each parent's knowledge, acceptance and understanding of the medical and/or psychological diagnosis needs to be evaluated. The parent's motivation and ability to implement the designated medical treatment plan or educational plan for the child needs to be addressed. Parental disagreement about the diagnosis or recommended treatment plan may suggest a parent's denial, rejection or misunderstanding of the inherent physical, mental or neurological problems of their child. An assessment of the parents' ability to independently increase their knowledge of the disability is important. Often after a parent has consulted with the pediatric neurologist, family physician, mental health therapist or educational specialist, they are more amenable to implementing a treatment plan.

When there are siblings, consideration might be given to a more flexible residential schedule to accommodate their needs. Such flexibility would allow each parent to spend individual time with either the siblings or the special needs child.

An important aspect of the evaluation is the history of the parents' attitude and behavior toward this child and their capacity to parent a unique and often complex child. Although parenting styles vary, the capacity of a parent to discipline a special needs child effectively is important. Does the parent have the flexibility and adaptability to modify their discipline based on the needs and temperament of this child?

Usually a special needs child is very responsive to a consistent, structured home life. The patterned predictability and physical stability of the home is internalized as social and emotional security.

TYPES OF SPECIAL NEEDS CHILDREN:

Psychological/Biological:

- Mood disorders: depression, anxiety, bipolar, schizophrenia

Neurological:

- Attention Deficit Disorder (ADD) with hyperactivity (ADHD)
- Learning disability: visual, auditory, spatial cognitive processing

Medical:

- Juvenile diabetes
- Allergies – necessitates medication or special diet
- Chronic physical illness, e.g.: asthma, cystic fibrosis, muscular dystrophy
- Physical disability

Developmental:

- Developmental delay
- Pervasive developmental disorder: Aspberger Syndrome, Autism, Tourette's

The demands of a special needs child may be life-long, complex and demanding in every aspect of family life. It is important that the parenting plan provide for proportional responsibility for the long-term needs of the special needs child. Referring a parent to appropriate resources specific to the special needs of the child might help the parent to interact effectively with this child. Resources might include professional consultation, parent education, or family counseling.

IMPACT ON THE CHILD OF AN ABSENT PARENT

There are several ways a parent can be absent from their child's life.

- A parent who is physically absent and non-responsive to the needs of the child.
- A parent who has a pattern of sporadic contact with the child.
- A parent who is "physically present" yet by the nature of their own addiction or untreated mental illness, imprisonment and/or severe personality disturbances is inconsistently responsive to the child.

Another type of parental absence could result from prolonged separation to which the child and family has adapted. Such separations may be due to military deployment or extended work assignments. It is important to consider the unique aspects of these family situations, as well as, the child's developmental needs. A child's ability to adapt to these scheduled absences is more likely to be positive than negative.

In some situations, prolonged separation may result from CPS investigations of allegations of child abuse or neglect. Whether these allegations result in legal action or not the child has been affected by the disruption in the family relationships caused by parental absence.

There is also the situation of parental absence resulting from a child's rejection of the parent which may be characterized by the child's denigration of their parent out of proportion to the parent's behavior. This results in the systematic rejection of that parent. These children are considered to be alienated from their parent. A child would not be considered alienated if they reject a parent who has been neglectful or abusive to them or has engaged in family violence.

The impact of an absent parent may create feelings of abandonment and rejection in the child. This is often internalized by the child as feelings of blame, guilt, anger, hurt or confusion. This absence may wound the identity of a child and create a pervasive loss of self-acceptance. The child questions "What is wrong with me? Does he/she remember me?" Personal embarrassment may occur in social situations at school or in the community when questions are asked that can't be answered. For example, a friend asks "where does your parent live? When do you see them? How come . . .? What's the matter with them?" Other examples of acutely painful reminders of parental absence occur with birthdays, holidays or special achievements awarded to the child. The adult's pervasive lack of interest in the child or knowledge of their life is internalized by the child as self-doubt about their value. Some children may idealize or fantasize about the absent parent, as well as, worry about them.

Some factors to consider when evaluating the impact of an absent parent on a child include:

- History of parenting prior to separation.
- Age and developmental level of child.
- Reason and type of absence.
- Responsible parent's adaptation and attitude toward absent parent.
- Economic and social support to the family.
- Absence is re-experienced periodically at different developmental stages.

The degree and intensity of impact of parental absence on the child may be mitigated by the following factors:

- Healthy acceptance by the responsible parent.
- Healthy sibling relationship.
- Supportive gender role models.
- Appropriate participation of extended family members of either parent.
- Nurturing supportive step-parents.
- Child's self-acceptance fostered by their own achievements.
- Availability of adequate social and economic resources.

Even with the consideration of mitigating factors, there may be residual vulnerability within the child which may be manifested by expressions of anger, rage, hurt, and sadness.

When there has been a prolonged absence between the parent and child and the parent requests residential time with the child, it may be necessary to make recommendations to the court regarding re-unification. Consideration may be given to the following factors:

- Reason, frequency and duration of parental absence.
- Intent and motivation of returning parent.
- Current age and developmental stage of the child.
- Age and developmental stage at the time of absence.
- Security of child in their present family and the disruptive impact of reintroduction of the parent.
- Residential parent's capacity to support the re-unification of the parent and child.

Often it is necessary to recommend either supervised visitation, therapeutic visitation, or re-unification therapy. There may be situations where a combination of services are needed.

Supervised visitation offers a safe, secure child-focused re-introduction to an absent parent. It is offered in a home, office or in the community and the visitation supervisor provides written observation of the parent/child interaction. Professional supervision may be recommended if the absent parent is a stranger to the child. In some circumstances, a family or friend might be an appropriate supervisor. It is recommended that an agreement be signed delineating expectations of the supervision process including cost and duration.

Therapeutic visitation is a form of supervised visitation provided by a master's degree or doctoral level therapist. The therapeutic supervisor provides general parenting guidance, models appropriate parenting behavior, and intervenes to correct inappropriate behavior. They may facilitate difficult conversations related to the parental absence. They may also help the child or adolescent express their thoughts, opinions and preferences to their parent.

Reunification counseling offers a therapeutic environment. The mental health counselor facilitates the expression of thoughts, feelings and behavior between the parent and child. The reunification therapist offers to teach the parents, to assess the child's reaction to the parents, and to critically evaluate the potential of the parent/child relationship. Professionals providing these services need to be experienced in the dynamics of complex family matters. Reunification therapists who provide these services have a master's degree or doctoral level degree.

Some factors to be considered when recommending supervised visitation, therapeutic visitation or reintegration therapy include: identify the purpose, the intended outcome, and the length of time of the service. The cost, frequency of service and logistics of transportation also need to be addressed. Selection criteria of an appropriate professional should include their experience in high conflict or complex family situations.

IMPACT OF NEW RELATIONSHIPS

Children are adjusting to the parental separation, divorce and residential schedule, all of which require physical, social and psychological adjustments. Each child's post separation/divorce reaction is influenced by their age, temperament and resilience.

Although parents may feel ready to begin a new relationship, it is important to keep their adult relationships separate from the child. The premature introduction of a new person further complicates the child's adaptation to each reorganized family. There are serious issues that frequently arise when a parent fails to give the child the time they deserve and the result may be that the child's need for their parent's attention is compromised. This might be another situation during which the child experiences divided loyalties between their parents. There may be secrecy and lies surrounding the new relationship which creates unnecessary confusion, hurt and anger. The child 'can't win'—what do they tell or share or deny to the other parent?

Introduction of a parent's new relationship is appropriate when there has been sufficient time to create consistency and stability in their separate family homes. Parents may ask for guidance on how or when to introduce a new relationship to the child. Discussion of the following ideas may be beneficial to this process:

- Inform the child about the person
- Participation in shared activities: a meal, a movie, or ice cream
- Maintain individual parent/child time
- Inform the other parent of the presence and involvement of this person
- Inform the child that the parents have shared this information
- Expressions of neutrality and tacit acceptance offered by the other parent are helpful to the child
- Willingness of parent to listen and respect the child's opinion about the relationship yet the parent needs to be responsible for their own decisions

BLENDED FAMILIES

When the parent remarries, it may take several years to "blend" together as a stepfamily. A stepparent may also have children from a previous relationship and the couple might have their own children. Each family has a particular culture with traditions, communication styles, and history. Some factors to consider when assessing how effectively the stepfamily has been established include the following:

- Awareness of parenting styles
- Family rules and rituals
- Discipline issues – who disciplines whom? How?
- Expectations of the parents

Adults need to be respectful of the child's acceptance of the stepparent. Issues such as divided loyalty, child's protection of the "single" parent, alliance with a disapproving parent may jeopardize this process. If the child feels pressured prematurely to call the adult "Mom" or "Dad" their compliance might mask their confusion. Higher compatibility between the family values regarding academic expectation, socialization, communication, discipline and chores will promote each family's stability. If there is disparity between the parents' values and lifestyles, friction and chaos may result. There are special features of the stepfamily which should be

considered when evaluating the impact of these blended family relationships on the child. The quality of the relationships between the children who are step-siblings or half-siblings depends upon many factors which may impact the child:

- Age and stage of development of child
- Personality and temperament of child
- Birth order of child
- Compatibility of interests in their lifestyle
- Quality of relationship with each parent
- History of relationship between the children

Some children share a stable, consistent sibling relationship with their step- or half-siblings and do not distinguish between these labels. Other children express discontent when they have nothing in common with another child and are "forced" to share their possessions, room or time with their parent. Due to differences in residential schedules, some children do not develop a significant relationship with step- or half-siblings or the age span is too great, e.g., 10 years or more. Often there are latent jealousies and competitions between the adults that impact the children. Whether covert or overt these hostilities create complicated social and emotional problems for the child.

CHILD AND FAMILY THERAPY

During the process of a family law matter it might become necessary to refer the child to mental health counseling or to evaluate the child therapy already being provided. Therefore, it is important to understand a clinician's approach to working with children or adolescents.

A clinical assessment which is the beginning of therapy must (if possible) include an interview with both parents, either separately or together. A child is seen together with the parents and/or siblings, as well as, individually to enable a clinical treatment plan to be developed. This plan is then discussed with the parents. An assessment typically includes:

- Medical history
- Developmental history
- Educational history
- Social History
- Family History

Since a young child needs cognitive functioning and expressive language to be involved in therapy, child therapy does not usually begin earlier than 3 years of age. Play therapy is employed for young children to engage in imaginative play in a non-directive manner. For children under age 3 years, the focus of therapy is to improve the parenting skills of the adult. Child and family therapy with any age child may also include parent education and training.

Confidentiality in therapy is the clinician's ethical obligation to maintain the client's privacy. The privilege of therapy is the right to permit disclosure of therapeutic information. That privilege belongs to the parents of children younger than age 12. Additionally, the consent of

children 12 years and older is required to access clinical records. The person holding the privilege must sign a release that permits disclosure of information. There are limits to confidentiality which include legally mandated reports of harm to self or others, or child abuse or neglect.

Consultation with a therapist might elicit the following information:

- Date of assessment
- Dates of therapy sessions
- Referral question
- Presenting problem/focus of concern
- Diagnosis and treatment plan
- Participation of parents
- Concerns of the therapist
- Treatment recommendations and progress of child

An attorney needs to listen critically in order to analyze and determine the objectivity and professionalism of the therapist. Some indication of the therapist's loss of professional objectivity may include:

- Alignment with one parent.
- Advocacy for the child/adolescent.
- Making recommendations without valid foundations.

The therapist should not be asked for recommendations regarding the parenting plan because such recommendations are outside the scope of child therapy. The information and recommendations by the therapist regarding the child could include:

- Child's attachment to each parent.
- Temperament.
- Adaptability/resilience.
- Coping mechanisms.
- Emotional equilibrium.
- Vulnerability.
- Need for therapy.

INTERVIEWING CHILDREN IN DEVELOPMENTALLY APPROPRIATE WAYS

During the process of a family law matter, it may become necessary to appoint a guardian ad litem, parenting evaluator, or in collaborative law, a parent/child specialist. These professionals should be guided in their child and family interviews by their understanding of child development. They will interview and observe the child and their family. The interviews and observations include each parent/child relationship, sibling relationships, as well as, individual

interviews with each adult and child in the family. In preparation for child interviews, it would be helpful to understand how the age and the child's developmental stage influences their social, emotional, and cognitive presentation. For example, the age of a child determines their understanding of time, dates, places, duration and frequency. The language, attitude, and behavior of a child may also reflect serious issues such as adult coaching, role reversal (child caretaking the parent), alienation, and pseudo adult behaviors.

An effective interview with the child will include the following:

- Reassure the child/adolescent that they are not making the decisions although their ideas and thoughts will be considered.
- Be aware that adolescents might have conflicting agendas.
- Establish rapport with them.
- Explain the purpose of the interview.
- Clarify there is no confidentiality.
- Offer privacy to child (interview child separately from siblings and parents).
- Adapt vocabulary, sentence structure, and content to the developmental level of the child.
- Begin the interview with general, open-ended questions and move toward specific questions if necessary.
- Offer appreciation to the child for participation.

RESEARCH TOPICS RELATED TO DEVELOPMENTAL ISSUES

There are two critical components to be considered when structuring a residential schedule: the developmental needs of the child and the capability of the parent to meet those needs. Developmental research is a primary source of information concerning the needs of children. This research provides information about:

(1) What constitutes parental competency. The research provides information relating to several areas of parental psychological health.
(2) The functioning of parents with limitations such as mood disorder, substance abuse, or personality disorders.
(3) Healthy family functioning and effective parenting.
(4) Factors that optimize a child's health or put a child at risk.

This general research information must be balanced with each family's unique characteristics.

For example, research strongly supports the benefits of siblings living together, but in certain family situations factors such as significant age spread between siblings may suggest separation of siblings.

The developmental literature, as well as the divorce literature, has presented two concepts worth review. One is that of *psychological parent.* The other is the distinction between *primary* and *secondary attachment figures.*

The definition of psychological parent includes ideas about which parent fulfills the child's psychological need for stability, comfort, affection and security on a day-to-day basis and meets

the child's physical needs. Previously the concept of psychological parent was presented by the clinical work of Goldstein, Freud, and Solnit in 1973. They assumed that a child had only one psychological parent and recommended that this parent have sole custody. It was posited that the child's separation from the psychological parent would disrupt the child's routine, diminish trust, and increase anxiety. Goldstein, Freud, and Solnit did not derive their concept of psychological parent from research, rather they applied theoretical concepts from their clinical experience.

In contrast to this clinical base, the developmental research by Warshak (1986), Lamb (1997), and Parke (1981) indicates that infants develop a close attachment to both parents simultaneously by age 6 months. Furthermore, the child thrives when they are able to establish and maintain these attachments.

While the concept of psychological parent as presented by Goldstein, Freud, and Solnit (1973) is attractive on the surface, there is no empirical evidence upon which an attorney may rely. For example, it does not inform us how the definition of psychological parent reflects the realities of that parent-child relationship. It also does not provide a basis for decision-making for parenting plans when the child experiences both parents as psychological parents. Therefore, we rely on research based behaviors that suggest the quality of the parent/child relationship.

As for the distinction between primary and secondary parental roles, this does not so much refer to quality of care provided by each parent, as in primary is better than secondary, rather it refers to the differences between what is typically being provided to the child by each of the two parents. Each parent provides unique and essential components for child development and the child comes to rely on each parent for what they provide.

Another area of interest in research is overnights for young children. The current thinking suggests that both parents be considered for overnight time *if* both parents have been a frequent and consistent presence for the child, as well as, informed and attentive as caregivers. The frequency and duration of parental contact, as well as overnight stays, serve to enhance the attachment between parent and child. The presence of the parent provides sufficient emotional security to allow the infant or toddler to separate from the other parent. During a divorce, the child is doing exactly this: taking their leave from one attachment figure to be in the care of the other parent.

Research shows that children do best when they maintain good, close relationships with both parents following divorce. Barring restrictions, if both parents are capable of providing care there is not, at this time, basis in research to automatically restrict the infant or toddler's overnight time with the parent.

In the past, clinical experience and conceptualization of attachment and parent-child separation, presented by Goldstein, Freud and Solnit (1973), has supported the view that infants and toddlers should not spend overnights away from their primary parent figure. The research from attachment studies, child development, and divorce literature, as opposed to clinical experience and conceptualization, offers contrasting opinions about how infants and toddlers fare with overnight residential time.

Kelly and Lamb's (2000) research supports the view that infants become attached to both parents at six to seven months. They also point out that infants and toddlers develop their attachments to caregivers depending on the infant/toddler need and the particular capacities of each caregiver. They add that it is not so much the amount of residential time spent together, as it is the kind of interaction that comes with longer stays and overnights.

The contrasting opinion comes from research by Solomon and George (1999). They argue against Kelly and Lamb's conclusion that the kinds of activities experienced by the infant and toddler during overnights serve to enhance attachment. They found that infants appeared disorganized in their attachment to one or both parents.

There are important limitations to the Solomon research. For example, many of the infants had never lived with their fathers previously. Furthermore, some of the infants had had repeated and prolonged separations from their fathers.

DEVELOPMENTALLY BASED RESIDENTIAL SCHEDULES

Residential schedules are most supportive of children and families if they are developmentally based and if they take into consideration the unique characteristics of each child and their parents. In all families there are dynamics which present the unique signature of the family.

Parents who create a stable, healthy family may have children who are resilient and adaptable to change. Parents who create a family with marked instability which is caused by violent, unpredictable or inconsistent behavior have an adverse effect on their children.

Therefore, the residential schedules for relatively healthy families may follow the guidelines presented below. In unhealthy or high conflict families the developmentally based guidelines may need to be adjusted according to the child and family situation.

There are many characteristics of parents and children described in this section which may affect the frequency and duration of parent-child contact. Although presented within one developmental age group, these characteristics are relevant to all age groups.

The ages presented in these developmentally based residential schedules are estimates. Children's normal development may vary by 6 to 9 months.

Residential schedules may be subject to statutory limitations and restrictions.

INFANT THROUGH 2 YEARS:

The infant and toddler should have consistent, frequent and predictable access to both parents to build and maintain secure attachments. This is likely to mean that access for the infant and parent with whom they are spending less time should include three or four times a week for a

few hours at a time. This could be accommodated at child care, the parent's home or a relative's home.

Previously recommendations for overnights for young children infant through 2 years were based on the premise that the 'primary' residential parent afforded the child stability, consistency and structure needed for their early development. The 'secondary' residential parent was offered frequent brief visitations, longer periods of time on weekends, and no overnights.

Historically, family organization and parental roles have changed. The current generational influences evidence an increase in both parents working, an increase in use of child care for infants and toddlers, and an increase in the father's involvement in the physical, social, and emotional care of infants/toddlers. The challenge presented is how to create a balance between the infant/toddler's need for a safe, secure environment and each parent's ability to provide frequent physical and social interactions.

The decision about overnights for infant/toddlers may be considered if each parent has been a frequent, consistent presence for the child, as well as, an informed and attentive caregiver. Other important factors that might influence a decision about overnights include: physical health, child's temperament, geographical proximity, parental cooperation, and effective communication.

If the adults have little or no history of a parenting relationship, then the adult's maturity, temperament, social support system and ability to learn parenting skills may be considered. Parents with a limited history of relationship with each other may present complicating factors:

- Immaturity
- Intense volatile relationship
- Antagonistic family relationships
- Lack of contact between parent and infant

For these parents who have had a limited relationship with each other, it may be difficult to formulate a residential plan. The parent's sense of responsibility toward the child and their potential for committing to a gradually changing child centered plan should be assessed. The infant/toddler will not be able to maintain their attachment to a parent who is an infrequent presence, such as those parents who are geographically distant or physically absent.

RECOMMENDATIONS FOR INFANT THROUGH 2 YEARS:

- Consistent, frequent, predictable access to each parent.
- Access 3-4 times weekly for a few hours at a time.
- Single, non-consecutive overnights once or twice a week.

PRESCHOOL: 3 YEARS THROUGH 5 YEARS:

The toddler's security within the parental relationship creates a safe haven which contributes to their ability to self soothe, develop empathy, and self-worth. Normal separation anxiety

characteristic of this age includes: temper tantrums, clinging, crying, hiding and refusal to go with the other parent. When there is secure attachment to both parents separation anxiety is lessened. Additional factors for consideration in the decision about frequency and duration of extended residential care include:

- Child's temperament
- Child's adaptability to change
- Strength of child's relationship to parent
- Parents' capabilities
- Parent's ability to cooperate
- Effective parental communication
- Consistency of schedule
- Number of siblings
- Geographic distance

Frequency of parental contact continues to be important at this young age. Each parent needs to be cognizant of the child's schedule for eating, sleeping and play and follow a similar schedule.

Between ages 3 and 4 years, consider up to two consecutive overnights on alternate weekends with a weekly mid-week visit. In some situations, the mid-week visit opposite the weekend may be an overnight.

Parental participation at the child's preschool/school is an additional way to provide the opportunity for child and parent contact. Exchange of the child at preschool minimizes the transitions and decreases the opportunity for negative interaction between the parents. For situations where the child is cared for at home transitions will likely occur at the parental home.

Between ages 4 and 5, consider up to two or three consecutive overnights on alternate weekends, as well as, a weekly evening visit. The opposite alternating week the evening visit may be extended to an overnight. The relationship between child and parent depends on frequency, which in turn is a function of proximity. The relationship will not be maintained solely by vacation or holiday get-togethers.

RECOMMENDATIONS FOR 3 YEARS THROUGH 5 YEARS:

- Age 3 years: up to 2 consecutive overnights on alternate weekends.
- Ages 4 and 5 years: 2 to 3 consecutive overnights on alternate weekends.
- Evening visit may include an overnight on alternating weeks.
- Weekly evening visit.
- Exchanges may take place at child care.
- Parents' participation in pre-school/school may increase contact.
- Parents follow a similar schedule for meals, naps, bedtimes.

ELEMENTARY SCHOOL: 6 YEARS THROUGH 11 YEARS:

These children can extend the time of separation from their parents, yet still need frequent contact with them. The developmental needs of the child for independence and social interaction are met through school, as well as at home. Each parent needs to commit to maintain the agreed-upon extracurricular activities.

These children can accommodate to a variety of residential schedules which reflect extended time and shared parenting. The schedule in this age range may take the form of alternating extended weekends from Thursday or Friday to Monday delivery to school or alternating extended weekends of Thursday through Sunday with one evening or overnight on the week opposite the extended weekend. In some families, a residential schedule of alternating and near equal time in both homes may be appropriate.

This residential schedule reflects a co-parenting situation which is an arrangement in which both parents are actively involved in their child's life, share in child activities, and problem-solve the normal challenges of parenting. Parents need to demonstrate cooperation with each other, effective communication, and both households should have somewhat similar and therefore predictable schedules.

Parents who have a moderate degree of difficulty cooperating and communicating with each other can be successful in parallel parenting. This arrangement is structured to minimize contact between the parents. There is limited flexibility and a structured detailed residential schedule is needed.

At this age, the child's participation in outside activities must be supported, as it is essential to the child's development. Additionally, these activities provide frequent opportunities for parents to be involved with their child outside the residential schedule.

RECOMMENDATIONS FOR 6 YEARS THROUGH 11 YEARS:

- Alternating weekends: Friday to Sunday.
- Alternating extended weekends: Thursday to Sunday or Monday.
- One evening or overnight on the week opposite of the alternating weekend.
- Alternate week or near equal time in both homes.

MIDDLE SCHOOL: 12 YEARS THROUGH 14 YEARS:

The residential schedule may be structured around extended weekends with flexibility to accommodate the young adolescent's increased social needs. For the young adolescent between 12 and 14 years, their friendships and activities must be given priority because of the importance of these activities in the mastery of their developmental tasks. Parenting plans need to be structured so that the agreed-upon activities are maintained in each home. The parents' relationship with the young adolescent develops as they participate with the adolescent by

transporting them to and from activities, participating directly with them through extracurricular activities and volunteering to assist with parties, sports, music and drama.

RECOMMENDATIONS FOR 12 YEARS THROUGH 14 YEARS:

- Extended weekends with flexibility to adapt to young adolescent's needs and activities.
- Extended shared residential plans: 3 to 4 overnights on alternate weekends; week on/week off schedule.
- Mid-week visits may include an overnight.

HIGH SCHOOL: 15 TO 18 YEARS:

From age 15 to 18 years, adolescents are increasingly involved outside the home. In addition to the aforementioned activities, they are more involved in their social lives, working and volunteering. Increased autonomy is associated with the increased responsibilities they assume as they continue to develop their identity. Parents support this developmental stage by considering the preferences of the adolescent and adapting a schedule compatible with their needs. This does not mean that the adolescent goes between homes solely at their discretion. There continues to be a need for parents to support the adolescent's independence while monitoring their whereabouts. The consistency of rules and curfews between homes and the consistency of contact is important at this stage.

RECOMMENDATIONS FOR 15 TO 18 YEARS:

- May want increased involvement with the parent with whom they have spent less residential time.
- May want increased time with same gender parent.
- May prefer one home to avoid confusing their friends.
- May prefer evenings or weekends with the other parent.
- May increase or decrease frequency of weekend residential time.
- May prefer flexibility for mid-week visits.
-

HOLIDAYS, SCHOOL BREAKS AND SUMMER VACATIONS:

School vacations include winter, spring and sometimes mid-winter break. Summer vacation is typically 8-10 weeks. Holidays are designated legal holidays and special occasions might include religious observances. The schedule for school breaks and vacations may digress from the child's usual schedule to include longer vacation periods. It is important that this exception to the usual residential schedule is still related to the developmental needs of the child. For example, preschool age children may be able to accommodate 5-7 days for a vacation period. An elementary age child might accommodate longer periods of uninterrupted time. An adolescent may accommodate extended time during the summer.

RESOURCES

Erikson, E.H. (1963), Childhood & Society, New York: Norton.

Gould, J.W. (1998), Conducting Scientifically Crafted Child Custody Evaluations, Thousand Oaks: Sage.

Javier, R.A. and Herron, W.G. (1998), Personality Development and Psycho Pathology in Our Diverse Society, New Jersey: Jason Aronson.

Johnston, J. and Roseby, V. (1997), In the Name of the Child, New York: The Free Press.

Lamb, M.E. and Kelly, J.B. (2001), Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringer, Family Courts.

Parke, R.D. (1981), Fathers, Cambridge, MA: Harvard Press.

Solomon, J. and Biringer, Z. (2001), Another Look at the Developmental Research, Family Courts Review, 39, 365-371.

Stahl, P.M. (1999), Complex Issues in Child Custody Evaluations, Thousand Oaks: Sage Publications.

Warshak, R. (1986), Father Custody and Child Development, Behavioral Science and The Law, 4, 185-202.

Warshak, R. (2000), Blanket Restrictions: Overnight Contact Between Parents and Young Children, Family and Conciliation Courts Review, 38, 422-445.

CHAPTER 8
WHAT A GUARDIAN AD LITEM SHOULD KNOW ABOUT CHEMICAL ABUSE/DEPENDENCY

WHAT A GUARDIAN AD LITEM SHOULD KNOW ABOUT CHEMICAL ABUSE/DEPENDENCY

Submitted by Robert S. Geissinger, BS, CCDCIII, CDP

INTRODUCTION

This chapter will assist the Guardian Ad Litem with:

- Defining chemical abuse/dependency assessment and treatment terminology
- Defining and identifying basic common indicators of chemical dependency
- Identifying how and when to get chemical dependency professionals involved
- Identifying the impact on children of parent's specific behavior as affected by chemical dependency or chemical abuse
- Identifying dangers presented to children
- Locating local and state resources for chemical abuse/dependency assessment and treatment
- What to expect from chemical abuse/dependency assessment and treatment professionals
- How to overcome confidentiality barriers and access information related to chemical abuse/dependency assessment and treatment
- Funding for chemical abuse/dependency assessment and treatment
- An understanding of parent/child participation in support groups
- The utilization of working agreements with chemical abuse/dependency assessment and treatment professionals
- Awareness of conflicting responsibilities between the Guardian Ad Litem and chemical abuse/dependency assessment and treatment professional

I. DEFINING CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT TERMINOLOGY:

As defined in Washington Administrative Code (WAC) 388-805-005 pertaining to certification requirements for chemical dependency service providers, effective June 17, 2006:

"Administrator" means the person designated responsible for the operation of the certified treatment service.

"Adult" means a person eighteen years of age or older.

"Alcoholic" means a person who has the disease of alcoholism.

"Alcoholism" means a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial. Each of these symptoms may be continuous or periodic.

"Approved supervisor" means a person who meets the education and experience requirements described in WAC 246-811-030 and 246-811-045 through 246-811-049 and who is available to the person being supervised.

"Certified treatment service" means a discrete program of chemical dependency treatment offered by a service provider who has a certificate of approval from the department of social and health services, as evidence the provider meets the standards of WAC 388-805.

"Chemical dependency" means a person's alcoholism or drug addiction or both.

"Chemical dependency counseling" means face-to-face individual or group contact using therapeutic techniques that are:

(1) Led by a chemical dependency professional (CDP), or CDP trainee under supervision of a CDP;

(2) Directed toward patients and others who are harmfully affected by the use of mood-altering chemicals or are chemically dependent; and,

(3) Directed toward a goal of abstinence for chemically dependent persons.

"Chemical dependency professional" means a person certified as a chemical dependency professional by the Washington state department of health under chapter 18.205 RCW.

"Child" means a person less than eighteen years of age, also known as adolescent, juvenile, or minor.

"Clinical indicators" include, but are not limited to, inability to maintain abstinence from alcohol or other non-prescribed drugs, positive drug screens, patient report of a subsequent alcohol/drug arrest, patient leaves program against program advice, unexcused absences from treatment, lack of participation in self-help groups, and lack of patient progress in any part of the treatment plan.

Author's note: The misuse (other than as prescribed) of prescription drugs can also be a clinical indicator.

"County coordinator" means the person designated by the legislative authority of a county to carry out administrative and oversight responsibilities of the county chemical dependency program.

Author's note: Each county in the state of Washington has appointed a County Alcohol/Drug Coordinator. The County Coordinator is responsible for the disbursement of funds for the purchase of substance abuse and dependency treatment in his or her respective county. The Coordinator usually works with a County Citizens Advisory Group to make service decisions. The Directory of Certified Chemical Dependency Services in Washington State (also known as the "Greenbook) includes the name and contact information for alcohol/drug coordinator for

each county.

"Danger to self or others," for purposes of WAC 388-805-520, means a youth who resides in a chemical dependency treatment agency and creates a risk of serious harm to the health, safety, or welfare to self or others. Behaviors considered a danger to self or others include:

(1) Suicide threat or attempt;

(2) Assault or threat of assault; or

(3) Attempt to run from treatment, potentially resulting in a dangerous or life-threatening situation.

"Detoxification" or "detox" means care and treatment of a person while the person recovers from the transitory effects of acute or chronic intoxication or withdrawal from alcohol or other drugs.

"Discrete treatment service" means a chemical dependency treatment service that:

(1) Provides distinct chemical dependency supervision and treatment separate from any other services provided within the facility;

(2) Provides a separate treatment area for ensuring confidentiality of chemical dependency treatment services; and

(3) Has separate accounting records and documents identifying the provider's funding sources and expenditures of all funds received for the provision of chemical dependency treatment services.

"Drug addiction" means a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. Drug addiction is characterized by impaired control over use of drugs, preoccupation with drugs, use of a drug despite adverse consequences, and distortions in thinking, most notably denial. Each of these symptoms may be continuous or periodic.

"Governing body" means the legal entity responsible for the operation of the chemical dependency treatment service.

"Opiate substitution treatment program" means an organization that administers or dispenses an approved medication as specified in 212 CFR Part 291 for treatment or detoxification of opiate dependence. The agency is:

(1) Certified as an opioid treatment program by the federal Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration;

(2) Licensed by the federal Drug Enforcement Administration;

(3) Registered by the state board of pharmacy;

(4) Accredited by an opioid treatment program accreditation body approved by the federal Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration; and

Authors note: The state of Washington Division of Alcohol and Substance Abuse is a federally approved accreditation body.

(5) Certified as an opiate substitution treatment program by the department.

"Patient" is a person receiving chemical dependency treatment services from a certified program.

"Patient contact" means time spent with a patient to do assessments, individual or group counseling, or education.

"Patient placement criteria (PPC)" means admission, continued service, and discharge criteria found in the patient placement criteria for the treatment of substance-related disorders as published by the American Society of Addiction Medicine (ASAM).

"Probation assessment officer (PAO)" means a person employed at a certified district or municipal court probation assessment service that meets the PAO requirements of WAC 388-805-220.

"Probation assessment service" means a certified assessment service offered by a misdemeanant probation department or unit within a county or municipality.

"Qualified personnel" means trained, qualified staff, consultants, trainees, and volunteers who meet appropriate legal, licensing, certification, and registration requirements.

"Registered counselor" means a person registered by the state department of health as required by chapter 18.19 RCW.

"Self-help group" means community based support groups that address chemical dependency.

"Service provider" or "provider" means a legally operated entity certified by the department to provide chemical dependency services. The components of a service provider are:

(1) Legal entity/owner;

(2) Facility; and

(3) Staff and services.

"Substance abuse" means a recurring pattern of alcohol or other drug use that substantially impairs a person's functioning in one or more important life areas, such as familial, vocational, psychological, physical, or social.

"Supervision" means:

(1) Regular monitoring of the administrative, clinical, or clerical work performance of a staff member, trainee, student, volunteer, or employee on contract by a person with the authority to give directions and require change; and

(2) **"Direct supervision"** means the supervisor is on the premises and available for immediate consultation.

"Treatment plan review" means a review of active problems on the patient's individualized treatment plan, the need to address new problems, and patient placement.

"Treatment services" means the broad range of emergency, detoxification, residential, and outpatient services and care. Treatment services include diagnostic evaluation, chemical dependency education, individual and group counseling, medical, psychiatric, psychological, and social services, vocational rehabilitation and career counseling that may be extended to alcoholics and other drug addicts and their families, persons incapacitated by alcohol or other drugs, and intoxicated persons.

"Urinalysis" means analysis of a patient's urine sample for the presence of alcohol or controlled substances by a licensed laboratory or a provider who is exempted from licensure by the department of health:

(1) **"Negative urine"** is a urine sample in which the lab does not detect specific levels of alcohol or other specified drugs; and

(2) **"Positive urine"** is a urine sample in which the lab confirms specific levels of alcohol or other specified drugs.

"Youth" means a person seventeen years of age or younger.

ADDITIONAL DEFINITIONS:

As defined in Revised Code of Washington (RCW) 70.96A.020 pertaining to Treatment for alcoholism, intoxication, and drug addiction, current as of December 9, 2007.

"Designated chemical dependency specialist" or "specialist" means a person designated by the county alcoholism and other drug addiction program coordinator designated under RCW 70.96A.310 to perform the commitment duties described in RCW 70.96A.140 and qualified to do so by meeting standards adopted by the department.

"Gravely disabled by alcohol or other psychoactive chemicals" or "gravely disabled"

means that a person, as a result of the use of alcohol or other psychoactive chemicals: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by a repeated and escalating loss of cognition or volitional control over his or her actions and is not receiving care as essential for his or her health or safety.

"Incapacitated by alcohol or other psychoactive chemicals" means that a person, as a result of the use of alcohol or other psychoactive chemicals, is gravely disabled or presents a likelihood of serious harm to himself or herself, to any other person, or to property.

"Intoxicated person" means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol or other psychoactive chemicals.

"Professional person in charge" or "professional person" means a physician or chemical dependency counselor as defined in rule by the department, who is empowered by a certified treatment program with authority to make assessment, admission, continuing care, and discharge decisions on behalf of the certified program.

"Treatment" means the broad range of emergency, detoxification, residential, and outpatient services and care, including diagnostic evaluation, chemical dependency education and counseling, medical, psychiatric, psychological, and social service care, vocational rehabilitation and career counseling, which may be extended to alcoholics and other drug addicts and their families, persons incapacitated by alcohol or other psychoactive chemicals, and intoxicated persons.

"Treatment program" means an organization, institution, or corporation, public or private, engaged in the care, treatment, or rehabilitation of alcoholics or other drug addicts.

AUTHOR DEFINITIONS:

Established recovery (from chemical dependency) means a chemically dependent person has:

- Remained abstinent from alcohol or other non-prescribed chemicals for a minimum of 60 days;
- Recognized their use of chemicals has resulted in life consequences; and,
- Regularly participates in chemical dependency and other support groups.

"Greenbook" means the *Directory of Certified Chemical Dependency Services in Washington State* published about every six months by the state of Washington Division of Alcohol and Substance Abuse.

"**Relapse"** means a series of behavior and thinking patterns that may lead the return of alcohol or drug use by a person with an established recovery from chemical dependency. A chemically

dependent person with an established recovery can be in relapse without having used alcohol or other drugs.

"Toxic state" means the state a person is in while under the toxic effects of a chemical (the term intoxicated means a person in a toxic state).

"Withdrawal state" means the state a person is in while experiencing withdrawal symptoms associated with the discontinuation of a chemical or group of chemicals. Some withdrawal states can be fatal such as withdrawal from alcohol while others such as withdrawal from heroin may not necessarily be fatal but can cause serious discomfort.

II. DEFINING AND IDENTIFYING BASIC COMMON INDICATORS OF CHEMICAL DEPENDENCY:

The Guardian Ad Litem should not try to diagnose chemical dependency even when qualified to do so. By obtaining an outside professional opinion, the Guardian Ad Litem can be provided with supportive information from someone more vested in the individual parent or parents needs.

Common indicators of chemical dependency are:

Alcohol/other drug use

Use of alcohol or other drugs by itself does not constitute abuse or dependency. Generally, there are five elements of use that can affect whether or not a person has a problem with his or her use of chemicals. The five elements are the:

- Age of onset of use which is the age of the person first used for each chemical of indicated use
- Date of last use (important for establishing the possibility of withdrawal) for each chemical of indicated use
- Frequency of use which is how often the person has used each chemical of indicated use
- Route of administration which is the usual method or methods (taken orally, by inhalation of the substance, by smoking the substance, by intravenous injection, by intramuscular injection) the person used to take for each chemical of indicated use
- Amount of substance usually taken on each occurrence for each chemical of indicated use

Preoccupation with alcohol or other drug use

Preoccupation means that considerable time, energy, and effort is used by the person to obtain and maintain sufficient quantity of the chemical for personal use. The person many talk frequently about use, feel anxious if supplies are low, and threatened if someone jeopardizes the source of their supply. A person may exhibit preoccupation in many different ways.

Loss of control when using alcohol or other drugs

Loss of control means the loss of the ability to predict what will happen when a person starts using a substance. A person may lose control over how they behave, how much they use, when the use, or in other ways. They may do things they would not do when not under the influence, or in attempts to secure a supply of a chemical.

Adverse consequences resulting from alcohol or other drug use

This could mean legal problems, child custodial issues, family, and work problems. Indications the persons use or abuse of chemicals has resulted in adverse consequences for themselves or others.

Continued use despite life contraindications

This usually means use despite legal contraindications such as use of a substance when on probation or parole and therefore risking the return to jail or prison. Continued use despite medical contraindications such as continuing to smoke marijuana or tobacco after being diagnosed with emphysema.

Problem recognition

Chemical dependency is chronic, progressive, and relapsing. It usually develops over a period of time and the adaptation to use of a chemical can be subtle. Persons with a chemical dependency have an over-developed defense system that interferes with their ability to acknowledge how their use of chemicals has impacted their life. Some may minimize, discount, dismiss, divert, excuse or otherwise deny the impact of the use of chemicals has had on their life and others. Generally speaking, persons with chemical dependencies need help to identify and accept the impact chemical use may have had in their life.

Tolerance and withdrawal

Increase in tolerance is when it takes more of a particular chemical to obtain a particular effect. Increases in tolerance to a particular chemical can indicate abuse when combined with other indicators. Withdrawal usually indicated physical dependence to a drug. Some drug craving and preoccupation is seated in withdrawal or fear of withdrawal. Withdrawal syndromes vary from chemical type to chemical type. Withdrawal from alcohol and other depressants is more dangerous than withdrawal from opiates.

Relief use

Many persons who abuse alcohol and other drugs may use them to relieve stress and deal with difficult situations. It can be a form of self-medication that becomes self-perpetuating. The more a person uses and a problem with use becomes progressively worse, the more a person feels compelled to use. Medications may be prescribed by medical and mental health

professionals for the same purposes, but are usually temporary solutions for transitory stress or anxiety.

III. IDENTIFYING HOW AND WHEN TO GET CHEMICAL DEPENDENCY PROFESSIONALS INVOLVED:

Alcohol and Other Drug Screening Instrument

The following information has been taken from Simple Screening Instruments for Outreach for Alcohol and Other Drugs and Infectious Diseases. (Rockville: U.S. Department of Health and Human Services, 1994):

The Alcohol and Other Drug Screening Instrument found in the appendices can be administered test to individuals who may be at risk of having an alcohol or other drug abuse problem. Use of the screening instrument should be accompanied by a careful explanation of the subject's rights to confidentiality, as well as any limits on confidentiality. The interviewer should also be clear about the instrument's purpose

Ideally, the screening test should be administered in its entirety. Situations may arise, however, in which there is inadequate time to administer the entire test. In such situations, a subset of the screening instrument can be administered.

The four boldfaced questions—1, 2, 3, and 16—constitute the short form of the screening instrument. These items were selected because they represent the prominent signs and symptoms covered by the full screening instrument. Although this abbreviated version of the instrument will not identify the variety of dimensions tapped by the full instrument and is more prone to error, it may serve as a starting point for the screening process.

A preliminary scoring mechanism for the screening instrument is provided with the screening tool. Until an empirical evaluation of this scoring protocol is complete, however, it should be considered only as a guideline to interpreting responses to the instrument.

Questions 1 and 15 are not scored, because affirmative responses to these questions may provide important background information about the respondent but are too general for use in scoring.

The observational items are also not intended to be scored, but the presence of most of these signs and symptoms may indicate an alcohol or other drug problem.

It is expected that people with an alcohol or other drug problem will probably score 4 or more on the screening instrument. A score of less than 4, however, does not necessarily indicate the absence of an alcohol or other drug problem. A low score may reflect a high degree of denial or lack of truthfulness in the subject's responses.

Authors note:

The screening instrument is intended to assist the Guardian Ad Litem to either screen in or screen out possible alcohol or other drug abuse. The results should be viewed as preliminary and not conclusive. The Guardian Ad Litem should always use his or her own judgment on whether or not to refer a person for a chemical dependency assessment or treatment.

I recommend the Guardian Ad Litem share any observations, information, or indications that gave cause for the referral with the assessing chemical dependency professional. Additional information may lead to a more accurate assessment outcome.

I also included a couple of guides to assist in distinguishing between mental states found in a variety of medical conditions. About 10-25% of persons with a chemical dependency also have co-occurring mental health issues. The guides assist the professional in making distinctions between toxic (chemical related) and other medical conditions. Toxic and withdrawal states can be managed through abstinence and detoxification processes.

Chemically induced syndromes is another tool to help consider if certain conditions may be the result of the use of a chemical. In one case, an individual blacked out for three days, and first remembered coming around in a tree in the woods. He was hallucinating that a state patrol Special Weapons and Tactics team was raping and killing a friend, and then hung the dead body from a limb on the tree where he was hiding. He then jumped from the tree, ran into a street, rolled off the hood of a car that hit him, tumbled down and embankment and burst through the front door of an elderly couples home and begged them to call the local police. He was transported to the county jail and while he was lying in his bunk, he hallucinated that spiders were dropping from the ceiling and immobilizing him. He was transported to Western State Hospital for evaluation and observation. He was 37 years old and father of three children. While this is an extreme case, it does describe a bizarre toxic and withdrawal state that was result of his chemical dependence on alcohol. All the symptoms dissipated after about 10 days.

(See Mental States Found In Various Medical Conditions located in the appendix).

(See Chemical Induced Syndromes located in the appendix).

IV. IDENTIFYING THE IMPACT ON CHILDREN OF A PARENT'S SPECIFIC BEHAVIOR AS AFFECTED BY CHEMICAL DEPENDENCY OR CHEMICAL ABUSE:

A family system made up of one or more parent figures and one or more children will become dysfunctional as a result of the progression of chemical abuse or dependency within the family. Dysfunction may also occur within a family system as a result of other issues, however, it is estimated there are about 20 million persons in the United States who have a chemical dependency and in turn directly or indirectly impact the lives of an average of four persons.

Therefore, the lives of about 100 million persons in the country are affected by the chemical dependency of a significant other.

Family members (including children) in a dysfunctional family will develop identifiable survivor behaviors in order to make sense of their lives. The survival roles can influence the lives of those affected well into and throughout adulthood. The survival behaviors are coping mechanisms to deal with a tremendous amount emotional tension and stress that result from the dysfunction. Many children who grow up in dysfunctional families suffer from post-traumatic stress disorder. While the primary purpose of the survival behaviors are to keep the torrent of emotions (guilt, shame, fear, anger, isolation, sadness, hurt, etc.) within the person, the survival behaviors also keep others at a distance. The roles also meet familial needs. Roles may result in giving other family members something to be proud of, or someone to blame for the families troubles.

Three unwritten laws of a dysfunctional family

Don't talk:

Children in dysfunctional families often learn from an early age that one does not talk about what is happening within the family. In one case, a six-year old came home from school to find his father passed out naked on the living room floor. He looked around and his mother and two sisters were acting as though his father wasn't really there. The family never talked about what happened. Three years later, when the boy was receiving some counseling, the boy disclosed the incident to the counselor. The boy thought maybe he had imagined it. The counselor called in the mother and two sisters and asked them about the event and the three of them acknowledged it did happen. When asked why they never talked about it with the young boy, they replied they had hoped he wouldn't have noticed.

Don't trust:

Children learn early on that dysfunctional parents cannot be trusted. Routines are irregular. Children may be abused or neglected, may go hungry, may have had strings of broken promises, or feel safe. They make efforts to tell others about what is going one, only to have others minimize, discount, or dismiss their claims. One seven-year old boy tried to tell his mother that his father raped him in their basement only to have the mother become hysterical and scream that his father would never have done such a thing. The young boy learned that he could not trust either parent to protect him and keep him safe. Some unspoken messages to not trust are more subtle, but many children from a dysfunctional family will have great difficulties establishing trust with others.

Don't feel:

Children in dysfunctional families are often afraid of their feelings. The intensity is so overwhelming at times they may become physically ill. They may have difficulty identifying feelings, or understanding the feelings other may have. They may become over engaged with another's feelings they lose all site and contact with their own. As indicated earlier, survival

behaviors are established in order to contain intense negative feelings about ones own self and life.

The following 12 characteristics of children of dysfunctional families has been adapted from Woititz, Janet Geringer Ed D ***" Adult Children of Alcoholics : Expanded Edition "*** (1983/1990). Health Communications, Inc.

Twelve Characteristics Of Children Of Dysfunctional Families:

1. Children of dysfunctional families guess at what normal is. Children of dysfunctional families have little or no experience with what is normal.

2. Children of dysfunctional families have difficulty in following a project through from beginning to end.

3. Children of dysfunctional families lie when it would be just as easy to tell the truth. Lying is basic to the family system affected by alcohol or other drugs. It masquerades in part as over denial of unpleasant realities, cover ups, broken promises, and inconsistencies.

4. Children of dysfunctional families judge themselves without mercy. While growing up, children of dysfunctional families were never good enough. They may have been constantly criticized. They may feel the family would be better off without them. They may have internalized these criticisms as negative self-feelings.

5. Children of dysfunctional families have difficulty having fun.

6. Children of dysfunctional families take themselves very seriously. Children of dysfunctional families didn't have much fun growing up. The spontaneous child within may have been squashed. They may even disapprove of others who act silly. But, in a little place inside of them, they really wish they could do that too.

7. Children of dysfunctional families have difficulty with intimate relationships. They have no frame of reference for a healthy, intimate relationship because they most likely have never seen one. They also carry with them the experience of come close, go away, the inconsistency of a loving parent to child relationship. They feel loved one day and rejected the next.

8. Children of dysfunctional families overreact to changes over which they have no control. The young child of a chemically dependent parent was not in control. They have a need of being in control of their lives, since aren't within their family. They may often be seen as being controlling, rigid, and lacking in spontaneity.

9. Children of dysfunctional families may constantly seek approval and affirmation. The messages receive at home about love are sometimes very confusing.

10. Children of dysfunctional families can't feel they are different from other people. They may not have had an opportunity to be children. They have difficulty feeling comfortable playing with other children. Their concern about their home problems can cloud everything else in their lives.

11. Children of dysfunctional families are either super responsible or super irresponsible. They take all the responsibility on or give it all up. There is little middle ground. They may not have a sense of being a part of a project, of how to cooperate with other people and let all parts come together and become a whole, they either do all of it or do none of it. They also don't have a good sense of their own limitations.

12. Children of dysfunctional families are extremely loyal, even in the face of evidence that the loyalty is undeserved. Family members hang in long after reasons dictate that they should leave. The so-called 'loyalty' is more the result of fear and insecurity than anything else. Nevertheless the behavior that is modeled is one where no one walks away just because the going gets rough.

The degree of impact of chemical abuse or dependency will have on children will depend on the progression of the abuse or dependency in family members.

Chemical abuse or dependency can impact family over the course of multiple generations. It has been suggested a family may be impacted for as many as three subsequent generations beyond the one with an active chemical dependency.

The behavior of non-chemical abusing family members can contribute to the families dysfunctional as much or sometimes more than the chemically dependent member of a family. Many family members may develop what has been called as "co-dependency." Persons can become obsessed with a family members chemical dependence to the point they lose themselves in that persons dependency. While co-dependent behavior is intended to control the chemically dependent person, the behavior actually has the reverse effect and enables the dependence to become progressively worse. That does not mean a co-dependent person is responsible for the dependence, but he or she does have influence on the ability of the person to come to terms with the addiction.

Most chemical dependency treatment in this state focuses on the person with the chemical dependency. In the author's opinion, there are minimal services provided to a non-dependent spouse or children. Entire families can and will recover if provided with the proper help and support. To simply treat the dependence without addressing the needs of other family members is similar to having a car with four flat tires, fixing one tire, and then wondering why the car doesn't run properly. Non-using family members deserve help and support in their own right. Even if a chemically dependent parent leaves the home and has their parental rights restricted or terminated, a non-using spouse and children may need help to sort through how the impact of the dependency affected their lives.

V. IDENTIFYING DANGERS PRESENTED TO CHILDREN:

There can be no doubt that parental chemical abuse or dependency issues can and does often represent a danger to children within a family system. While issues such as domestic violence, sexual abuse, child abuse, or neglect do not occur only within a family with chemical abuse or dependency issues, the likelihood significantly increases with the progression of a problem with chemicals. There is such a high prevalence of various types of abuse that occur within such families (70-80%), that one should rule out such issues once a chemical abuse or dependency problem has been established.

A rule of thumb is that if domestic violence, sexual abuse, child abuse, or neglect AND a chemical abuse or dependency has been established within a particular family system, then toxic and withdrawal states associated with various chemicals may increase the likelihood of reoccurrence of abuse events. (See Child Abuse/Neglect (CA/N) Risk By Drug Category located in the appendix).

Persons may have difficulty responding to legal, medical, or therapeutic interventions to abusive behavior without first establishing recovery from a chemical abuse or dependency problem. The use of alcohol and some other drugs of abuse and dependence affect a persons reasoning, judgment, and emotional control that are necessary to respond to the interventions. This does not mean that chemical abuse or dependency causes abusive behaviors, but does mean it will most likely make it more likely to reoccur. Therefore, chemical abuse and dependency issues should be addressed in order to better enable a person's response to various interventions. Stress reduction, and parental education techniques can be helpful, but can be rendered all but useless in the presence of an active chemical abuse or dependence problem.

Also, children may be at greater risks from associates of the parents who may have chemical abuse or dependency issues and access to children. Parents may be intoxicated to the point of being unable to provide a safe environment for a child. Children can become more vulnerable.

There may be an increase in the number of accidents as the result of the chemical abuse or dependence of a parent with a higher risk for injury or death, such as fires, or driving motor vehicles while under the influence of alcohol or other drugs.

Another problem presented to children in homes where chemical abuse or dependency is an issue is the accessibility to alcohol or other drugs, including prescription medication. The chemicals may not be stored in child proof containers, or substances may fall to the ground when a parent may be using. Many adults with chemical abuse or dependence problems had their first experiences with alcohol or other drugs in their home. Some parents may use alcohol to quiet infants during the night by giving it to the infants in baby bottles. Other parents may find it amusing to observe a young child under the influence of alcohol or other drugs.

In some homes, parents may be involved in the manufacture of substance such as methamphetamine, methadone, or LSD. The process to manufacturing some substances involves the use of toxic chemicals that can be harmful to children.

The parent or guardian may model abuse or dependency behaviors that could encourage children to use chemicals to cope or pleasure.

As suggested by the before mentioned information, the dangers can range from minimal to the extreme, dependent upon the extent of the chemical abuse or dependence within a parent or guardian. Some of the behaviors may be abhorrent to the outside observer, however, do in fact occur in some families in this country.

VI. LOCATING LOCAL AND STATE RESOURCES FOR CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT:

There are three sources for information to locate local and state resources for chemical abuse/dependency assessment and treatment. The first is entitled the *Directory of Certified Chemical Dependency Services in Washington State* also known as the Greenbook. The directory is published about every six months by the state of Washington Division of Alcohol and Substance Abuse (DASA). The Greenbook is available for download in pdf format on the internet on the DASA website at:
http://www1.dshs.wa.gov/dasa/services/certification/GB.shtml.

The Greenbook contains a list of all DASA certified chemical dependency assessment/treatment programs in the state of Washington arranged alphabetically by county.

The Greenbook also includes the following information:

ALCOHOL/DRUG 24-HOUR HELP LINE

CRISIS LINE:	**(206) 722-3700**
TOLL FREE:	1-800-562-1240 (from within Washington State only)
TEEN LINE:	**(206) 722-4222**
BUSINESS LINE:	(206) 722-3703

E-Mail: staff@adhl.org

Web site: **http://www.adhl.org**

WASHINGTON STATE ALCOHOL/DRUG CLEARINGHOUSE

Street Address:
6535 5th Place South
Seattle, WA 98108-0243

TOLL FREE:	1-800-662-9111 (from within Washington State only)
SEATTLE AREA:	(206) 725-9696

E-Mail: clearinghouse@adhl.org

Web site**:** **http://clearinghouse.adhl.org**

Who can use the Clearinghouse?

Anyone is welcome to use services, including prevention and community organizations, parents, treatment professionals, preschool-through-college students and educators, health care practitioners and hospitals, libraries, state and government agencies, business and individuals.

What kind of information is available?

They provide a continually updated substance abuse resource room; information on programs, personnel and referral; networking; educational videos; hundreds of complimentary copies of printed materials. Information is available in a variety of format including books, posters, pamphlets, curricula, videos, journal, and periodical articles.

Also available are copies of:

- The Directory of certified Chemical Dependency Treatment Services in Washington State *(The Greenbook)*

- Chapter 388-805, Washington Administrative Code (WAC) *(Chemical Dependency Service Providers)*

- WAC Implementation Guide *(WIG)* for WAC 388-805

- Forms to reorder the state of Washington Department of Licensing DUI/PC Assessment Report forms

- Purchase of *American Society of Addiction Medicine (ASAM) Patient Placement Criteria* 2-R manuals

Appendix A includes the name and contact information of the Alcohol/Drug Coordinator for each county in Washington State. The County Coordinator would have knowledge of outpatient chemical dependency services within their respective counties and may be a resource on developing resources to meet special needs in the county. County Coordinators usually manage outpatient chemical assessment/dependency services in their counties. There are other appendices that provide other information on various chemical abuse or dependency and prevention services throughout the state of Washington.

The inside front cover includes the names and contact information of the DASA Regional Administrators. The DASA Regional Administrator works with the County Coordinators for the counties in their region and usually manages residential and group-care contracts provided in

their regions. The inside back cover includes contact information and working titles of all DASA employees.

VII. WHAT TO EXPECT FROM CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT PROFESSIONALS

Authors note: While the following material addresses issues between chemical dependency professionals and professionals within the child protective service system, the issues and roles are very similar. The primary role of the Guardian Ad Litem is to represent the best interests of a child or children, while the primary role of the chemical dependency professional is most often to represent the best interests of a parent or legal guardian. The two roles are not necessarily in conflict, but can be a source of misunderstanding between professionals in either role.

Keep in mind that chemical abuse/dependency assessments are subject to misinformation and misdirection. Conclusions and treatment recommendations will be based on the evaluator's skill and available information. I once refused to admit a person into treatment because the evaluator honestly indicated to me the assessment outcome was based on a "gut feeling." I advised the evaluator that we could not treat "a gut feeling." Any information that may suggest a person to be assessed has a problem with alcohol or other drugs should be provided to the evaluator before the assessment. An experienced evaluator should be able to consider the information during the course of the assessment and whether or not it should influence the assessment outcome.

The following information is an excerpt from Substance Abuse Treatment for Persons with Child Abuse and Neglect Issues. (Rockville: U.S. Department of Health and Human Services, 2000):

Organizational Roles and the Need for Collaboration

In treating adults with substance abuse disorders who are suspected of abusing or neglecting their children or who are already involved in the CPS system, counselors must communicate and collaborate with representatives from CPS agencies, all while keeping the best interests and confidentiality of clients and their families in mind. Counselors also must understand the role of juvenile, family, and criminal courts in prosecuting cases of child abuse and neglect. Every system attempts to accomplish a specific set of goals to help further the well-being of clients and family members. However, the philosophies and processes used may be very different, and the potential for conflict (expressed or unexpressed) among agency representatives is great. It is important to find ways to collaborate with other agencies in a manner that builds and maintains trust--while continuing to adhere to Federal confidentiality laws.

Core Functions of a Child Protection System
• Respond to reports of child abuse and neglect, identify children who are experiencing or at risk of maltreatment. • Assess what is happening with those children and their families--the safety of the children, the risk of continued maltreatment, the resources and needs of the parents and extended families, and their willingness and motivation to receive help. • Assemble the resources and services needed to support the family and protect the children. • Provide settings for alternative or substitute care for children who cannot safely remain at home. • Evaluate progress of the case during service provision and assess the need for continuing child protective services. Source: The Center for the Future of Children (Schene, 1998, p. 36).

Role of Chemical Dependency Treatment Providers

The main focus of the treatment provider is to provide interventions and support to help clients with their substance abuse and dependence issues and recover from the physical, psychological, emotional, social, and spiritual harm that their substance abuse has caused themselves and others. However, once child abuse or neglect is known or suspected, legal constraints take precedence because counselors are mandated to report cases to CPS agencies. It is not the role of the treatment provider to investigate child abuse; once the report is made, the provider's clinical attention should shift back to and remain with the client.

It is important for counselors to let clients know from the beginning that counselors must report suspected abuse and neglect because the law requires them to do so. However, the accompanying message to the client should be that even if a report is made, the counselor will continue to work with the client, providing treatment and support. (Counselors should emphasize that it is in a client's best interest to address abuse issues before a child is harmed and before a client has jeopardized her parental rights.) For clients who have been reported, an extra measure of support may be necessary. For example, although counselors' large caseloads would preclude them from routinely accompanying clients to court, exceptions could be made for some clients.

Even when accompanying clients to court is not possible, the counselor can create strategies to address the upcoming court date and related issues in treatment. For example, clients who abuse their children often have their own abuse histories and may have painful memories of having to appear in court as children to be placed in foster care. Discussing such memories with clients may prove valuable to the treatment process. Helping clients understand the court system and procedures may also strengthen the therapeutic bond. The role of the alcohol and drug counselor often involves teaching clients self-advocacy and communications skills--that is, helping them learn to approach various systems in ways that will produce fruitful results that meet their individual needs.

Role of CPS Agencies

Every State has a CPS system to investigate reports of child abuse and neglect to determine whether the child in question is in danger and to intervene if necessary. The CPS agency initiates a comprehensive assessment of a child's safety and well-being in the family. The assessment can involve interviews with the child, the parents, and other family members; visits to the home to

evaluate the environment and family dynamics; contacts with schools and other service providers who are or have been involved with the family; and testing to assess the child's health and development (see Kropenske and Howard, 1994). CPS investigations, foster care placement, and adoption services are different aspects of child welfare services, but these functions are organized and titled differently in various States and municipalities; in smaller (i.e., local) jurisdictions, roles and responsibilities may often overlap.

If the CPS agency determines that a child is (or is at risk of being) neglected or abused, it can initiate family preservation services to remedy the problems (see Figure 5-3). The CPS worker is responsible for developing a service plan to help the family improve in those areas the assessment found lacking. The service plan can cover housing, day care, transportation, clothing, food stamps, parenting training, individual or group counseling (including substance abuse treatment), and teaching the parent basic household skills. These services may be provided while the child remains in the home if the child's safety can be assured, or the child may be removed to foster care while services are provided.

When it is determined that a child is not safe in the home, the CPS agency has the authority to remove a child temporarily and place the child in another living situation, such as foster care or with relatives (i.e., kinship care). Relatively few children are actually removed from their homes (in 1996, children placed in foster care represented 16 percent of CPS cases), and most of those removed are returned to the parents' custody fairly quickly once their safety has been assured (DHHS, 1999; Goerge et al., 1996).

Children who are placed in out-of-home arrangements must wait for the legal system's procedures to take place before a final plan of family reunification or other permanent placement is completed. This plan generally focuses on reuniting the family while ensuring the child's safety and may include substance abuse treatment for parents, as well as other services. The plan and progress toward it are reviewed periodically by the court, and it must be demonstrated to the judge that efforts are being made toward the achievement of the planned goals. Recent Federal legislation mandates that permanency plans be determined quickly and that a permanency hearing be held within 12 months of adjudication of the abuse or neglect. If the child remains in foster care for 15 of the most recent 22 months, the jurisdiction must start the process of terminating parental rights and developing a plan for adoption or kinship care for the child.

CPS agencies are required to investigate all reports of child abuse or neglect within a short time--generally a week. Unlike other public service agencies, they cannot generate a waiting list when service needs outstrip resources. With increasing reports of maltreatment in recent years, backlogs of uninvestigated cases have grown, and CPS agency caseloads have soared. Many workers are assigned more than 50 families even though standards developed by the Child Welfare League of America (CWLA) call for caseloads of no more than 12 to 17 families (CWLA, 1989; Daro and McCurdy, 1991; Reid et al., 1999).

Role of the Courts

The juvenile or family court judge has several placement options, which vary slightly by State. These are reunification with parents, adoption, or guardianship (often with a relative). Children aged 16 and above might enter an independent living program. After reasonable efforts are made

at reunifying the child with the family within the timeframe stipulated by law, the court can terminate parental rights and free the child for adoption. Juvenile and family courts have heavy caseloads, and judges sometimes hear a new case every 15 minutes (General Accounting Office, 1999).

Some child abuse perpetrators are charged in the criminal court, which is generally more crowded and slower than the family court system. In some cases, families may be involved with both courts. In those cases, the juvenile or family court judge may decide to delay a decision about a child placement case until the criminal court acts.

To make the courts more responsive to families' needs, the Center for Innovative Courtrooms has begun to establish juvenile and family courts that offer a whole range of services. The Center's court in Brooklyn, for example, offers drug treatment as an alternative to incarceration, as well as welfare, domestic violence services, general equivalency diploma programs, and other services to prepare offenders to become productive citizens.

In Hawaii, the West Hawaii Counseling and Supportive Living Project has been designed to assist individuals and families in providing safe and nurturing homes for children. A core team of professionals consists of a clinical social worker, a substance abuse treatment professional, a clinical nurse specialist, a service coordinator, and an agency director. They are the primary service providers who conduct a service needs assessment, provide service coordination, and make referrals to other programs and providers in the community. The goal is to provide families and children with individualized treatment planning and services that are flexible and are delivered in a manner that respects the family and their cultural heritage. The target clientele includes:

- Families threatened by their own inability to cope with the current stress in their lives.
- Pregnant women and mothers with children at risk of child abuse or neglect due to mental health or substance abuse factors.
- Families who require service assessment or counseling to provide a safe, drug-free environment for their children.
- Pregnant women and mothers with children seeking a recovery program that may include a supportive living environment.
- Pregnant women, mothers, parents, or adults with caretaking responsibilities for children.
- Parents whose children may be temporarily living outside the home.
- Parents whose parental rights have been terminated and who no longer have custody of their children.

Role of the Community:

The effects of substance abuse and child abuse are felt by the entire community. Thus planners, policymakers, and administrators are developing collaborative community responses that involve community education and prevention efforts, as well as pooling community resources that support clients' treatment. For example, over the past decade, community leaders in Albuquerque, New Mexico, focused on the growing problem of homeless and "throwaway" youths. Local schools, churches, and neighborhood associations joined together to provide

physical space and staff for emerging service programs. Outreach teams were created to work on the streets with youths, and clean and sober drop-in centers and shelters were established. In Connecticut, the Department of Children and Families is facilitating connection among social workers, schools, and hospitals. San Antonio, Texas, has created the Alamo Area Prevention and Treatment Providers (AAPTP) Association. This is a consortium of prevention and treatment providers whose mission is to (1) promote accessible and comprehensive prevention, intervention, and treatment services to individuals and families in the surrounding counties; (2) implement a seamless continuum of care that includes prevention, intervention, and treatment services; and (3) facilitate access to care through advocacy, positive community relations, and ongoing systems development.

Importance of Collaboration

Because of the chronic and relapsing nature of substance abuse disorders, ensuring a child's ongoing safety in a home with a substance abuser, or working toward reunification of a family in that home, can be extremely difficult. Even when the parent seeks help or is ordered by the court to seek help, the parent's treatment needs and the family functioning issues related to child safety are rarely addressed simultaneously (CWLA, 1992; Young et al., 1998). The intertwined problems of substance abuse disorder and child abuse require that systems collaborate if they are to break the intergenerational cycle that has resulted in so much damage to society. However, historically, there have been barriers to such collaboration.

Different perspectives on dependency

Alcohol and drug counselors and CPS workers are both involved with clients with substance abuse disorders, but generally their perspectives on addiction are quite different (see DHHS, 1999). This difference is at the heart of the conflicts that historically have characterized relationships between these two groups of professionals and prevented closer cooperation. Much of the substance abuse treatment community views the alcohol- or drug-using parent who neglects or abuses a child as having a chronic and often progressive disease that cannot be cured but can be treated. However, much of the rest of society, including some CPS workers and judges, view this parent as having made an irresponsible choice that has endangered a child. In addition, the CPS worker may perceive the counselor as willing to overlook unsafe situations for children to avoid alienating the parent and disrupting treatment. The treatment provider, however, may see the CPS agency worker as unwilling to give the parent's treatment a chance to work.

Different clients, different goals

Another barrier to collaboration between the two fields is that the organizations have different clients and different goals. Although the CPS agency worker will seek to ensure the child's safety, the alcohol and drug counselor is focused on treating the parent.

Different timeframes

For the treatment provider, relapse is an expected part of recovery from a condition that has taken years to develop and will take years to resolve. CPS agency workers and the courts are accustomed to working within shorter and more well-defined time frames (usually 18 months) because of their desire to prevent children from remaining for long periods in out-of-home placements and to ensure that permanency plans are made for the child.

A related factor is the overburdened public system and the frustration that professionals in both fields often experience, not only within their own agencies but also in dealing with other systems. For example, CPS agency workers who refer parents to a substance abuse treatment program often find that the program has a long waiting list and that no help is immediately available. Similarly, alcohol and drug counselors who report suspected child maltreatment often complain that their reports go unheeded or are dismissed for lack of evidence in a system where workers have time to focus attention on only the most egregious cases (Reid et al., 1999).

Improving collaboration

Treatment providers and CPS agencies differ in their priorities and approaches to parents with substance abuse disorders. To improve their working relationship, these agencies do not need to lessen their commitments to their different missions; instead, they must recognize that both sets of goals are compatible and can best be achieved through joint efforts (Feig, 1998).

VIII. HOW TO OVERCOME CONFIDENTIALITY BARRIERS AND ACCESS INFORMATION RELATED TO CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT

Confidentiality Issues Can Present a Barrier to Collaboration

One of the most common frustrations that will be experienced between a Guardian Ad Litem and chemical dependency treatment professionals has to do with confidentiality of chemical dependency assessment treatment information.

A chemical dependency professional is required to protect the confidentiality of persons under his or her care.

Failure to protect the patient confidentiality can result in monetary fines of up to $5,000 per occurrence and loss of organizational and personal certification or licensures.

Confidentiality is vital to the therapeutic relationship.

Chemical dependency professionals are required by RCW 26.44 to report any instance of suspected child abuse or neglect. When making the initial report, he or she is not required to have written consent from the patient. Alcohol or other drug use by itself does not constitute child abuse or neglect.

Most chemical dependency professionals would like to provide information and work cooperatively with a Guardian Ad Litem, but all must have a valid consent for the release of information in order to do so.

A Guardian Ad Litem can obtain the cooperation of chemical dependency professionals if he or she provides the chemical dependency professional with a properly completed written consent for the release of confidential information that authorizes that professional to make the disclosure.

There are sample releases of information located in the appendix. The first is a blank form the Guardian Ad Litem can use to communicate the patient's written consent to the chemical dependency professional. The second is a sample release of information, completed on a hypothetical patient for use as an example. The highlighted or shaded areas on the sample form identify the essential parts of a valid release of confidential information.

IX. FUNDING FOR CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT:

Funding for chemical abuse or dependency assessment and treatment can come from a variety of sources, both private and public.

Private Sources:

Certain insurance plans issued in the state of Washington are required to include coverage for chemical abuse or dependency assessment and treatment services. Some plans may allow covered persons to elect to include or not include the coverage for such services. Costs for services can vary widely, and is not regulated. Cheaper does not always mean better.

Some agencies or professionals may require higher fees for assessments due to the unique requirements for Guardian Ad Litem purposes. Fees could be included in the working agreement in order to better predict costs for persons requiring the services.

Cost for treatment services should remain relatively consistent within an organization regardless of the circumstances that brings an individual into treatment.

Some counties do have faith-based and other charitable organizations that may also provide some services. These services may or may not be certified by the Division of Alcohol and Substance Abuse.

Public Sources:

County Funded Sources

Each county in Washington State is provided funds from federal, state, and county sources to purchase chemical abuse and dependency assessment and treatment services. The services are usually based on a sliding scale, and set according to a persons ability to pay. Some counties

may authorize service providers to collect a small co-pay for each counseling session. County funds are usually used to purchase a variety of outpatient, detoxification, and involuntary committal services.

Each county has a citizen's advisory group that meets regularly to make recommendations to county officials on what services to purchase. The counties have some flexibility with the purchase of services and have authorized expenditures for special needs and projects.

Each county also has a county alcohol/drug coordinator who is responsible for the issuance of contracts for services, contract monitoring, and working with state officials regarding the distribution of funds. There are federal and state requirements that may impact or influence how funds are used. The county alcohol/drug coordinator is usually the best source for determining local resources for chemical abuse/dependency assessment and treatment services.

Additionally, there are chemical abuse/dependency assessment systems included in most public schools, juvenile courts, misdemeanant courts, city and county jails, the state prisons and community supervision, some emergency rooms, and some Department of Social and Health Services Child Protective Service, and Community Service Offices. These systems may be able to provide services to appropriate persons.

The Division of Alcohol and Substance Abuse purchases many residential and some outpatient chemical abuse/dependency assessment and treatment services across the state. Most of the residential services for adults are provided through a funding program called Alcohol and Drug Assessment and Treatment Act (ADATSA). Persons must meet certain financial requirements in order to qualify for the services. Persons can usually access these services through their local DSHS Community Service Office.

Most persons can access chemical abuse/dependency assessment and treatment services in Washington State.

X. AN UNDERSTANDING OF PARENT/CHILD PARTICIPATION IN SUPPORT GROUPS

Support groups such as Alcoholics Anonymous, and Al-Anon can be of vital support to persons who are attempting to recover from a chemical dependency or the impact of sharing a life with someone who is chemically dependent. While they do not necessarily meet the needs of all persons, they are very valuable to those whose needs are met. Persons with a chemical dependency or living with someone with a chemical dependency should be encouraged to participate in support groups. Some communities have Ala-teen and Ala-tot support groups for children of one or more alcoholic parents. Some times, a non-using parent's involvement in support groups such as Ala-Anon can provide the children in the family with at least one parent in recovery and stability whether the chemically dependent parent recovers or not.

XI. THE UTILIZATION OF WORKING AGREEMENTS WITH CHEMICAL ABUSE/DEPENDENCY ASSESSMENT AND TREATMENT PROFESSIONALS

Importance a Working Agreement

The establishment of a written working agreement between Guardian Ad Litem and a chemical dependency treatment providers can:

- Enhance communication, while reducing misunderstanding between the two groups;
- Help define the roles and boundaries of the two professional disciplines in response to issues related to substance abuse and child welfare;
- Facilitate the collaboration between the two systems for the good of the chemically dependent family system; and,
- Allow new line staff in either system understand the collaborative relationship without having to experience the difficulties that often occur when establishing their different roles while dealing with a common family system (parents and children).

Recommendations:

- First determine whether or not a working agreement currently exists between you and the chemical dependency assessment/treatment provider.
- If a working agreement currently exists, then review it and obtain any clarification that may be necessary for its implementation in your work with the chemical dependency assessment/treatment provider.
- If a working agreement does not exist, then recommend to a chemical dependency assessment/treatment provider that they consider the development of working agreement between you and their organization. A sample agreement is located in the appendix.
- Although you may want to enter into an agreement with an individual from the other organization, it is recommended the agreement be established between you and the organization rather than individuals. The chemical dependency assessment/treatment field has a relatively high staff turnover rates. Therefore, an agreement with the organization can be sustained for longer periods of time.

Components of an agreement between a chemical dependency assessment/treatment provider and a Guardian Ad Litem

- A description of the range of intervention methods that will be used and the level of treatment that will accompany the intervention methods.
- Information about the duration of the various child welfare intervention methods and the duration of treatment; a description of the content of treatment: what the treatment will entail.
- A description of information that will be shared by the treatment program and the child welfare agencies.
- A specific description of circumstances (such as aborting treatment) when it will be the treatment program's responsibility to notify the child welfare agency.

- Definition of a regular period of reevaluation and identification of the system that will conduct and document the reevaluation.
- Identification of which agency will supply ancillary services to the client group.
- A description of responses to compliance with treatment and/or intervention methods and identification of which agency will decide the consequences of each noncompliant behavior.
- A description of the consequences of noncompliant behavior such as:

    - Unwillingness to commit to treatment and/or participate in the treatment program;
    - Drug-positive results;
    - Aborting treatment; or,
    - Other issues: violence, sex, etc.

- Identification of the agency that will decide the consequences of each noncompliant behavior.
- The list is not exhaustive, and should be augmented or modified according to locality.

APPENDICIES

CHILD ABUSE/NEGLECT (CA/N) RISK BY DRUG CATEGORY

	TOXIC STATE		WITHDRAWAL STATE	
DRUG CLASS	**ABUSE**	**NEGLECT**	**ABUSE**	**NEGLECT**
DEPRESSANTS	MORE	MORE	MORE	MORE
OPIATES	LESS	MORE	MORE	MORE
HALLUCINOGENS	MORE	NO CHG	NO CHG	NO CHG
STIMULANTS	MORE	MORE/LESS	MORE	MORE
CANNABIS	LESS	MORE	MORE	LESS

CHILD ABUSE/NEGLECT (CA/N) RISK BY DRUG CATEGORY

- **More** means increased risk
- **Less** means decreased risk
- **More/Less** means it could go either way
- **No chg** means that no change in risk is anticipated in that state

This is a subjective guide for the Guardian Ad Litem, intended to provide some basic information as to whether or not one can anticipate there to be any changes to risk of CA/N associated with the toxic or withdrawal effects of various drug categories.

This information alone should not be used as sole criteria in decision-making. The information provided is not conclusive. Also, keep in mind that the toxic and withdrawal states are transitory. Intoxicated or withdrawal state today, does not mean intoxicated or withdrawal state tomorrow.

There is greater risk for CA/N in cases where CA/N has already occurred and when the caretaker is in certain indicated states.

Risk in certain states exists regardless of whether or not pervious CA/N has occurred.

The more severe the chemical dependency, the higher the risk in indicated states. For example: A severely dependent alcoholic would present a greater risk of CA/N when in a toxic state that a moderately dependent alcoholic. A severely dependent opiate addict would have a higher risk of child neglect than a moderately dependent opiate addict.

This may be more appropriate for assisting the Guardian Ad Litem in deciding whether or not to recommend child custody or visitation of a parent/guardian with a child based on that person's current state.

MENTAL STATES FOUND IN VARIOUS MEDICAL CONDITIONS

MENTAL STATUS	TOXIC STATE	PSYCHOSIS	DELERIUM	AMNESTIC	DEMENTIA
General appearance	Very Ill Comatose	Alert, frightened, bizarre	Confused, obtunded	Normal, alert	Normal, alert
Verbal	Usually Can't test	Rapid talking, loose association	Talkative, may be bizarre	Normal	Not abnormal
Emotional Expression (mood)	Usually Can't test	Inappropriate	Fluctuates up and down	Inappropriate or normal	Normal
Perception	Normal if able to test	Hallucinations, delusions	Hallucinations, illusions, delusions, fluctuations	Normal	Abnormal
Cognition	Usually Can't test	Normal	Abnormal	Abnormal	Abnormal
Orientation	Usually Can't test	Normal	Abnormal	Normal	Abnormal
Memory	Usually Can't test	Normal	Poor	Abnormal	Abnormal
Intelligence	Usually Can't test	Normal	Poor	Normal	Abnormal
Concentration	Usually Can't test	Normal	Poor Fluctuates	Normal	Abnormal
Calculations	Usually Can't test	Normal	Poor Fluctuates	Normal	Abnormal
Judgment	Usually Can't test	Normal	Poor	Often poor	Abnormal
Medical	Respiration down, heart rate up, blood pressure down	May be normal	Usually signs of withdrawals, Delirium Tremens	Signs of long-term drug use, remote and recent memory, Immediate recall, new learning	May be normal Global damage, remote and recent recall will be affected

CHEMICAL INDUCED SYNDROMES

Drug	Panic	Flashbacks	Overdose	Intoxication	Alcoholic Paranoia Alcoholic Hallucinations Psychosis	Amnesia	Delirium	Dementia
Alcohol	(-)	(-)	(+)	(+)	(+)	(+)	W	(+)
Barbiturates	(-)	(-)	(+)	(+)	(-)	(+)	W	(-)
Tranquilizers	(-)	(-)	(+)	(+)	(-)	(+)	W	(-)
Opiates	(-)	(-)	(+)	(+)	(-)	(-)	W	(-)
Cocaine	Some	(-)	(+)	(+)	(+)	(-)	(+)	(-)
Amphetamines	(+)	(-)	(+)	(+)	(+)	(-)	(+)	(-)
Hallucinogens	(+)	(+)	(-)	(-)	(+)	(-)	(-)	(-)
Marijuana	(+)	(+)	(+)	(+)	(+)	(+)	(-)	(+)
PCP	**(+)**	**(+)**	**(+)**	**(+)**	**(+)**	**(-)**	**(+)**	**(+)**
W = Withdrawal (+) = Does (-) = Doesn't						**Result 0f Brain Damage**		

Simple Screening Instrument for AOD Abuse
Interview Form

Name:	**Date:** / /

Location of Interview:

Note: **Boldfaced** questions constitute a short version of the screening instrument that can be administered in situations that are not conducive to administering the entire test. Such situations may occur because of time limitations or other conditions.

Introductory statement:

I am going to ask you a few questions about your use of alcohol and other drugs during the past 6 months. Based on your answers to these questions, I may recommend you get a more complete assessment.

During the past 6 months:

1.	**Have you used alcohol or other drugs? (Such as wine, beer, hard liquor, pot, coke, heroin or other opiates, uppers, downers, hallucinogens, or inhalants.)**	**YES** ☐	**NO** ☐
2.	**Have you felt that you use too much alcohol or other drugs?**	**YES** ☐	**NO** ☐
3.	**Have you tried to cut down or quit drinking or using drugs?**	**YES** ☐	**NO** ☐
4.	Have you gone to anyone for help because of your drinking or drug use? (Such as Alcoholics Anonymous, Narcotics Anonymous, Cocaine Anonymous, counselors, or a treatment program.)	**YES** ☐	**NO** ☐
5.	Have you had any of the following?		
	• Blackouts or other periods of memory loss	**YES** ☐	**NO** ☐
	• Injury to your head after drinking or using drugs	**YES** ☐	**NO** ☐
	• Convulsions, or delirium tremens (“DTs”)	**YES** ☐	**NO** ☐
	• Hepatitis or other liver problems	**YES** ☐	**NO** ☐
	• Feeling sick, shaky, or depressed when you stopped drinking or using drugs	**YES** ☐	**NO** ☐
	• Feeling coke bugs,’ or a crawling feeling under the skin, after you stopped using drugs	**YES** ☐	**NO** ☐
	• Injury after drinking or using drugs	**YES** ☐	**NO** ☐
	• Using needles to shoot drugs	**YES** ☐	**NO** ☐
6.	Has drinking or other drug use caused problems between you and your family or friends?	**YES** ☐	**NO** ☐
7.	Has your drinking or other drug use caused problems at school or at work?	**YES**	**NO**

		☐	☐
8.	Have you been arrested or had other legal problems? (Such as bouncing bad checks, driving while intoxicated, theft, or drug possession.)	**YES** ☐	**NO** ☐
9.	Have you lost your temper or gotten into arguments or fights while drinking or using drugs?	**YES** ☐	**NO** ☐
10.	Are you needing to drink or use drugs more and more to get the effect you want?	**YES** ☐	**NO** ☐
11.	Do you spend a lot of time thinking about or trying to get alcohol or other drugs	**YES** ☐	**NO** ☐
12.	When drinking or using drugs, are you more likely to do something you wouldn't normally do, such as break rules, break the law, sell things that are important to you, or have unprotected sex with someone?	**YES** ☐	**NO** ☐
13.	Do you feel bad or guilty about your drinking or drug use?	**YES** ☐	**NO** ☐

The following questions are not limited to the past six months:

14.	Have you ever had a drinking or other drug problem?	**YES** ☐	**NO** ☐
15.	Have any of your family members ever had a drinking or drug problem?	**YES** ☐	**NO** ☐
16.	**Do you feel that you have a drinking or drug problem now?**	**YES** ☐	**NO** ☐

Closing statement:

Thank you for answering the questions.
Do you have any questions for me?
Is there something I can do to help you?

Interviewer Observation Checklist:

The following signs and symptoms may indicate an alcohol or other drug abuse problem in the individual being screened:

Check all that appear present	**Present**
• Needle track marks	☐
• Skin abscesses, cigarette burns, or nicotine stains	☐
• Tremors (shaking and twitching of hands and eyelids)	☐
• Unclear speech: slurred, incoherent, or too rapid	☐
• Unsteady gait: staggering, off balance	☐
• Dilated (enlarged) or constricted (pinpoint) pupils	☐
• Scratching	☐
• Swollen hands or feet	☐
• Smell of alcohol or marijuana on breath	☐
• Drug paraphernalia such as pipes, paper, needles, or roach clips	☐
• "Nodding out" (dozing or falling asleep)	☐
• Agitation	☐
• Inability to focus	☐
• Burns on the inside of the lips (from freebasing cocaine)	☐

Interviewer Notes:

Preliminary Scoring and Interpretation

Items 1 and 15 are not scored.

The following items are scored as 1 (for yes) or 0 (for no):

Item #	Score	Item #	Score	Item #	Score
2		7		12	
3		8		13	
4		9		14	
5*		10		15	
6		11		Total Score	

*Score 1 if one or more items listed under item 5 has been checked yes
Score range is 1-14

Score	Degree of Risk for Alcohol or Other Drug Abuse
0-1	None to low risk
2-3	Minimal risk
4 or more	Moderate to high risk and suggests need for further assessment

SAMPLE AGREEMENT BETWEEN INDIVIDUALS

Memorandum of Understanding Between
_____, Social Worker
and
_____, Chemical Dependency Professional

This agreement is made and entered into by and between _____ hereinafter referred to SW, and _____ hereinafter referred to as CDP.

It is therefore, mutually agreed that:

I. Purpose of Memorandum of Understanding:

The purpose of this agreement is to foster the collaboration necessary to address the substance abuse and child welfare issues in family units (care taking adults and children) of mutual interest.

II. Basic Agreement:

Referral for Substance Abuse/Dependency Evaluation:

SW agrees to make referrals to CDP for substance abuse evaluation and treatment recommendations when indicated. SW also agrees to provide the CDP with a written summary of the reason for referral, and any information that may assist the CDP in determining the evaluation outcome. SW will provide the CDP with Consent for the Release of Confidential Information signed and dated by the person being referred. SW will determine the funding source for the cost of the evaluation, and refer only those persons for whom funding has been established.

Upon referent (person referred for evaluation) contact, and receipt of the referral information, CDP agrees to schedule the referent for an evaluation at the earliest possible time, taking into account the needs of both the referent and SW. CDP agrees to give cases involving child abuse or neglect the highest priority in the scheduling of appointments.

CDP acknowledges his/her responsibility to make an initial report of any instances of suspected child abuse or neglect to SW under RCW 26.44.030 and allowed under 42 CFR, Part 2 regardless of status of referent consent at the time of the required report.

Substance Abuse/Dependency Evaluation:

CDP agrees to establish that a proper Consent for the Release of Confidential Information has been signed by the referent that authorizes CDP to disclose the outcome of the evaluation and any treatment recommendations when indicated. CDP also agrees to ensure that funding for the evaluation has been established. CDP agrees conduct a complete substance abuse evaluation of the referent and to ensure the evaluation meets all the requirements of state and federal regulations and the needs of the SW and referent.

CDP agrees to verbally advise SW of the results (when proper consent has been obtained by the referent) of the evaluation within three working days and in writing within five working days of the end of the evaluation. The evaluation will include:

CDP determination of whether or not there was sufficient evidence
demonstrating the referent suffered from substance abuse or dependency.

If CDP determines the referent is experiencing a substance abuse or dependency, the CDP agrees to make initial treatment recommendations in accordance with patient placement criteria and to issue a prognosis of the referents likelihood of establishing a recovery from his or her substance related problems at the conclusion of the evaluation.

CDP agrees to take whatever steps necessary to refer the referent to appropriate treatment and care.

SW agrees to provide CDP with any new information that comes to his/her attention that could have an impact of the CDP evaluation outcome, treatment recommendations, and prognosis while the referent is considering to participate in or waiting for substance abuse or dependency treatment.

Substance Abuse/Dependency Treatment and Monitoring:

Whether providing a course of substance abuse/dependency treatment or referring the referent, the CDP agrees to notify the SW of referent admission within three working days of admission to treatment.

CDP agrees to make every effort to maintain referent cooperation in authorizing on-going consent for the exchange of confidential information

The SW agrees to provide CDP with any new information that comes to his/her attention that could have an impact of the referent treatment while the referent is participating in substance abuse or dependency treatment.

CDP agrees to provide SW with a monthly status report that includes the following information:

Referent's name;

Month and year covered;

Referent's current level of treatment;

Summary of patient progress in treatment, including adjustments to referents last reported level of care (higher or lower level of care) as indicated by last CDP patient placement criteria continuing care review;

CDP determines the referent has unexcused absences or failed to report support group attendance with specific recommendations on the part of the CDP in response to the determination;

CDP determines the referent has failed to make acceptable progress in any part of the treatment plan with specific recommendations on the part of the CDP in response to the determination; and,

Current prognosis for recovery from substance related problems.

In addition, CDP agrees to report emergent instances of non-compliance, along with specific recommendations on the part of the CDP in response to the determination, to SW within three-working days of making the determination the referent has:

Failed to maintain abstinence from alcohol and other non-prescribed substances as verified by referent self-report, third-party report that is verified by CDP, or blood alcohol content, urinalysis, or other laboratory test;

Referent reports subsequent arrest or conviction;

CDP obtains information that could impact the welfare of any children under the care of the referent.

Referent leaves treatment against staff advice; or,

Is discharged for a rule violation.

The SW agrees to provide CDP with a summary of any actions taken by SW in reliance on the information reported by CDP that could have an impact of the current or future referent substance abuse or dependency treatment.

Discharge from Substance Abuse/Dependency Treatment

In cases of referent transfer to another substance abuse/dependency treatment program, within five working days of the transfer, CDP agrees to provide the SW the name, address, and phone of the organization agreeing to admit the referent for treatment, the date of transfer, a summary of the reason for transfer, and any recommendations made to the referent at the time of transfer.

In cases of referent discharge, within three working days of the date of discharge, the CDP agrees to provide the SW with the reason for discharge, date of discharge, a summary of the referent progress towards treatment goals, any recommendations for the continuing care of the referent, and the CDP prognosis for recovery from his/her substance abuse/dependency at the time of discharge.

CDP agrees to make every effort to obtain written referent consent for the release of information for a period of not less than 90 days from the date of discharge, at the time of referent discharge.

CDP agrees to maintain records of all activities for a period of five years from the date the referent was last seen by the CDP. Subsequent SW access to information may be limited by expiration or events indicated on the consent forms at the time of discharge.

III. PERIOD OF AGREEMENT:

This agreement shall commence upon the date of signature by both parties and continue until either party terminates the agreement pursuant to Section VII.

IV. INDEMNIFICATION:

Each party shall defend, protect and hold harmless the other party from and against all claims, suits and/or actions arising from any negligent or intentional act or omission of the other party while performing under this memorandum.

V. MEMORANDUM ALTERATIONS AND AMENDMENTS:

SW and CDP may mutually amend this memorandum. Such amendments shall not be binding unless they are in writing and signed by both parties.

VI. TERMINATION:

Either party may terminate this agreement upon sixty (60) days written notification. Notification shall be mailed to the other party and signed and dated by the other party.

VII. ALL WRITINGS CONTAINED HEREIN:

This agreement contains the conditions agreed upon by both parties. No other understandings, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or to bind either of the parties herein.

In witness whereof, the undersigned have affixed their signatures in execution thereof:

SW Printed Name:	Title:
Signature:	Date:

CDP Printed Name:	Title:
Signature:	Date:

SAMPLE AGREEMENT BETWEEN organizations

Memorandum of Understanding Between
Everett Children's Administration Office
And
CD Recovery Center

This agreement is made and entered into by and between Everett Children's Administration Office hereinafter referred to Agency A, and CD Recovery Center hereinafter referred to as Agency B.

It is therefore, mutually agreed that:

I. Purpose of Memorandum of Understanding:

The purpose of this agreement is to foster the collaboration necessary to address the substance abuse and child welfare issues in family units (care taking adults and children) of mutual interest.

II. Basic Agreement:

Referral for Substance Abuse/Dependency Evaluation:

AGENCY A agrees to make referrals to AGENCY B for substance abuse evaluation and treatment recommendations when indicated. AGENCY A also agrees to provide AGENCY B with a written summary of the reason for referral, and any information that may assist AGENCY B in determining the evaluation outcome. AGENCY A will provide AGENCY B with a Consent for the Release of Confidential Information signed and dated by the person being referred. AGENCY A will determine the funding source for the cost of the evaluation, and refer only those persons for whom funding has been established.

Upon referent (person referred for evaluation) contact, and receipt of the referral information, AGENCY B agrees to schedule the referent for an evaluation at the earliest possible time, taking into account the needs of both the referent and AGENCY A. AGENCY B agrees to give cases involving child abuse or neglect the highest priority in the scheduling of appointments.

AGENCY B acknowledges his/her responsibility to make an initial report of any instances of suspected child abuse or neglect to AGENCY A under RCW 26.44.030 and allowed under 42 CFR, Part 2 regardless of status of referent consent at the time of the required report.

Substance Abuse/Dependency Evaluation:

AGENCY B agrees to establish that a proper Consent for the Release of Confidential Information has been signed by the referent that authorizes AGENCY B to disclose the outcome of the evaluation and any treatment recommendations when indicated. AGENCY B also agrees to ensure that funding for the evaluation has been established. AGENCY B agrees conduct a complete substance abuse evaluation of the referent and to ensure the evaluation meets all the requirements of state and federal regulations and the needs of AGENCY A and referent.

AGENCY B agrees to verbally advise AGENCY A of the results (when proper consent has been obtained by the referent) of the evaluation within three working days and in writing within five working days of the end of the evaluation. The evaluation will include:

AGENCY B determination of whether or not there was sufficient evidence
demonstrating the referent suffered from substance abuse or dependency.

If AGENCY B determines the referent is experiencing a substance abuse or dependency, AGENCY B agrees to make initial treatment recommendations in accordance with patient placement criteria and to issue a prognosis of the referents likelihood of establishing a recovery from his or her substance related problems at the conclusion of the evaluation.

AGENCY B agrees to take whatever steps necessary to refer the referent to appropriate treatment and care.

AGENCY A agrees to provide AGENCY B with any new information that comes to his/her attention that could have an impact of AGENCY B evaluation outcome, treatment recommendations, and prognosis while the referent is considering to participate in or waiting for substance abuse or dependency treatment.

Substance Abuse/Dependency Treatment and Monitoring:

Whether providing a course of substance abuse/dependency treatment or referring the referent, AGENCY B agrees to notify AGENCY A of referent admission within three working days of admission to treatment.

AGENCY B agrees to make every effort to maintain referent cooperation in authorizing on-going consent for the exchange of confidential information

AGENCY A agrees to provide AGENCY B with any new information that comes to his/her attention that could have an impact of the referent treatment while the referent is participating in substance abuse or dependency treatment.

AGENCY B agrees to provide AGENCY A with a monthly status report that includes the following information:

Referent's name;

Month and year covered;

Referent's current level of treatment;

Summary of patient progress in treatment, including adjustments to referents last reported level of care (higher or lower level of care) as indicated by last AGENCY B patient placement criteria continuing care review;

If AGENCY B determines the referent has unexcused absences or failed to report support group attendance with specific recommendations on the part of AGENCY B in response to the determination;

If AGENCY B determines the referent has failed to make acceptable progress in any part of the treatment plan with specific recommendations on the part of the AGENCY B in response to the determination; and,

Current prognosis for recovery from substance related problems.

In addition, AGENCY B agrees to report emergent instances of non-compliance, along with specific recommendations on the part of AGENCY B in response to the determination, to AGENCY A within three-working days of making the determination the referent has:

Failed to maintain abstinence from alcohol and other non-prescribed substances as verified by referent self-report, third-party report that is verified by AGENCY B, or blood alcohol content, urinalysis, or other laboratory test;

Referent reports subsequent arrest or conviction;

AGENCY B obtains information that could impact the welfare of any children under the care of the referent.

Referent leaves treatment against staff advice; or,

Is discharged for a rule violation.

AGENCY A agrees to provide AGENCY B with a summary of any actions taken by AGENCY A in reliance on the information reported by AGENCY B that could have an impact of the current or future referent substance abuse or dependency treatment.

Discharge from Substance Abuse/Dependency Treatment

In cases of referent transfer to another substance abuse/dependency treatment program, within five working days of the transfer, AGENCY B agrees to provide the AGENCY A the name, address, and phone of the organization agreeing to admit the referent for treatment, the date of transfer, a summary of the reason for transfer, and any recommendations made to the referent at the time of transfer.

In cases of referent discharge, within three working days of the date of discharge, AGENCY B agrees to provide the AGENCY A with the reason for discharge, date of discharge, a summary of the referent progress towards treatment goals, any recommendations for the continuing care of the referent, and the AGENCY B prognosis for recovery from his/her substance abuse/dependency at the time of discharge.

AGENCY B agrees to make every effort to obtain written referent consent for the release of information for a period of not less than ninety (90) days from the date of discharge, at the time of referent discharge.

AGENCY B agrees to maintain records of all activities for a period of five years from the date the referent was last seen by AGENCY B. Subsequent AGENCY A access to information may be limited by expiration or events indicated on the consent forms at the time of discharge.

III. PERIOD OF AGREEMENT:

This agreement shall commence upon the date of signature by both parties and continue until either party terminates the agreement pursuant to Section VII.

IV. INDEMNIFICATION:

Each party shall defend, protect and hold harmless the other party from and against all claims, suits and/or actions arising from any negligent or intentional act or omission of the other party while performing under this memorandum.

V. MEMORANDUM ALTERATIONS AND AMENDMENTS:

AGENCY A and AGENCY B may mutually amend this memorandum. Such amendments shall not be binding unless they are in writing and signed by both parties.

VI. TERMINATION:

Either party may terminate this agreement upon sixty (60) days written notification. Notification shall be mailed to the other party and signed and dated by the other party.

VII. ALL WRITINGS CONTAINED HEREIN:

This agreement contains the conditions agreed upon by both parties. No other understandings, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or to bind either of the parties herein.

In witness whereof, the undersigned have affixed their signatures in execution thereof:

Agency A Representative Printed Name:	Title:
Signature:	Date:

Agency B Representative Printed Name:	Title:
Signature:	Date:

CHAPTER 9
CHILD ABUSE AND NEGLECT

CHILD ABUSE AND NEGLECT

Submitted by Naomi Oderberg, Ph.D. and
Margo Waldroup, MSW

INTRODUCTION

As a Guardian Ad Litem, most of your cases will include allegations of physical, sexual, or emotional abuse, neglect, exposure to domestic violence, or the abusive use of conflict by one or both parents. This first part of this chapter will review the basic indicators of abuse and neglect, and provide guidelines for when and how to report to Child Protective Services. The second part of this chapter will explore the abusive use of conflict, high conflict families and the effects of conflict on the children. Finally, we will discuss possible recommendations to address these allegations in your investigations and reports.

Incidence of Child Abuse and Neglect

The United States Department of Health and Human Services, Administration for Children and Families (2007), collect data on child abuse and neglect reports across the US. They use this data to estimate national incidence rates of child abuse and neglect. During Federal Fiscal Year 2005[40]:

- An estimated 899,000 children were victims of maltreatment;
- Nearly 3.6 million children received a CPS investigation or assessment.
- Of the children who received an investigation, approximately one quarter were determined to have been abused or neglected.

This figure reflects a maltreatment rate of 12.1 per 1000 children as follows:

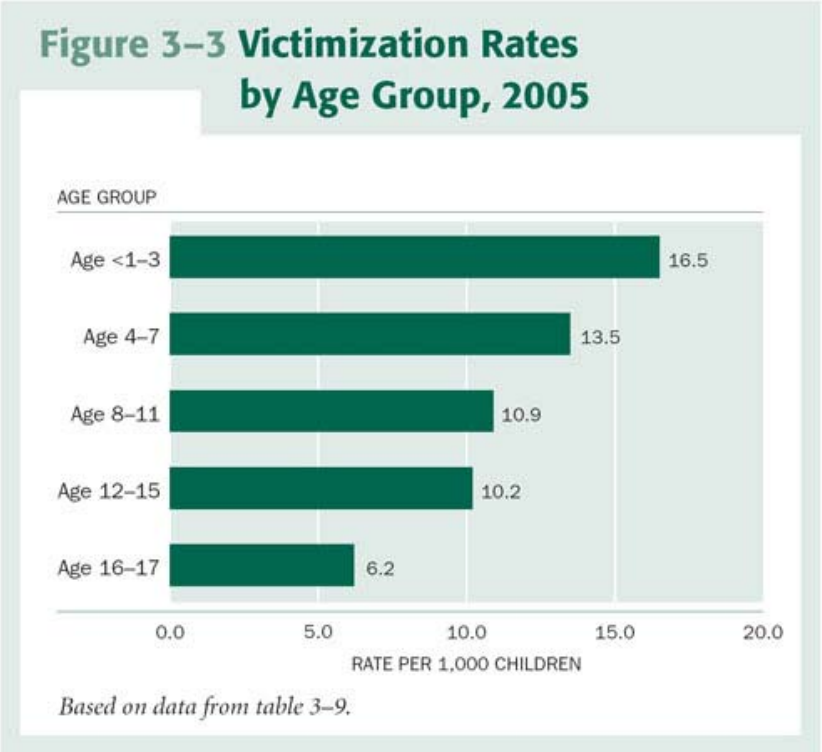
62.8%	[41]Neglect	7.1%	Emotional or psychological maltreatment
16.6%	Physical abuse	2.0%	Medical neglect
9.3%	Sexual abuse	14.3%	Other

Other types of maltreatment included abandonment, threats of harm, and congenital drug addiction. Some children were victims of more than one type of maltreatment.

[40] The full report can be viewed at http://www.acf.hhs.gov/programs/cb/pubs/cm05/index.htm

[41] These percentages add up to more than 100 percent because children who were victims of more than one type of maltreatment were counted for each form of abuse or neglect.

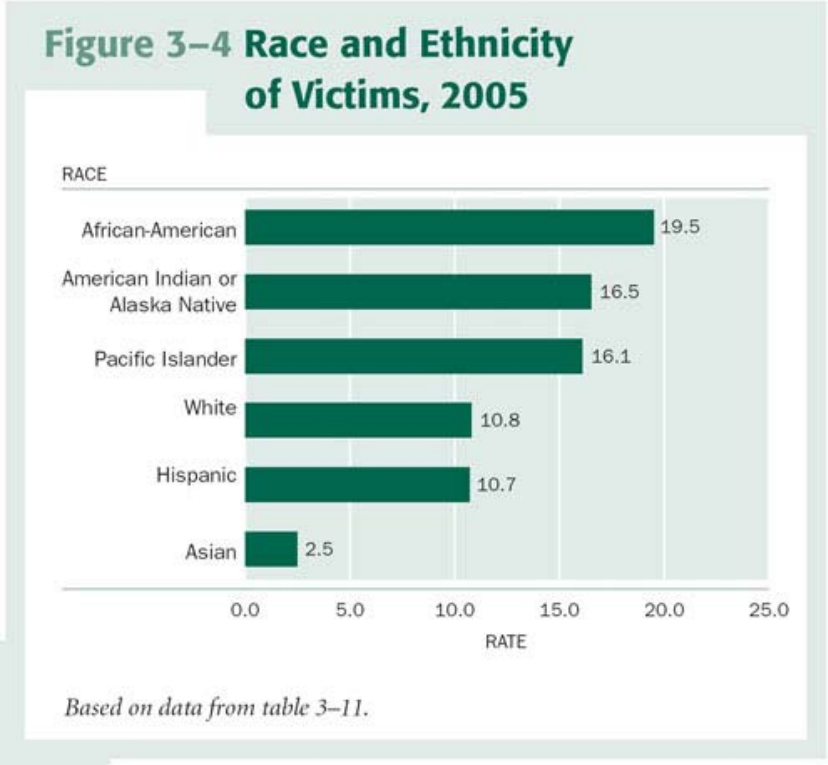
US Dept. of Social and Health Services *Child Maltreatment 2005*
Victimization Rates by Age Group



This graph shows that the youngest children were victimized at the highest rate.

Parents were by far the most likely abusers with forty percent of child victims being maltreated by their mothers; another 18.3% were maltreated by their fathers; and 17.3% were abused by both parents. Only 10.7% of child victims were abused by others including a caregiver who was not a parent such as a foster parent, childcare worker, unmarried partner of a parent, legal guardian, or residential facility staff.

US Dept of Social and Health Services *Child Maltreatment 2005* Race and Ethnicity of Victims



Children who were African-American, American Indian or Alaska Native, and Pacific Islanders had the highest rates of victimization.

WASHINGTON LAW

REVISED CODE OF WASHINGTON (RCW) AND THE WASHINGTON ADMINISTRATIVE CODE (WAC)

RCW 26.44 is the Washington state law that defines child abuse and neglect and describes mandatory reporting practices. The Complete RCW can be viewed at **http://apps.leg.wa.gov/RCW/default.aspx?cite=26.44**

The WACs are current administrative regulations created by state agencies to carry out the laws. They provide more detailed definitions of child abuse and neglect and Child Protective Service procedure. The full WAC explaining child abuse and neglect reporting can be found at http://apps.leg.wa.gov/WAC/default.aspx?cite=388-15-009.

Both the RCW and the WAC are included below in our discussion of the definitions and indicators of child abuse and neglect.

RCW 26.44.010 Declaration of purpose

"The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of non-accidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children: PROVIDED, That such reports shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions: PROVIDED FURTHER, That this chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety.

Definitions (Effective January 1, 2007)

RCW 26.44 Definitions (12)"Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

It is necessary to make distinctions between the various forms of abuse and neglect. Definitions for each type of abuse are described below.

WAC 388-15-009 provides the following definitions:

(1) Physical abuse means the non-accidental infliction of physical injury or physical mistreatment on a child. Physical abuse includes, but is not limited to, such actions as:

(a) Throwing, kicking, burning, or cutting a child;
(b) Striking a child with a closed fist;
(c) Shaking a child under age three;
(d) Interfering with a child's breathing;
(e) Threatening a child with a deadly weapon;
(f) Doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare and safety.

WAC 388-15-009 (2) Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child. The age, size, and condition of the child and the location of any inflicted injury shall be considered in determining whether the bodily harm is reasonable or moderate. Other factors may include the developmental level of the child and the nature of the child's misconduct. A parent's belief that it is necessary to punish a child does not justify or permit the use of excessive, immoderate or unreasonable force against the child.

When considering an allegation of abuse or neglect, a single sign or symptom in a child may not provide sufficient evidence to draw a conclusion. With an accumulation of indicators we can be more confident in a determination that abuse or neglect has taken place. While considering the possibility of abuse it is important to keep in mind that potential indicators of abuse may look the same as reactions to the stress of separation and divorce in non-abused children. Such responses may include, sleep disturbance, clinginess, difficulties transitioning from one parent to the other, regression in developmental tasks, changes in school performance, anger toward one or both parents, problematic peer and sibling relationships or unusually compliant behavior. In screening for abuse, these behaviors need to be evaluated in terms of the date of onset, frequency, severity and each parent's interpretation and response to the child's behavior being examined.

Abuse and neglect are unlikely to occur in isolation. Physical abuse and neglect frequently occur in combination with emotional abuse and when sexual abuse is present, physical and emotional abuse are often present as well.

Indicators in the child:

Unexplained burns, broken bones, bruises or bites
Flinches when a parent or caretaker makes sudden movements
Discloses injury
Frightened of parent or caretaker
Fading bruises or marks identifiable after an absence from school
Crying or other protests when it is time to go home

Indicators in the parent or caretaker:

Keeps the child home from school or daycare when child isn't sick
Offers unconvincing or inconsistent explanations for the child's injury
Describes the child in a negative way and may even see them as evil
Has a history of abuse as a child
Apparent attachment problems between parent and child

WAC 388-15-009 (3) Sexual Abuse means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. The intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or

other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis.

Sexual abuse includes incidents which involve touching and those which do not involve touching. Both types of abuse exist on a continuum of violence and emotional trauma.

Touching offenses may include:

Penile penetration into the children's oral, anal and genital cavities
Oral and anal digital penetration
Genital contact without intrusion
Fondling of a child's breasts or buttocks

Non-touching offenses may involve:

Indecent exposure
Inappropriate supervision of a child's voluntary sexual activities
Sexual exploitation

WAC 388-15-009 (4) Sexual exploitation includes, but is not limited to, such actions as allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in:
(a) Prostitution;
(b) Sexually explicit, obscene or pornographic activity to be photographed, filmed, or electronically reproduced or transmitted; or
(c) Sexually explicit, obscene or pornographic activity as part of a live performance, or for the benefit or sexual gratification of another person.

Possible indicators of sexual abuse or exploitation in a child:
Nightmares
Sexual acting out with adults or children
Bedwetting
Change in appetite
Difficulty walking or sitting
Verbal disclosure
Demonstrates unusual or sophisticated sexual knowledge or behavior
Contracting a venereal disease
In teens: running away or pregnancy

Possible Indicators in the Parent:
Unduly protective of the child or severely limits the child's contact with other children
Secretive and isolated
Jealous and controlling with family members
Has created an emotional wedge between the child and non-offending parent

May also be physically abusive toward the child
The offender may use force, coercion or threats with the victim to enforce silence

In a large scale study for DSHS, Goldman, Salus, Wolcott and Kennedy (2003), found that the most commonly reported cases of sexual abuse involved indecent exposure or sexual abuse occurring among family members (incest). Father-daughter incest has received the most attention from researchers and clinicians but recent data suggests that sibling incest may be more common (Cyr, Wright, McDuff & Perron, 2002). Incest perpetrated by mothers and by fathers against sons is also beginning to come to the attention of those working with and evaluating families.

Initial data regarding maternal incest suggests that it tends to be more subtle and involves behaviors that may be difficult to distinguish from normal care giving (e.g., genital touching), but still lead to potentially serious long-term consequences. In all types of sexual abuse, the victims are in a position of less power or authority than the perpetrator. He or she may not disclose the abuse for fear of what would happen to the offender or family, or out of fear that the family will not believe them.

In recent years, several large studies have examined sibling incest and have helped to identify important aspects of the experience for individuals and families. In a survey of the childhood experiences of 2,869 18-24 year olds, Flanagan & Hayman-White (2000) found that 43% of their sample of nonadjudicated[42] youth reported offending against a sibling. This was about twice the number of respondents than those reporting father-child abuse. Some features of sibling incest that have emerged are:

1) Sibling incest usually involves individuals between the ages of 4 to 9 years of age.
2) The average age difference between siblings is 4 to 5 years
3) The majority of perpetrators are male
4) The preponderance of the sexual acts involve fondling and touching genitals
5) There is a higher rate of oral and vaginal penetration than in father/stepfather incest
6) The sexual contact is unwanted by the target child
7) There is usually concomitant physical or emotional abuse by the sibling
8) The rate of abuse contacts occur at a higher rate than in other types of abuse
9) A high frequency of verbal threats are used to maintain secrecy
10) The duration of the abuse is often two years or longer

Research indicates that there are specific qualities in the family environments which increase the risk of sibling incest including:

- Distant, inaccessible parents; (Smith and Israel 2002; Owen, 1998)
- The children have greater feelings of parental rejection
- Significant emotional neglect or poorly supervised children (Adler and Schutz)
- The home environment is highly sexualized. There may be exposure to inappropriate nudity, parental sexual behavior or pornography (Smith and Israel 2002; Worling, 1995)
- There tends to be a culture of family secrets (Smith and Israel, 2002)

[42] "Nonadjudicated" means that the Juvenile Court has **not** entered an order declaring that a child is neglected, abused, dependent, a minor requiring authoritative intervention, a delinquent minor or an addicted minor.

- Families use more physical punishment, physical and emotional abuse
- There is heightened marital discord (Worling, 1995)
- A parent was a victim of childhood sexual abuse (Cyr, et al, 2002; Worling, 1995)
- There is a pattern of parental denial (Rayment-McHugh & Nisbet, 2003)
- Parents may feel they are being forced to choose between the victim and the offender in responding to the victim's disclosure. This can be very difficult for parents who continue to feel love and affection for both their children
- Non–offending family members may collude with the offender, reinforcing denial or minimization

Effects

Survivors of sibling sexual abuse evidenced symptoms similar to those seen in parent-child incest (Cyr, et al 2002; Rayment-McHugh & Nisbet, 2003; Wiehe, 1990; O'Brien, 1991; and, Laviola, 1992). Some of the symptoms noted are:

1. lowered self-esteem
2. re-victimization in later life
3. sexual dysfunction as adults
4. difficulties with intimacy and trust

Emotional Abuse (also known as psychological maltreatment):

Goldman and Salus (et al, 2003) define emotional abuse as: "a repeated pattern of caregiver behavior or extreme incident(s) that conveys to the child that they are unwanted, worthless, flawed, unloved or only of value in meeting another's needs." In marital relationships a common form of parent to parent emotional or psychological abuse is the systematic undermining of a partner's sense of self as an intelligent, competent, or attractive person. Putdowns, ridicule, constant criticism, and complaints are all standard forms of interaction (Dalton, Carbon & Oleson, 2003).

Summarizing research literature and expert opinion, Stuart Hart PhD, and Marla Brassard, PhD (1995), present the following categories of psychological maltreatment:

Categories of Psychological Maltreatment

Spurning	Belittling, hostile rejecting, ridiculing
Terrorizing	Threatening violence against a child, placing a child in a recognizably dangerous situation
Isolating	Confining the child, placing unreasonable limitations on the child's freedom of movement; restricting the child from social interactions
Exploiting or Corrupting	Modeling antisocial behavior such as criminal activities, encouraging prostitution, permitting substance abuse
Denying Emotional Responsiveness	Ignoring the child's attempts to interact, failing to express affection

Possible indicators in the child:

Extremes in behavior: overly compliant or demanding, extreme passivity or aggression
Infantile, regressed behavior – rocking or head-banging
Delays in physical or emotional development
Has attempted suicide
Lack of attachment to the parent
Low self esteem as evidenced by the child's inability to describe positive qualities in themselves
Self-critical talk

Possible indicators in the adult:

Blaming, belittling or berating the child
Is unconcerned about the child's feelings
Refuses to consider offers of help for the child's problems
Overtly rejects the child
Focus on own needs to the exclusion of the child's needs

Negligent treatment or maltreatment means an act or a failure to act on the part of a child's parent, legal custodian, guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, and safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, and safety. Negligent treatment or maltreatment includes, but is not limited, to:

(a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, and safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves;

(b) Actions, failures to act, or omissions that result in injury to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child; or

(c) The cumulative effects of consistent inaction or behavior by a parent or guardian in providing for the physical, emotional and developmental needs of a child's, or the effects of chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties, when the result is to cause injury or create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child.

Physical Neglect

Physical Neglect includes refusal of health care, failure to allow or provide timely needed care in accordance with recommendations of a competent health-care professional for a physical injury, illness, medical condition, or impairment. It may also include inadequate supervision such as leaving a child unsupervised or inadequately supervised for an extended period of time, or allowing the child to remain away from home overnight without knowing or attempting to determine the child's whereabouts. Permanent or indefinite expulsion from home without

adequate arrangements for care or refusal to accept custody of a returned runaway may also be considered neglect.

Physical neglect also includes inadequate nutrition, clothing or hygiene; conspicuous inattention to avoidable hazards in the home; and other forms of reckless disregard for the child's safety and welfare (e.g., driving with the child while intoxicated, leaving a young child in a car unattended).

Prenatal Exposure to Drugs

Prenatal exposure to drugs is another behavior that may be considered neglectful. Approximately two thirds of women between the ages of 12 to 34 years have used alcohol some time during their pregnancy. There are significant developmental consequences to fetal exposure to alcohol and other drugs with an estimated 1.9 per 1000 infants diagnosed with fetal alcohol syndrome (FAS) and an additional 500,000 to 740,000 drug exposed infants in the United States (Arizona Supreme Court, 2007).

Failure to Thrive/Malnutrition

When a children's physical development falls below the third percentile in height and or weight for no known medical reason, they are designated as malnourished. Failure to thrive (FTT) is a term that is usually used to refer to infants and occurs when they have not been provided adequate nutrition or emotional care. Intensive medical treatment usually leads to significant improvements in weight gain and development. With intervention, many of these children continue to thrive when returned to their parents. In homes with positive outcomes, the FTT is generally less chronic and parents respond to parent training. In other cases, children with FTT show deficits in attachment and may continue to show significant developmental delays. Parental depression or other mental health difficulties, lack of knowledge about child care, poverty, and other sources of social stress have been identified as contributing causes of non-organic failure to thrive.

Educational Neglect includes permitting chronic truancy or habitual absenteeism from school, particularly if the parent or guardian is informed of the problem and does not attempt to intervene. Other forms of educational neglect include failure to register or enroll a child of mandatory school age, or a pattern of keeping a school-aged child home without valid reasons. It may also include refusal to allow or failure to obtain recommended remedial education services or neglecting to following through with treatment for a child's diagnosed learning disorder or other special education need.

Emotional neglect occurs when there is marked inattention to the child's needs for affection, emotional support, or attention. Exposure to chronic or extreme spouse abuse or other domestic violence is also categorized as emotional neglect in some states. Other types of emotional neglect may involve encouraging or permitting a child to use drugs or alcohol or to engage in other maladaptive behavior (e.g. chronic delinquency, severe assault), refusal or delay in allowing needed and available psychological treatment for emotional or behavioral problems when recommended by a competent professional, or inattention to a child's emotional and developmental needs such as markedly overprotective restrictions which foster emotional

overdependence or chronically applying significantly inappropriate expectations based on a child's age and level of development.

Possible indicators in the child:

No one at home to provide care
Forced to care for siblings in the absence of a parent or guardian
Begs or steals food or money
Poor hygiene
Clothing insufficient for the weather
Lacks needed medical, dental or vision care
Frequent absences from school
Running away
Abuse of alcohol and drugs

Possible indicators in the parent:

Mental Health Disorder
Violent, irrational or bizarre behavior
Depression
Abuse of alcohol or other drugs
Difficulties with emotional attachment which presents as indifference to the child
Apathy, helplessness, hopelessness

MANDATORY REPORTING

Now that abuse and neglect and its indicators have been defined, the question arises: Who needs to report abuse and neglect? How do you report? What information is reported? Answers to these questions are given below.

Who Is Mandated to Report Suspected Child Abuse or Neglect?

RCW 26.44.030 Those required to report include (but are not limited to) the following individuals:

Medical practitioners; school personnel and daycare providers; social services counselors including mental health, drug and alcohol treatment, and domestic violence providers; and, an adult living in a home where abuse or neglect are occurring.

Under Washington state law, mandated reporters who knowingly fail to make a report, or cause a report to be made, shall be guilty of a gross misdemeanor (RCW 26.44.080).

How soon after discovery does a report have to be made?

RCW 26.44.030 (1) (e) The report must be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable cause to believe that the child has suffered abuse or neglect.

Who do I call?

State of Washington Child Protective Services 24 hour reporting:
1-866-ENDHARM (1-866-363-4276)
Voice/TTY Accessible: 1-800-737-7931 http://www1.dshs.wa.gov/

For a brochure on mandatory reporting go to:
http://www1.dshs.wa.gov/ca/safety/abuseStates.asp?2

What information has to be reported?

RCW 26.44.040 Reports must be made by telephone or other manner to the proper law enforcement agency or the department of social and health services and, if requested, must be followed by a report in writing. The reports must contain the following information, if known:

1) The identity of the perpetrator if known;
2) The name, address, and age of the child;
3) The name and address of the child's parents, stepparents, guardians, or other persons having custody of the child;
4) The nature and extent of the alleged injury or injuries;
5) The nature and extent of the alleged neglect;
6) The nature and extent of the alleged sexual abuse;
7) Any evidence of previous injuries, including their nature and extent;
8) Any other information that may be helpful in establishing the cause of the child's death, injury, or the identity of the alleged perpetrator or perpetrators.

In your role as GAL, you don't necessarily seek to substantiate abuse and neglect because that is the role of CPS. It is up to the court to make a finding of whether or not the abuse occurred. However, the GAL has to recommend whether further evaluation is necessary and whether there needs to be either short term or long term restrictions in access as part of the parenting plan. Even though each family needs to be examined on a case by case basis, statistical information about allegations need to be kept in mind. For in depth sexual abuse evaluations contact:

Center for Sexual Assault and Traumatic Stress

Harborview Medical Cente
General Contact (TTD): (206) 744-1616
General Contact (Fax): (206) 744-1614
General Contact (Phone): (206) 744-1600
Address:

Jefferson Professional Building
400 (4th Floor)
1401 East Jefferson Street
Seattle, WA 98122

Children's Response Center

1120 112th Ave NE, Suite 130
Bellevue, WA 98004
(425) 688-5130
(425) 688-5762 (TDD)
(425) 454-1583 (FAX)

ALLEGATIONS OF ABUSE DURING DIVORCE

There is a common misperception that allegations of abuse and neglect that arise during custody disputes have a high likelihood of being fabrications. These allegations are seen as a parent's (usually a mother's) attempt to disrupt a father's relationship with their child, to manipulate the custody determination, or to seek revenge. Overall, data suggests that allegations of physical and sexual abuse that arise during divorce are actually quite rare (Thoeness and Tjaden, 1990, 2002; Trocme and Bala, 1998).

First, examining all types of abuse, intentionally false allegations appear to be unusual. Trocme and Bala (2005) described the 1998 national incidence study in which 7,672 reports of abuse were investigated by 51 social welfare agencies across Canada. In their study, Trocme and Bala defined *unsubstantiated* allegations of abuse and neglect as ones which investigators judged to be untrue. *Intentionally false allegations* were defined as intentional fabrications "made with the hope of manipulating the legal system, or are made to seek revenge against an estranged former partner, or may be the product of the emotional disturbance of the reporter." Trocome and Bala distinguished these first two types of abuse and neglect reports from others they called "suspicious." In these cases, there was not enough evidence to make a determination that abuse or neglect had occurred but investigators maintained a strong suspicion that it had.

Forty-two percent of all child abuse and neglect allegations in Trocme and Bala's sample proved to be substantiated by investigators. An additional 23% of the allegations remained suspicious. Thirty five percent of the sample was made up of unsubstantiated cases in which 4% were determined to have been intentionally false and 31% were considered to be "the result of well-intentioned reports triggered by a suspicious injury or concerning behavior or a misunderstood story."

When looking the subgroup of allegations that were made during custody or access disputes, the rate of substantiated cases was 40% and in 14% investigators found the report suspicious. The rate of intentionally false allegations was somewhat higher with approximately 12% of reports falling into this category. Thirty-four percent of the allegations were judged to be unsubstantiated but made in good faith. Results of this analysis showed that neglect was the most

common form of intentionally fabricated maltreatment. Custodial parents (usually mothers) and children were least likely to fabricate reports of abuse or neglect. Non-custodial parents (usually fathers) and anonymous reporters made the most intentionally false reports. Fathers have also been found to be more likely to make intentionally false reports in other studies (Bala & Schuman, 2000).

Intentionally false allegations of child sexual abuse in the context of custody disputes also appear to occur relatively rare. Marilyn McDonald (1997) reviewed several large incident studies carried out in the United States, Australia and Canada regarding false allegations of sexual abuse during custody disputes. She estimated that all types of sexual abuse allegations are raised in only about 2% of disputed custody or visitation cases. One to eight percent of those cases were determined to be *intentionally* false allegations. Factors motivating a significant portion of allegations that were considered to be unfounded (judged to be untrue) or unsubstantiated (she defines as unable to determine if true or not), were a faulty perception or confused interpretation of events by the accuser. McDonald noted two difficulties in determining the rate of false accusations. First, since sexual abuse is underreported in general, this is likely true in custody cases as well. Secondly, there is a high rate of allegations which end up being unsubstantiated, some of which are seriously suspicious.

ASSESSING THE CREDIBILITY OF ABUSE AND NEGLECT ALLEGATIONS

Mary-Ann Burkhart (2000) outlined a number of factors to be considered when trying to determine the credibility of a child's report of sexual abuse. Many of these can generalize to any form of abuse or neglect that has been reported. Some of her suggestions include:

Detail: Accurate knowledge of sexual anatomy and functioning in a young child may indicate sexual abuse. When a disclosure is accompanied by sensory details such as taste or odor, it suggests the child did not receive the sexual information from another source.

Words Used: When a child uses words which are not age appropriate, coaching may be indicated. For example, we would expect a five-year-old to describe an act of sexual abuse as "My daddy peed on my tummy" rather than as "My daddy sexually assaulted me."

Child's Manner and Emotional Response: When a child discloses abuse accompanied by a spontaneous show of emotion, such as crying or shaking, it may signify a truthful disclosure. However, at times children are emotionally flat or laugh inappropriately and this does not indicate a false report but may be a manifestation of the child's coping mechanisms.

Content of Statement: Does the child's allegation make sense? Is she telling you something that is physically impossible? A description of a number of events over time, a progression of increasingly serious sexual activity over time and elements of secrecy may also be indicative of credibility.

Existence of a Motive to Fabricate: What motives does the child have to fabricate a disclosure of abuse or neglect? Remember, when children lie it is usually to avoid trouble rather than to initiate it.

Adult receiving disclosure: This is particularly important in the context of a custody dispute. Although not indicative of a false report, when a child only discloses to one parent and is reluctant to discuss the abuse with anyone else, it may suggest coaching.

On the other hand, general statements with vague details are not as well accepted as detailed information about specific incidents. Below is a list of areas to consider when trying assessing the accuracy of abuse or neglect allegations.

1. What happened?
2. Were strategies used to keep the abuse secret?
3. Where did the event occur?
4. When did event occur?
5. Were there more than one event and if so what was the frequency?
6. What was the duration of overall abuse or neglect?
7. How severe was the incident?
8. Is there a history of prior incidents?
9. Did the perpetrator have access to the child (time alone)?

Other areas that may be assessed when an allegation of abuse or neglect has been made include:

- History of abuse or neglect in the parents family of origin
- Quality of the parents relationship while married
- Quality of the parents post separation relationship
- What does a parent have to gain by making an allegation? Does the alleging parent want the child to have a relationship with the other parent if that relationship is safe for the child or does the parent want to cut off contact completely?
- Quality of parent child relationship
- History of grooming behaviors
- Rules and discipline practices
- A parent's ability to protect the child in the future
- Presence of abuse in the sibling relationship
- Sexual boundaries in the home
- Coercive strategies used to control the child or other parent
- Parent and child roles
- Time elapsed between separation and allegations of divorce

CONCLUSION:

As a Guardian Ad Litem, your role will be to prescreen allegations of abuse or neglect. If the evidence you uncover suggests the probability that abuse or neglect occurred, it is then up to you to refer the family for further assessment by professionals expert in forensic evaluations of abuse such as CPS, police, sexual assault center, substance abuse evaluator, domestic violence

assessment or private evaluator. If a case comes to you in which abuse or neglect has been substantiated or is strongly suspected, your recommendations regarding custody, access and interventions will need to consider the impact of the abuse or neglect on the child and whether the events are likely to repeat. In making these recommendations, the effects of the abuse or neglect needs to be weighed against what the perpetrator has to offer the child and how that parent may provide benefits that the other parent cannot provide.

ABUSIVE USE OF CONFLICT

Parental conflict consistently emerges in divorce research as one of the principal factors negatively affecting children's pre-divorce and post-divorce adjustment. The courts recognize that when one parent continuously initiates or propagates conflict, when children are consistently exposed to ongoing high levels of conflict over long periods of time or when parents involve their children in interparental hostility, the use of conflict may become abusive. Many of the children living through these types of family dynamics begin to show a myriad of emotional and behavioral symptoms including depression, anxiety and aggression. This section attempts to outline the features of high conflict families, describe the harmful effects of this range of behaviors on children and suggest recommendations that Guardians Ad Litem may include in their reports to the court when evaluating these families.

Defining High Conflict

The term “abusive use of conflict” is a legal term found in the Revised Codes of Washington (RCW) chapter 26. Section 191 (3) of this chapter describes situations under which the court may limit or prohibit parent-child contact due to parental behavior that has "an adverse effect on the child's best interests" including:

> "(a) A parent's neglect or substantial nonperformance of parenting functions; (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions...; (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions; (d) The absence or substantial impairment of emotional ties between the parent and the child; (e) *The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development*; (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child."

When making a recommendation that the court consider a limitation in parent-child contact, it is important to describe specific behavioral anchors to support your recommendation. Although neither the RCW nor the professional literature defines the term “abusive use of conflict,” there is a growing body of clinical reports and research that describes specific characteristics commonly seen in families where a high level of post-divorce conflict exists. In their 1992 book *Caught in the Middle*, Barris and Garrity described conflict from the child’s point of view:

> For children, conflict is any situation that places them between their parents or that forces them to choose between them. Being in the middle means anything from hearing one

> parent belittle the other's values to vicious verbal attacks; from threats of violence to actual violence; from implicit appeals for exclusive loyalty to explicit demands that children side openly with one parent. Whatever forum it takes, all conflict hurts. The more intense, pervasive and open the hostility is, the greater is the damage to the children. And the longer it lasts, the greater the toll it takes."

As Baris and Garrity (1988) suggest, the level of conflict, the degree to which it pervades a child's life and the amount of open hostility provide a framework for describing parental conflict. The authors developed a *Conflict Assessment Scale* in which they defined mild to severe conflict. Parents who have Minimal Conflict in their relationship are able to parent cooperatively, separate the children's needs from their own, validate the importance and competence of the other parent, resolve conflict between the adults using only occasional expressions of anger and are able to bring negative emotions under control quickly. Mild Conflict included a relationship in which there was occasional berating of the other parent and quarreling in front of the child, questioning the child about personal matters in the other parent's life and occasional attempts to form a coalition with the child against the other parent.

In a parental relationship with Moderate Conflict, there is verbal abuse, loud quarreling, denigration of the other parent, threats of litigation and ongoing attempts to form a coalition with the child against the other parent around isolated issues. However there has not been a threat or history of physical violence. In Moderately Severe Conflict a child is not directly endangered by parental violence but the parents are endangering to each other. In addition there is a threat of violence, slamming of doors and throwing objects, verbal threats of harm or kidnapping, continual litigation, attempts to form a permanent coalition or alienate a child against the other parent and the child is experiencing emotional endangerment. Severe Conflict was identified as the presence of endangerment by physical or sexual abuse, use of drugs or alcohol to the point of impairment, and severe psychological pathology.

<u>The Spectrum of High Conflict</u>

Janet Johnston's 1995 article, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making* (1995), outlines a number of common high conflict behaviors:

> "Ongoing high conflict is identified by multiple criteria, a combination of factors that tend to be, but are not always, associated with each other: intractable legal disputes, ongoing disagreement over day-to-day parenting practices, expressed hostility, verbal abuse, physical threats, and intermittent violence."

High conflict cases often remain in the courts for two to three years or more without being resolved. There may be frequent changes in lawyers and usually have high levels of attorney involvement over day-to-day parenting practices. Visitation is seen as a parental right no matter how the schedule affects the children. When there is joint decision making, every child related decision is an opportunity for parental polarization and conflict. In general, there is a high level of overt hostility which takes place in front of the children and often leaks out into the child's school, sports and social environments. There are often frequent parenting plan and boundary

violations such as when one parent schedules an activity or vacation during the other parent's time without prior consent.

Those working in the area of divorce consistently find that for most high-conflict families, one or both parents exhibit the features or meet diagnostic criteria for a personality disorder. Characteristics of narcissistic, obsessive-compulsive, histrionic, paranoid, or borderline personality disorders are most common in high conflict cases.

How Personality Disorder Leads to High Conflict

Parents with personality disorders may become rigid in their perception of the other and tend to deal with situations that arise with extreme strategies. Many parents are polarized, viewing themselves as all good and the other as all bad. These parents focus on the traits within the other parent that reinforce their view of that parent, and they approach each new conflict as verification of how difficult the other parent is. These parents experience chronic externalization of blame, possessing little insight into their own contributions to the high conflict dynamic.

Parents with personality disorders may have a variety of strengths as parents. However, when focused on the conflict with the other parent they usually have little awareness or empathy for the impact their behavior has on their children. They routinely feel self-justified, believing that their actions or decisions are best for the children and no alternatives will suffice. No matter how much helping professionals try to keep the focus on the children, these parents remain focused on their own experience and on the conflict.

Some other manifestations of parental personality disorder observed in high conflict divorce are:

- A High degree of distrust;
- A poor sense of boundaries;
- A lack of differentiation between the parent's and the child's thoughts and feelings in a manner that discourages the child's autonomy;
- The parent may openly express their own emotional distress regarding ongoing disputes with the other parent or the absence of the children.
- Parent relies on their children for emotional support and sustenance leading to parentification of the child;
- Rigid and inflexible thinking about child development and parenting practices;
- Feelings of intense bitterness;
- Intense feelings of fear, anger, upset and powerlessness;
- Rewriting the history of the marital relationship in a manner that highlights the negative features and dismisses the positive ones as a way to defend against feeling deeply hurt by the other parent's decision to separate or developing a super-idealized view of the marriage and its memories;
- Uses conflict to defend against a deep feeling of rejection that is damaging to the parent and affects their core sense of themselves;
- Uses conflict as a defense against helplessness and guilt;
- Distrust of the other person as a parent;

- An overwhelming sense of unresolvable loss;
- Generalized anger toward life and members of the opposite sex; and
- A high degree of competitiveness in the marriage and in the separation.

Impact on Children

Also characteristic of high conflict custody cases is a tendency toward involving the children in disputes, denigrating or vilifying a parent in front of the children, and devaluing or sabotaging the other parent's relationship with the child. For example, a conflict generating parent often has a history of denying the other parent access to the child and often interferes with visitation and telephone contacts. Children of high conflict parents may be regularly asked to carry messages about provocative or conflictual issues (e.g. changes in child support or a remarriage) to the other parent. The children may be used to spy on the other parent's household indirectly though the use of intrusive questions or directly with requests that the child report on activities in the other household. High conflict parents often encourage their child to align with them and at extreme levels attempt to alienate the child from the other parent.

Children in high conflict families usually feel torn between their parents or resolve the loyalty conflict by aligning with one parent. Children frequently tell each parent what they want to hear in order to avoid rejection or disappointing the parent. In order to seek favor or reassurance from a conflict inducing parent, a child might volunteer information about the other home, focusing on or magnifying the negative aspects and leaving out or denying the positive ones. In some cases, a child's previously warm and positive relationship with a parent becomes awkward or estranged. Appendix One provides a comprehensive list of behaviors one might find in high conflict families.

High Conflict and Domestic Violence

Although not all divorcing high conflict parental relationships involve violence, data suggests that between fifty and seventy-five percent of them involve some type of domestic abuse or evidence of ongoing control in the parental relationship (Jaffe, Crooks, and Poisson, 2003). In some families where a pattern of domestic violence exists but has not been visible, signs of conflict emerge around the time of separation or divorce when the abused partner begins to emancipate from the batterer. The presence of domestic violence in custody disputes is addressed elsewhere in this manual and will not be discussed here but we will review characteristics that differentiate high conflict families from those in which domestic violence exists.

Clare Dalton, Judge Susan Carbon, and Nancy Olesen (2003) suggested that control is one of the main differentiating factors. In the chart below the authors compared high conflict couples with couples where domestic violence control-initiated conflict is present.

High Conflict	***Abuse***
The likelihood of personality disorders in both partners, stemming from unresolved childhood issues.	*One partner exhibits attitudes and behavior designed to exert inappropriate control in the relationship, while the other may display symptoms of physical and/or emotional injury from exposure to abuse.*
The partners' unresolved feelings regarding their failed relationship, which are channeled into fighting over the children.	*The abusive partner's unresolved feelings regarding his or her partner's desire to separate from the relationship prompt the abusive partner to fight for custody or generous access to the children as a way of punishing him or her for leaving, or using the children to meet physical or emotional needs. maintaining access to the partner,*
Mistrust of each parent for the other, based on the distorted and exaggerated negative view of each held by the other.	*Mistrust of the abusive partner by the spouse, solidly grounded in past experience and well-informed assessment of the abuser's current intentions and likely future behavior, along with unfounded allegations about the abused parent made by the abusive , based on his or her distorted and exaggerated negative view of the abused parent.*
Cycles of reaction and counter reaction which further erodes the possibility of trust.	*Repeated instances of manipulation and control, which further erode the abused partner's capacity to trust the abuser.*
Pressure on the children to "take sides," leading children, on occasion to relieve the pressure by pleasing one parent since they cannot please both.	*Children fearful of exposure to the abusive partner's dangerous, neglectful, or inappropriate behavior, yet often desirous of maintaining a connection to him or her and sometimes distrustful of the abused parent's capacity to meet their physical, social and emotional needs.*

It is important to examine the differences between high conflict and domestic violence because recommendations for custody, access and decision making may be different depending on this distinction. Important questions to ask in your efforts to clarify this issue are: Were allegations of violence raised before or after the separation? If raised afterwards, is there evidence of prior violence or control? What are the specific incidents on which a parent is basing allegations? Is there evidence to corroborate the parent's reports? However, even when the allegations only come up after separation and there is no corroborating data, domestic violence may well have occurred.

Recommendations for High Conflict Families

What do you do with these high conflict couples when developing recommendations for a parenting plan? The goals of your recommendations are to protect the children from parental conflict and reduce the likelihood of ongoing conflict and litigation. We are looking for the least restrictive recommendations that meet those criteria. In general, the greater the overt conflict the more the two families should be encouraged or directed toward parallel parenting rather than cooperative parenting. In Parallel parenting, points of contact between the parents are minimized and independence in parenting style, home structure and rules are encouraged. Contentious interactions arise when an element of the parenting plan is vague or ambiguous. Therefore, the greater the conflict the more detailed and less flexible the parenting plan must be (Stewart, 2001; Baris and Garrity, 1994).

Residential Custody

In Janet Johnston's (2002) article *High-Conflict and Violent Parents in Family Court: Findings On Children's Adjustment, And Proposed Guidelines For The Resolution Of Custody And Visitation Disputes*, she lays out specific recommendations regarding primary custody in parenting plans for high conflict couples:

> **1**. Where there is *indication of both current AND episodic or ongoing threats of and/or use of violence,* sole legal custody should normally be given to the nonviolent parent. In these cases, the noncustodial parent may be denied right of access to the child's medical and educational records if such information would provide access to the custodial address and telephone number, which the custodial parent has the right--for safety reasons--to keep confidential.
>
> **2.** Where there is a history of domestic violence that is *not* current, nor both recent AND episodic, or ongoing, there should be no presumption in favor of any particular legal custody arrangement."

Other experts in the area of high conflict divorce suggest a primary parent may be necessary when conflict is overt and consistent even when domestic violence is not an issue.

Transitions

- When it is possible to exchange at a parent's home or when exchanges have to take places at other locations, such as airports, the parent who is dropping the children off should provide the transportation so that they can say good-bye to the children without pressure from the receiving parent.

- If parents cannot contain their anger during transitions, a neutral drop-off point may be necessary to ensure minimal or no contact between parents. School is often the most convenient location and the most comfortable place for the children to make the exchanges. If school does not work, other potential drop off areas include a public library, the home of a mutual friend or neutral relative, or extracurricular activities (if the parent dropping off

leaves before the receiving parent gets there). Police stations should be avoided, if possible, as they often create heightened anxiety for the children (although at times this may be the best solution).

- Transitions may need to be scripted. An example may be: The parent dropping off the child says most of their good-byes prior to the actual transition (e.g. before getting out of the car). The parents say hello to each other and exchange necessary information regarding the care of the child such as last meal time, illnesses, or medical regimens. The parent dropping the child off says a short good-bye and encourages the child to transition to the other parent.

- If conflict continues to be a problem at transitions, transfers by a neutral party or supervised transfers may be necessary.

- When conflict during transitions remains high despite use of these other strategies, it may be necessary to adjust the visitation plan, by decreasing the number of transitions and substituting longer visits even with younger children.

Communication

- The greater the conflict, the more important it is to minimize direct communication between the parents.

- If communicating basic information during transitions creates conflict, a log with basic information could be passed back and forth. It is important to outline the type of information that should and should not be communicated. For example, the log could include information about meals, activities, medications and injuries. It is not a place to criticize the other parent or document failures to follow the parenting plan. The log may be more successful if it is not admissible in court.

- Email communication is often used successfully; particularly when there are guidelines for its use (see Appendix Two for detailed email communication guidelines).

- As GAL, you may need to monitor email for a period of time to assist parents in using it successfully as a means of communication. Long term monitoring may also be necessary.

Schedule Changes

- Changes should be firmly kept to a minimum.

- If a change to the basic schedule is unavoidable, it should be written out in detail so misunderstandings are minimized.

- The residential parent must OK any change that takes place during their time before the change is made and before the children are notified of the change.

Special Events and Holidays

- When parents are unable to celebrate holidays and special events peaceably in each other's presence, it is best to alternate special events (such as the children's birthdays) or hold celebrations in both homes.

Telephone

- There should be unrestricted, private telephone contact between the children and the nonresidential parent.

- If unrestricted calls are not occurring, phone appointments should be made two or three times a week. Consequences would occur if the residential parent is not home during scheduled calls or interferes with calls in some other way.

- There are arguments for having make-up phone calls and for not having them. On the one hand, phone contact with the non-residential parent should be encouraged. On the other hand, when telephone calls are a source of conflict, rescheduling them provides one more avenue for conflict. There are a variety of circumstances under which phone calls are missed or cancelled. When a parent is intentionally missing phone calls to hamper a child's communication with the other parent, phone calls may be made up. In this case a make-up time should be scheduled within 24 hours. If the calling parent misses more than one phone appointment within two weeks, the call would not be rescheduled.
- Each parent should notify the other in advance if missing a phone appointment is unavoidable.

Children's events

- When possible, both parents may attend events (school activities, sports practice or games, performances for extracurricular activity). If there is conflict, families may try to both be present but not sit near each other or talk to each other.

- There needs to be an agreement that children may take a few minutes to approach the non-residential parent to say hello. After five to ten minutes the non-residential parent should encourage the child to return to the residential parent.

- If conflict continues to occur when parents attend the same event, separate or alternating attendance should take place.

- When there is a high level of conflict, schools should be encouraged to meet with parents separately for school conferences. Each parent may be given half of the time allotted to other families if teachers' time is limited. When this is not possible, parents could alternate conferences or make other arrangements with the children's teachers.

Decision Making

- Joint decision making in contraindicated for high conflict families who have a history of failure to resolve decisions.

- The parent who is more able to make appropriate child oriented decisions should be given sole decision making.

- Another alternative would be having, a GAL, parenting coordinator, mediator or arbitrator in place, possibly for long term, to assist in resolving differences.

Dispute Resolution

Janet Johnston (2002) recommends "A Spectrum of Alternative Dispute Resolution Services for Divorcing Families" which begins with the least intrusive intervention and increasingly sets up additional structure and monitoring as it becomes apparent that a high conflict couple cannot successfully use less restrictive forms. Some forms may be used simultaneously such as Co-Parent Counseling to address communication enhancement and setting appropriate boundaries and impact directed mediation to deal with specific issues such as a child support modification.

Co-Parent Counseling

These therapies are conducted by a mental health professional that has specific experience working with high conflict divorced or divorcing couples. Treatment has two main areas of focus. First, therapy provides feedback regarding how parents' behavior may positively or negatively affect their children and information regarding child development. The second area of focus is communication, problem solving and decision making with the other parent. At times the therapist works with both parents in the same room and other times works with each parent in parallel in individual sessions. It is appropriate to work with parents separately when one parent feels uncomfortable, pressured or coerced while in the other parent's presence.

Mediation and Consultation

Johnston and Roseby (1997: 230-231) point out that mediation, as originally conceived, "is the use of a neutral, professionally trained third party in a confidential setting to help disputing parents clearly define the issues, generate options, order priorities, and then negotiate and bargain differences and alternatives about the custody and care of their children after divorce." Mediation and consultation are inappropriate for cases involving serious allegations of abuse, molestation, domestic violence, severe mental illness, substance abuse, etc.

Therapeutic or Impasse-Directed Mediation

This type of mediation integrates mediation and therapy. The rationale for using this type of dispute resolution process is the assumption there are underlying emotional factors that contribute to the impasse between the parents and that this must be dealt with before the parents can make rational, child-centered decisions.

Parenting Coordinator

Also called a case manager, Guardian Ad Litem, special master, custody commissioner, or parenting plan coordinator. This professional is appointed by stipulation of the parties or an order of the court to manage ongoing conflict, help co-ordinate parenting, make timely and flexible decisions, and case manage with other professionals involved. Includes access to children or their therapists.

Arbitration

When there is joint decision making in families Although Johnston includes arbitration in her scheme for intervention and dispute resolution, we approach this as a separate and final level in the dispute resolution process. An arbitrator would make a legally binding determination when a high conflict couple is unable to come to resolutions over specific disagreements.

Other Services to High Conflict Families

Psychotherapy

Individual counseling would address psychological factors that are contributing to an impasse in the dispute resolution process and assisting the parents in understanding the child's needs.

Supervised Visitation

Where there is recent concern about a child's physical or emotionally safety, due to allegations of child abuse, battering, parental substance abuse or severe psychological pathology on the part of the parent, supervised visitation if often recommended by the GAL. It may also be used when abduction is a threat. In this context supervised visitation is only about protecting the child physically and giving an anxious or fearful child the support of a protective adult in hopes of reducing their fears during visits. If interactions between parent and child become inappropriate or the child becomes stressed, the supervisor could terminate the visit.

Supervised visitation is observation only, as compared to therapeutic visitation below, where the third party will intervene in an effort to bring about more appropriate parent-child interactions.

Therapeutic Supervision

A therapeutic supervisor not only keeps the child protected from harm but may also teach parenting skills, facilitate needed discussion between parent and child and in high conflict

situations, aid children in remaining focused on their own emotions and needs rather than reactively siding with a parent.

We have also used therapeutic supervision in situations where parent and child have had little contact in recent years (due to lack of attachment, alienation, or parental absence) and need the help of a facilitator to normalize feelings and explore a basis for the relationship.

Suspended Visitation or Temporarily Suspended Visitation

When there has been a history of child abuse, witnessing parental battering, ongoing substance abuse or ongoing severe parental pathology and despite intervention, the child continues to be anxious and fearful; visits may need to be suspended. If permanent suspension of contact is being considered the GAL must weigh the cost of the child losing the parent against future benefits of continuing the relationship.

Reunification Therapy

When there has been estrangement due to child abuse, battering, the child has been co-opted into alienation by the other parent, or there has been a long term disruption to the parent-child relationship for some other reason, reunification therapy may be helpful. There is some functional overlap between therapeutic supervision and reunification therapy in the areas of facilitating a parental apology to the child, having the child voice their experiences and setting rules for how the parent-child dyad will act together in the future. In cases of alienation or a child deciding to align with one parent to avoid conflict; reunification therapy is aimed at helping the parent understand the difficult situation the child is in and what approaches may be the most useful in establishing meaningful dialogue. For the child, reunification therapy targets helping the child to detach themselves from the alienating parent's emotional aggressiveness and reconstituting a relationship with the parent with whom they have become estranged. Reunification therapy may be a long, delicate process that takes considerable skill on the part of the practitioner, requires court structure to assure the alienating parent will make the child available for appointments and requires patience on the part of all the participants.

The GAL assessment is focused on determining a parenting plan and interventions that will support the children's positive adjustment to their parents' separation, support the children's healthy development as they age and allow for meaningful parent-child relationships. The degree of structure and level of intervention recommended for these families depends on the parents' ability to cooperate or collaborate on behalf of the children and their ability to maintain an environment that is safe, nurturing and encouraging. As the parents' ability to provide these important factors decrease, recommendations will seek to increase the structure and rigidity of the parenting plan and provide for higher levels of intervention.

BIBLIOGRAPHY

Adler, N. & Schultz, J. (1995). "Sibling incest offenders." Child Abuse and Neglect, 19(7), 811-819.

Bala, N. & Schuman, J. (2000). Allegations of Sexual Abuse When Parents Have Separated, *Canadian Family Law Quarterly*, 17,191-241.

Bancroft L. & Silverman, J. (2002). *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics.* Thousand Oaks, CA: Sage Publications.

Bancroft, L. R. (1998). *Understanding The Batterer In Custody And Visitation Disputes*. http://www.lundybancroft.com/pages/articles_sub/CUSTODY.htm or http://stopfamilyviolence.org/media/bancroft_abuser_custvisit.pdf

Barris, M.A. & Garrity, C.B. (1988). *Children of Divorce: A Developmental Approach to Residence and Visitation.* Illinois: Psytec

Buchanan, C. M., & Waizenhofer, R. (2001). The impact of interparental conflict on adolescent children: Considerations of family systems and family structure. In A. Booth, A. C. Crouter, & M. Clements (Eds.), *Couples In Conflict* (pp. 149-160). Mahwah, NJ: Lawrence Erlbaum, Inc.

Buchanan, C. M., Maccoby, E. E., & Dornbusch, S. (1991). Caught between parents: Adolescents' experience in divorced homes. *Child Development, 62,* 1008-1029.

Burkhart, M.R. (2000). Child abuse allegations in the midst of divorce and custody battles: Convenience, coincidence or conspiracy? *American Prosecutors Research Institute Update* 13 (10).

Child Welfare Information Gateway (2006). *Recognizing Child Abuse: Signs and Symptoms.* Washington, DC: U.S. Department of Health and Human Services, 1-4.

Child Welfare Information Gateway. (2006). *What Is Child Abuse?* Washington, DC: U.S. Department of Health and Human Services, 1-31. http://www.childwelfare.gov/pubs/can_info_packet.pdf

Cyr, M., Wright, J., McDuff, P., & Perron, A. (2002). Intrafamilial sexual abuse: Brother-sister incest does not differ from father-daughter and stepfather-stepdaughter incest. *Child Abuse and Neglect, 26*, 957-973.
Dalton, D., Carbon, S. and Oleson, N. (2003). High conflict divorce, violence, and abuse: implications for custody and visitation decisions. *Juvenile and Family Court Journal*, Vol. 54 (4), 11-34.

Emery, R. (1982). Interparental conflict and the children of discord and divorce. *Psychological Bulletin,* 92(2), 310-330.

Faller, K. C. (1991). Possible explanations for child sexual abuse in divorce, *American Journal of Orthopsychiatry,* 61(1), 86–91.

Flanagan, K., & Hayman-White, K. (2000). Sexual abuse counseling and prevention program. *Child abuse prevention newsletter, 8*(1), 11-14.

Garrity, C.B. & Barris, M.A. (1994). *Caught in the Middle: Protecting the Children of High-Conflict Divorce*, New York: Lexington Books.

Gilmour, G.A. (2004). *High-Conflict Separation and Divorce: Options For Consideration.* Canada: The Department of Justice. http://www.justice.gc.ca/en/ps/pad/reports/index.html

Goldman J., Salus, M.K., Wolcott, D. and Kennedy, K.Y. (2003). *A Coordinated Response to Child Abuse and Neglect: The Foundation For Practice.* Washington DC: U.S Department of Health and Human Services.

Hart, S., & Brassard, M. (1995). *Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents: APSAC Practice Guidelines.* Chicago, IL: American Professional Society on the Abuse of Children (APSAC).

Jaffe, P. G., Crooks, C. V. and Poisson, S. E. (2003). Common misconceptions and addressing domestic violence in child custody disputes. *Juvenile and Family Court Journal*, 54, 57-67.

Johnston, J. R. (1992). High-conflict and violent parents in family court: Findings on children's adjustment, and proposed guidelines for the resolution of custody and visitation disputes. Section III: Proposed guidelines for custody and visitation for cases with domestic violence. Corta Madera, CA: Center for the Family in Transition.

Johnston, J.R. (1994). High-conflict divorce, *The Future of Children*, 4(1), 165-182.

Johnston, J.R. (1995). Children's adjustment in sole custody compared to joint custody families and principles for custody decision making. *Family Court Review,* 33(4), 415-425.

Johnston, J.R. (1995*).* Research update: Children's adjustment in sole custody compared to joint custody: families and principles for custody decision making*. Family and Conciliation Court Review* 33*, 415*-425.

Johnston, J., Campbell, L. and Tall, M. (1985). Impasses to the resolution of custody and visitation disputes. *American Journal of Orthopsychiatry*, 55(1): 112-129.

Johnston, J. R., Gonzalez, R. & Campbell, L.E. (1987). Ongoing post-divorce conflict and child disturbance. *Journal of Abnormal Child Psychology*, 15, 493-509.

Johnston, J. R., & Roseby, V. (1997). *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*. New York: The Free Press.

Langford, L., Isaac, N.E. & Kabat, S. (1999). *Homicides Related to Intimate Partner Violence in Massachussets 1991-1995*, Boston: Peace at Home.

Laviola, M. (1992). *Effects of older brother - younger sister incest: A study of the dynamics of 17 cases*. Child Abuse and Neglect*.* Vol. 16, 409-421.

Mary-Ann Burkhart (2000). Child abuse allegations in the midst of divorce and custody battles: convenience, coincidence or conspiracy? *Update* -

American Prosecutors Research Institute, Volume 13(10).

McDonald, M. (1998). The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, Court *Review*, Spring, 12-19.

Nelson, R. (1989). Parental hostility, conflict and communication in joint and sole custody families. *Journal of Divorce*, 13(2), 145-157.

O'Brien, M. (1991). Taking sibling incest seriously. In M. Q. Patton (Ed.), *Family Sexual Abuse.* Newbury Park, CA: Sage Publications.

Owen, N. (1998). More than just child's play: A study on sibling incest. *Children Australia, 23*(4), 15-21.

Pearson, L. & Gallaway, R. (1998). *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access*. Ottawa: Parliament of Canada, Public Works and Government Services Canada.

Prevent Child Abuse America (2003). Recognizing Child Abuse: What Parents Should Know. Chicago: Prevent Child Abuse America. www.preventchildabuse.org

Rayment-McHugh, S. & Nisbet, I. (2003). *Sibling Incest Offenders As A Subset Of Adolescent Sexual Offenders.* Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, Australia May 1-2.

Stewart R. (2001). *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review.* Department of Justice, Canada.

Thoennes, N. (1988). Summary of finding from sexual abuse allegations project. In: Nicholson, B. and Bulkley, J., Editors, 1988. "Sexual abuse allegations in child custody and visitation cases", National Legal Resources Center for Child Advocacy and Protection, Washington, DC, pp. 1-28.

Trocome, N & Bala, N. (2005). "False Allegations of Abuse and Neglect When Parents Separate." *Child Abuse & Neglect* Vol.29, Issue 12, 1333-1345.

Thoennes, N. & Tjaden, P.G. (1990) The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Divorce Disputes, *Child Abuse & Neglect* 151, 153-54.

U.S. Department of Health and Human Services, Administration on Children, Youth and Families (2007). *Child Maltreatment 2005.* Washington, DC: U.S. Government Printing Office

Warshak, R.A. (2003). *Divorce Poison: Protecting the Parent-Child Bond from a Vindictive Ex.* New York*:* Harper.

Wiehe, V. (1990). *Sibling Abuse. Hidden Physical, Emotional and Sexual Trauma*. New York:Lexington Books.

Worling, J. R. (1995). Adolescent sibling-incest offenders: Differences in family and individual functioning when compared to adolescent nonsibling sex offenders. *Child Abuse*

and Neglect, 19(5), 633-643.

Other Helpful Resources

Department of Justice Canada. www.justice.gc.ca/en/ps/pad/reports/index.html - Series of literature reviews and research on various topics related to divorce.

Revised Codes of Washington (RCW) http://apps.leg.wa.gov/RCW/default.aspx

Shared Parenting Council of Australia http://www.familylawwebguide.com.au/spca/index.php?page=library&keep_su=secretary_spca Articles on divorce and high conflict

Washington Administrative Codes (WAC) http://apps.leg.wa.gov/WAC/default.aspx

APPENDIX ONE

CHARACTERISTICS OF HIGH CONFLICT FAMILIES

Naomi Oderberg, Ph.D. & Margo Waldroup, MSW

The following table lists many of the behaviors seen in high conflict families. It is meant to help identify, describe and organize the behavior associated with each family member.

1) Presence of Violence and Abuse	
Parent has a criminal conviction for a sexual offence, act of domestic violence or child abuse.	
There is a pattern of domestic violence.	
There is an isolated incident of domestic violence around time of separation.	
Police have been called to break-up parental conflict.	
There are allegations of physical or sexual abuse or domestic violence.	
Child welfare agencies have become involved in the dispute.	
There is a confirmed or alleged history of ongoing verbal aggression, hostility or abuse.	
There is a confirmed or alleged history of intense jealousy, withholding family resources, monitoring a partner's movements or other evidence of abusive power and control dynamic.	
Frequent, demanding, critical or abusive telephone calls and email communications (leaves diatribes on the other parent's voice mail).	
Threats of violence, destroying the parent or taking the children away from a parent.	
2) Legal Involvement	
One or the other party has gone to the court several times to resolve issues.	
The divorce proceeding has been before the court for at least two to three years without being resolved.	

A parent is repeatedly in contempt of the court order.	
A parent has changed lawyers several times.	
There is frequent lawyer involvement and ongoing disagreement over day-to-day parenting practices and inconsequential matters.	
There is a large amount of collected affidavit material related to the divorce proceeding with harmful content against the character of the other parent.	
Inappropriate legal information is communicated to the children directly or through legal documents being left where the children can see them.	
3) Behavior Relating to the Other Parent:	
Traumatic or ambivalent separations.	
Rewrites history of the marital relationship as all bad or as idealized.	
History of denying the other parent access to the children.	
Blames all difficulties on the other parent and does not take responsibility for their own contributions to the conflict or effect their behavior has on the children.	
Disrespectful, devaluing attitude and behavior toward the other parent.	
Boundary violations and manipulations (Gets tickets to Mexico two days early during other parent's residential time, putting the residential parent in a bind).	
Withholds support payments or money owed for medical or other expenses.	
A tendency to vilify the other parent.	
Polarized positions lead to frequent disagreements over schedules, finances, child related activities, and access to children.	
Uses the same destructive patterns of provocation and retaliation that were used in the marriage.	
The parent is rigid in their interpretation of the other parent's intention, behavior, thoughts or feelings and is unable to consider alternate explanations.	
Old disagreements from the beginning of the marital relationship become part of later disputes over the children.	
Transfers negative views from the marriage to the current situation whether or not they are relevant.	
Efforts to block access to information or participation in the children's school, social and recreational activities.	
Withdrawal and non-communicative behavior such as refusing to speak with, look at or acknowledge the other parent at transfers or answer phone calls or emails.	
Resolves disagreements by avoiding the other parent and the issues raised rather than by verbal reasoning.	
4) Parent's Behavior in Parent-Child Interactions	
Parents argue violently or constantly in the presence of the children.	
The interparental struggle takes center stage and as a consequence, the parent does not perceive or respond to the child's needs and	

personal circumstances.	
A parent is more interested in exacting revenge or maintaining control than they are in solving conflict or protecting the children.	
Residential time is seen as the parent's right despite the effect of a particular schedule on the children.	
Parent is self-focused and has difficulty distinguishing their needs from those of their children's.	
During interviews the parent is unable to answer questions concerning the child's well being without repeatedly refocusing the conversation on their own feelings or negative experiences with the other parent.	
Parent has poor boundaries and encourages enmeshment rather than autonomy in the children.	
Does not protect the children from their own emotional distress and ongoing disputes with the other parent.	
The parent depends on their child for emotional support in a way that ignores the child's needs and experience.	
Parents engage in a competition for the child's affection.	
A parent uses guilt to manipulate the child or plays a victim role to gain their loyalty or pity such as, "I just don't know what I'll do when you're with dad/mom."	
The child is rejected or punished for expressing positive thoughts or feelings about the other parent.	
Does not allow the child to approach the other parent or emotionally punishes the child for acknowledging the other parent at performances, activities or other events.	
Children are actively involved in disputes in a number of ways such as asking them to choose an activity when parents endorse different options (e.g. one parent favors soccer and the other baseball).	
Children are used as spies (child complies) and asked to report on the activities at the other household.	
Children are interrogated about the other parent's activities, relationships, parenting decisions, other aspects of the child's life when with that parent (child is pressured to respond).	
Parents insist that the children carry verbal or written communications between homes about topics of conflict to the parents such as late support payments or missed visits.	
Parent encourages the child to align with them and reject the other parent.	
The parent does not allow the child to take any of their belongings to the other parent's home or does not allow them to bring anything from the other parent to their home.	
A parent changes the child's clothes into clothes they've bought as soon as the child transitions to them.	
Distorts the truth about the other parent's behavior or tells the truth without considering the effect the information has on the child.	
Bombards the child with negative stories about the other parent.	

Frequently criticizes, devalues or diminishes the other parent to the child. Uses words such as "liar" or "adulterer" to describe the other parent.	
Allows the child to overhear phone conversations about conflicts, criticism and hostile feelings toward the other parent.	
A parent implies that the other parent is dangerous is some way when there is no evidence that the child is in danger.	
A parent magnifies or exaggerates the other parent's behavior. For example if a parent is labeled an alcoholic although they only drink moderate amounts of alcohol occasionally.	
Devalues or minimizes the importance of the child's relationship with the other parent or repeatedly points out how they have been trustworthy, reliable and devoted to them while the other parent has not.	
A parent communicates that other activities are more important than phone calls or scheduled visits with the other parent.	
The parent makes "loaded" comments to the child before transitions such as "It's too bad you have to go to dad's/mom's and miss your cousin's party."	
A parent will not be home at designated times for scheduled phone calls, will not answer the phone when the other parent calls or does not give the child messages from the other parent.	
A parent interrupts the child's time with the other parent in various ways such as frequently calling to speak with the child or check on them. This may increase the child's anxiety about the other parent and can make the child feel guilty about visitation.	
Makes intentionally provocative decisions or ones that blatantly disregards the other parent's values (cutting a child's hair, piercing ears, allowing tattoos).	
Minimizes the impact that being separated from the other parent will have on the child.	
Views a relocation which significantly decreases contact with the other parent as something that will not have much impact on the child or that the child can easily cope with.	
Parent identifies the child as having the same characteristics as the disliked parent.	
Parent restricts child's access to other parent's extended family members	
5) Child's experience	
The child feels torn in their loyalty to each parent (usually younger than nine years of age).	
Child tells each parent what they want to hear leading to contradictory messages to the parents.	
Child allies with one parent to resolve their loyalty conflict (more likely in nine to twelve year olds).	
A child volunteers information about the other home, focusing on or	

magnifying the negative aspects and leaving out or denying the positive ones.	
Child does not spontaneously offer any information about the other parent or activities at the other household, as would occur in non-conflictual families (I saw that movie at dad's).	
The child feels anger, fear, sadness and powerlessness in response to the parents' conflictual relationship with each other.	
Feels pressure to take sides with one parent or the other in a disagreement between parents.	
It feels untenable and stressful for the child to be at a location with both parents at the same time (transitions are stressful)	
Child begins to reject the other parent, having tantrums at transitions or refusing to go on visits when it is not justified.	
The child displays separation anxiety but only prior to transitions with the other parent and not in other situations.	
Child ignores non-residential parent when together at child focused events such as sports or school activities.	
Child discontinues displays of affection toward one parent in order to avoid disappointing the other parent or appearing disloyal.	
Children recount minor grievances as reasons for disliking or discontinuing contact with the other parent.	
Child parrots complaints about the non-residential parent using the same words and tone as the residential parent.	
Child fears previously trusted parent because of the other parent's view that s/he is dangerous in some way.	
6) Extended family and others	
Child's access to extended family members is restricted.	
The parent creates alliances with friends and family members (sometimes of the other parent's), helping professionals, counselors and lawyers, by constantly relating their negative perceptions of the other parent to them.	
Attorneys, therapists, friends and family accept one parent's side of the story without considering alternative explanations and fuel the dispute by suggesting that the "victim" take an aggressive and uncompromising stance.	
A parent's family members join the hostile parent in denigrating and devaluing the other parent in front of the child.	

This table was created by the authors with some information coming from the following sources: Gilmour, 2004; Stewart, 2001; Johnston, 1995; Emery, 1982; Pearson & Gallaway, 1998; Nelson,1989; Johnston, Gonzalez and Campbell, 1987;Johnston, 1994; Johnston et al., 1985; Johnston, Campbell, and Mayes 1985; Buchanan et al., 1991; Buchanan & Waizenhofer, 2001; Warshak 2001; Jaffe, Crooks, and Poisson, 2003.

APPENDIX TWO

GUIDELINES FOR E-MAIL COMMUNICATION

Naomi Oderberg, Ph.D. & Margo Waldroup, MSW

Here are some guidelines to help structure e-mail communication in high-conflict families. It may be helpful to monitor emails and provide feedback to parents while they are learning more adaptive communication.

1. The tone of email communications should be neutral and polite. There should be no name calling, put downs, sarcastic comments, verbal threats, demanding or derogatory language which will enflame the conflict. Parents may want to wait 1-24 hours before sending an email so they have time to review and edit before sending it out.

2. The content would be business like, just the facts, and restricted to areas that directly affect the children such as scheduling, appointments and school or other activities. Unresolved feelings about the relationship or a critique of the other's parenting should not be included. Emails could be used in court and parents should be aware that inappropriate emails may be used against them.

3. If a child complains about something that occurs at the other parent's home, send a courteous inquiry asking for an explanation instead of assuming the worst.

4. If the one parent inquires about something that happened at the other parent's home, that parent needs to respond politely with an explanation, request for more information, apology or a solution, whichever is appropriate.

5. Emails should be kept short, between one and four sentences in length. One format is to a) present the issue, request or difficulty; b) state the goal or offer a solution; c) suggest the other parent provide other solutions. For example: "I am concerned that Joshua is having difficulty keeping track of his homework. We could set up a homework log. Any other ideas?"

6. The number of emails sent each week should be limited. Some practitioners suggest a maximum of one a day or one longer email once a week. The limit ensures that parents do not end up having to respond to emails constantly. In situations where one parent feels highly anxious or intruded upon, fewer emails may help create a calmer atmosphere.

7. There needs to be an agreement about how often parents check their email (from once a day to once a week) and how long they have to respond (24-48 hours). If a parent can't respond within that timeframe, they should send an email stating when a response will be forthcoming. For example: "I do not know if I will be available Saturday the 14th, I will let you know by next Thursday."

8. If there is a time sensitive issue, such as the illness of a child, having to cancel a visit with short notice or an emergency, there needs to be some form of back-up communication such as text messaging or voicemail.

9. Both parents should keep a hard copy of all communications for future reference.

10. The files holding past emails should be password protected to keep them out of the children's sight.

CHAPTER 10
UNDERSTANDING THE DYNAMICS OF DOMESTIC VIOLENCE

UNDERSTANDING THE DYNAMICS OF DOMESTIC VIOLENCE

Submitted by Grace Huang

WHY IS DOMESTIC VIOLENCE RELEVANT TO PARENTING PLANS?

Domestic violence is a crucial area of inquiry in addressing parenting plan disputes. In cases involving domestic violence, courts are obligated to determine how and to what extent the children have been affected by what has gone on in the family, the quality of the children's relationships with each parent, and how to assure the children's ongoing physical, psychological, and emotional well-being.[43] Courts are required to consider a history of domestic violence in determining the best interests of children.[44]

Domestic violence can create grave risks for an abused parent and his or her children; and there is no fail-proof method to determine with absolute certainty, especially at the outset, exactly which case, or which circumstances, contain or create those risks. In many cases, separation increases, rather than reduces, the risks of harm to an abused parent or to the children.[45] Thus, promoting ongoing contact between children and a violent ex-spouse may create increased opportunities for domestic violence through exchanges of children and visitation.[46] In extreme cases, domestic violence may be lethal. The lethality of domestic violence often increases when the perpetrator believes that the abused party is leaving or has left the relationship.[47] In these extreme cases, children themselves may become victims or be involved as witnesses to homicide.[48]

In addition, the presence of domestic violence is also an indicator for the co-existence of child maltreatment. In one review of studies investigating this overlap, research indicted that between 30% and 60% of children whose mothers had experienced abuse were also likely to have been abused.[49] For these and numerous other reasons, domestic violence is a crucial area of inquiry in addressing parenting plan disputes and requires an individualized analysis.

---

[43] RCW 26.09.187.

[44] RCW 26.09.191(1) and (2)(a) restrict mutual decision-making and dispute resolution and restrict a parent's residential time when a parent has engaged in a history of acts of domestic violence or an assault that has caused grievous bodily harm or fear of such harm.

[45] Walter S. DeKeseredy, McKenzie Rogness & Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675 (2004).

[46] M. Sheeran & S. Hampton, Supervised visitation in cases of domestic violence, *Juvenile and Family Court Journal* 50, 13-25 (1999).

[47] N. Websdale, Reviewing Domestic Violence Deaths, *National Institute of Justice Journal, 250*, 26-31 (2003); J. Campbell, D. Webster, J. Koziol-McLain, C.R. Block, D. Campbell, M.A. Curry, et al, Assessing Risk Factors for Intimate Partner Homicide, *National Institute of Justice Journal, 250,* 14-19 *(2003)*

[48] K. Starr & J. Fawcett, *If I Had One More Day…Findings and Recommendations from the Washington State Domestic Violence Fatality Review,* 30-31 (2006).

[49] J. Edleson, The Overlap Between Child Maltreatment and Woman Battering. *Violence Against Women, 5,* 134-154 (1999).

DEFINING DOMESTIC VIOLENCE

For purposes of determining its effect on children and families, it is crucial to be aware of the behavioral definition of domestic violence as well as legal definitions. Domestic violence is a ***pattern*** of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—that abusers use against their intimate partners. The pattern of behaviors is neither impulsive nor "out of control," but is purposeful and instrumental, in order to gain compliance from or control over the victim.[50] Some of the behaviors may include criminal conduct, such as physical and sexual assaults, as well as other behaviors designed to control, dominate, humiliate, or terrorize, such as emotional abuse or financial control.

1. Legal Definitions of Domestic Violence

Washington law defines domestic violence in RCW 26.50.010(1) as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members;
(b) sexual assault of one family or household member by another; or
(c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

The legal definition of domestic violence may be narrower, and more focused on physical acts of violence, than the broader behavioral definition articulated previously. The legal definition may also be broader, as it encompasses violence against a broader ranger of family members than does the behavioral definition.

Most of the family or household members defined in RCW 26.50.010(2) encompass the behavioral definition of intimate partner, including "spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, . . .persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship. . .. " However, RCW 26.50.010 also includes household or family members who are not, nor have they ever been, intimate partners such as some "adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren."

The behavioral pattern and effects of domestic violence are similar for adult or adolescent intimate relationships regardless of whether they are spouses, ex-spouses, boyfriend/girlfriend, ex-boyfriend/girlfriend, adult child/adult parent, same-sex relationships, individuals who currently live together and are intimately involved, those who have lived together in the past, or individuals who have children in common.

---

[50] A. Ganley, Ph.D, *Domestic Violence Manual for Judges,* Chapter 2 (Olympia, WA: published by the Office of the Administrator for the Courts, 2006

While domestic violence cases typically involve intimate partner violence, non-intimate partner violence may also appear in legal proceedings. The dynamics differ in cases involving intimate-partner violence and cases involving domestic violence perpetrated by household members who are not, nor have they ever been, intimate partners with their victims (i.e., adult siblings, adult child to parent, roommates, etc.).

For the purposes of parenting plans, Washington law directs courts to limit a parent's residential time with a child shall if "it is found that the parent has engaged in … a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm…."[51] In addition, Washington law directs courts to consider whether a "parent's involvement or conduct may have an adverse effect on the child's best interests…and preclude or limit any provisions of the parenting plan," if a parent has engaged in the "abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development" or "Such other factors or conduct as the court expressly finds adverse to the best interests of the child." [52]

Because domestic violence in the broader sense impacts the well-being of children, children, it is crucial that guardians ad litem in family law cases have an accurate picture of the violence or abuse perpetrated by one parent against the other or against a child, and to consider its implications for the child after the parents separate on the best interests of a child. It is also important to understand that the impact of domestic violence on children may be mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent.[53]

2. Distinguishing Between Domestic Violence, High Conflict, and Normal Conflict of Separating Couples

There is general consensus that children's psychological well-being and adjustment may be negatively affected by both parental conflict and violence.[54] Some conflict is a normal consequence of most parental separations and can be addressed by the passage of time, or on parenting classes that help focus the parties on the needs of children. Often, these are cases that do not involve guardians ad litem, as the parties are able to resolve the conflicts themselves. However, there is frequently confusion over the term "high conflict," which has been used to describe more extreme and protracted situations that may involve extensive court and community resources, and which include domestic violence cases.[55]. Given the prevalence of domestic violence in cases before the court system, the term "high-conflict" may obscure serious concerns about violence and abuse. [56]

---

[51] RCW 26.09.191(2)(a)(iii).
[52] RCW 26.09.191(3).
[53] *See* Peter G. Jaffe, Nancy K.D. Lemon & Samantha E. Poisson, *Child Custody & Domestic Violence: A Call For Safety And Accountabililty,* 21-28 (2003);at 27-28 (providing a table that identifies risk and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).
[54] D.A. Wolfe, C.V. Crooks, V. Lee, A. McIntyre-Smith, & P. Jaffe. "The Effects of Children's Exposure to Domestic Violence: A Meta Analysis and Critique", *Clinical Child and Family Psychology Review,* 6, 171-187.
[55] J. Johnston & L. Campbell, *Impasses of Divorce*. New York: Free Press (1988).
[56] P. Jaffe & C. Crooks, "Assessing the Best Interests of the Child," in *Parenting by Men Who Batter,* 2007. The authors recommend that there be distinctions designating individuals who demonstrate a pattern of abusive behaviors that continue over time and that are designed to control, dominate, humiliate, or terrorize their victim as

If the risks to children associated with ongoing conflict and with domestic violence were the same, and the methods to mitigate those risks were the same, the distinction might not matter. However, while there is crossover in both the risks posed to children and strategies to address those risks, there are also some crucial differences. First, the physical safety of the non-abusive parent and the children after separation should be addressed when the parents' relationship has been abusive; this is not necessarily the case if the parents' relationship has been highly, but mutually, conflictual.

Second, when both parents are engrossed in ongoing conflict, the participation of each in the conflict, in of itself does not provide a basis for choosing one over the other as the primary residential parent, but rather, other factors will be determinative in that decision.[57] However, when one parent has abused the other, there are strong arguments, as well as legal requirements for recommending primary residential time to the non-abusive parent.[58]

Third, the abused parent's capacities may be currently diminished as a result of the domestic violence, making it crucial to look at evidence of past capacity and future potential for parenting once the effects of the domestic violence have been mitigated. Fourth, parents embroiled in conflict are likely to be equally vocal about their differences, and about one another's perceived parenting deficiencies. As explored in greater detail in the following section, in an abusive relationship, the abusive partner is likely to deny and minimize his or her abuse; and the abused partner may also have been, or still be, unwilling or afraid to disclose either the abuse, or other concerns about the partner's parenting.

In the context of contested family law cases, the ability to assess the competing claims made by the parties, to understand the precise nature and level of the risks to which children may be exposed in the post-separation context, and to make appropriate recommendations with respect to parenting plans that meet children's needs and assure their safety depends on being able to identify and distinguish between "conflict-initiated" and "control-initiated" violence.[59]

"Control-initiated" domestic violence is specific to intimate relationships that are more accurately described as "abusive" than simply as "violent" or "conflictual." In abusive relationships, one partner uses a range of coercive behaviors to control the other's activities, associations, and behavior. The threat or actual use of physical violence is just one kind of abusive behavior, and may well not be the predominant one.[60] Additionally, when violence occurs in an abusive relationship, it is not necessarily triggered by conflict.

In conducting investigations and making recommendations to the court, it is crucial for guardians ad litem to recognize whether it is conflict or domestic violence as defined in the behavioral context that has shaped the family prior to the separation of the parents, and is shaping the ongoing experience of the case within the family law system.

"batterers," as contrasted with individuals who perpetrate minor, isolated incidents of behavior that are not part of a pattern of behavior over time.

[57] See RCW 26.09.187.

[58] See RCW 26.09.191.

[59] D. Ellis & N. Stuckless, *Mediating And Negotiating Marital Conflicts* 13 (1996).

[60] K. Fischer, N. Vidmar, & R. Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U.L. REV. 2117, 2120-2126 (1993).

DOMESTIC VIOLENCE IN FAMILIES[61]

Domestic Violence is a Pattern of Abusive Tactics.

Domestic Violence is:

> A pattern of assaultive and coercive behaviors; including physical, sexual, and psychological attacks, as well as economic coercion; that adults or adolescents use against their intimate partners.

Examples of Domestic Violence Behavioral Tactics include, but are not limited to the following:

- **Physical abuse:** Spitting, poking, shaking, grabbing, shoving, pushing, throwing, hitting with open or closed hand, restraining, blocking, choking, hitting with objects, kicking, burning, using weapons, etc.

- **Sexual abuse**: Pressured, coerced, or physically forced sex

- **Psychological abuse:** Acts of violence against others, property or pets, intimidation through threats of violence against victims, children, others, or self (suicide), as well as through yelling, stalking, and hostage taking, physically or psychologically isolating victims from family, friends, community, culture, accurate information, etc, attacks against victim's self-esteem and competence, forcing victims to do degrading things, controlling victim's activities, etc., alternating use of indulgences: promises, gifts, being affectionate

- **Economic coercion:** Control of funds: spending family funds, not contributing financially to family, withholding funds, etc., or control of victim's access to resources: money, health insurance, transportation, child care, employment, housing, etc.
- **Use of children to control victim:** interrogating children about victim's activities, forcing child to participate in the physical or psychological abuse of adult victim, using children as hostages, using visitation with children to monitor adult victim, undermining parenting of adult victim, custody or visitation fights, etc., false reports to Child Protective Services

Domestic violence consists of a wide range of behaviors.

Some acts of domestic violence are criminal, such as hitting, choking, kicking, assault with a weapon, shoving, snatching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, harassment at work, attacks against property, attacks against pets, stalking, harassment, kidnapping, arson, burglary, unlawful imprisonment, etc. Other abusive behaviors may not constitute criminal conduct, e.g., degrading comments, interrogating children or other family members, suicide threats or attempts, controlling the victim's access to the family

[61] Portions of this section have been adapted from, A. Ganley, Ph.D, *Domestic Violence Manual for Judges,* Chapter 2 (Olympia, WA: published by the Office of the Administrator for the Courts) 2006.

resources: time, money, food, clothing, and shelter, as well as controlling the abused party's time and activities, etc. Whether or not there has been a finding of criminal conduct, evidence of such behaviors may indicate a pattern of abusive control, or domestic violence.

Domestic violence is a pattern of behavior, not an isolated, individual act.

The pattern may be evidenced either (a) in multiple tactics in one episode (e.g., physical assault combined with threats and emotional abuse), or (b) in multiple episodes over time. One battering tactic or episode builds on past tactics or episodes and sets the stage for future tactics or episodes. All incidents or tactics of the pattern interact with each other and have a profound effect on the abused party. The use of physical force combined with psychological coercion establishes a dynamic of power and control in the relationship. Also there is a wide range of consequences from the pattern, some physically injurious and some not; all are psychologically damaging.

Acts of violence against others or property to control the adult victim.

Some of the acts may appear to be directed against or involve the children, property, or pets when in fact the perpetrator is behaving this way in order to control or punish the intimate partner (e.g., physical attacks against a child, throwing furniture through a picture window, strangling the adult victim's pet cat, etc.). Although someone or something other than the abused party is physically damaged, that particular assault is part of the pattern of abuse directed at controlling the intimate partner.

Psychological attacks through verbal abuse.

Not all verbal insults between intimates are necessarily psychological battering. A verbal insult done by a person who has not also been physically assaultive is not the same as a verbal attack done by a person who has been violent in the past. It is the perpetrators' use of physical force that gives power to their psychological abuse through instilling the dynamic of fear in their victims. The psychological battering becomes an effective weapon in controlling abused parties because abused parties know through experience that perpetrators will at times back up the threats or taunts with physical assaults. The reality that the perpetrators have used violence in the past to get what they want gives them additional power to coercively control the victims in other non-physical ways. For example, an abuser's interrogation of the abused party about the victim's activities becomes an effective non-physical way to control the abused party's activities when the perpetrator has assaulted the victim in the past. Sometimes abusers are able to gain compliance from the abused party by simply saying "Remember what happened the last time you tried to get a job . . . to leave me . . . etc.?" (e.g., subtly reminding the victim of a time when the perpetrator assaulted the abused party). Because of the past assaults, there is the implied threat in the statement.

Psychological control maintained by intermittent use of physical force and psychological attacks.

The psychological control of abused parties through intermittent use of physical assault along with psychological abuse (e.g., verbal abuse, isolation, threats of violence, etc.) is typical of domestic violence. These are the same control tactics used by captors against prisoners of war and hostages. Perpetrators are able to control abused parties by a combination of physical and psychological battering since the two are so closely interwoven by the perpetrator. The incident

of physical assault may be in the distant past but the coercive power is kept alive by the perpetrator's other tactics of control.

Perpetrator's use of indulgences to control victim.

Domestic violence perpetrators, like captors of prisoners of war, also alternate their abusive tactics with occasional indulgences, such as flowers, gifts, sweet words, promises to get help, attention to children, etc. Some victims may think that the abuse has stopped, whereas for batterers they have simply changed control tactics. Early domestic violence literature sometimes referred to this conduct as part of a "honeymoon phase" when, in fact, these are merely different tactics of control.

Some mistakenly argue that both the perpetrator and the abused party are "abusive," one physically and one verbally.

While some abused parties may resort to verbal insults, the reality is that verbal insults are not the same as a fist in the face. Furthermore, domestic violence perpetrators use **both** physical and verbal assaults. Early research indicates that domestic violence perpetrators are more verbally abusive than either their victims or other persons in distressed/non-violent or in non-distressed intimate relationships.[62] It is crucial where there are allegations that both parties are abusive to examine whether the situation involves mutual high conflict or whether there is a pattern of coercive controlling behavior on the part of one party.[63]

Determining Predominant Aggressor

Some argue that there is "mutual battering" where both individuals are using physical force against each other. Careful fact-finding often, but not always, reveals that one party is the predominant physical aggressor and the other party's violence is in self-defense (e.g., she stabbed him as he was choking her) or that one party's violence is more severe than the violence of the other (e.g., punching/choking versus scratching).[64] Sometimes the domestic violence victim uses physical force against the batterer in retaliation for chronic abuse by the perpetrator, but this retaliation incident is not part of a pattern of assaultive and coercive behavior. Research of heterosexual couples indicates that women's motivation for using physical force is often self-defense, while men use physical force for power and control.[65] "Mutual combat" among gay and lesbian partners is also rare. Even though gay and lesbian partners may be approximately the same size and weight, there is usually a primary aggressor who is creating the atmosphere of fear

---

[62] G. Margolin, L. Gleberman, J. John and T. Ransford, *Interpersonal Factors Associated with Marital Violence* (paper presented at the Third National Family Violence Research Conference, University of New Hampshire, Durham, 1987).

[63] P. Jaffe, C. Crooks, & S. Poisson, Common Misconceptions in Addressing Domestic Violence in Child Custody Dispures, *Juvenile and Family Court Journal, 54,* 57-67 (2003).

[64] D. Saunders, "When Battered Women Use Violence: Husband-Abuse or Self-Defense?" *Violence and Victims* 1, no. 1 (1986): 47-60; L. K. Hamberger and T. Polente, "Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice," *Violence and Victims* 9, no. 2 (1994): 125-37.

[65] D. Saunders and A. Browne, "Domestic Homicide," *Case Studies in Family Violence*, ed. R. Ammerman and H. Michel (1991); M. Wilson and M. Daly, "Til Death Do Us Part," in *Femicide: The Politics of Woman Killing*, ed. J. Radford and D. E. Russell (1991).

and intimidation that characterizes battering relationships.[66] Self-defense against a violent partner does not constitute "mutual battering."

Domestic Violence in the Context of Family Court Proceedings

Guardians ad litem may unwittingly become part of a domestic violence perpetrator's attempts to control the abused party and should be aware of attempts by perpetrators to control the court process as a means of showing the abused party that the perpetrator, not the judge, is in control. Perpetrators of domestic violence become very adept at using the legal system as one more tactic of control against the victim. Some examples may include, but are not limited to:

- Physical assaults or threats of violence against the abused party and others inside or outside the courtroom, threats of suicide, threats to take the children, etc., in order to coerce the abused party to change the petition or to recant previously given testimony.
- Following the abused party in or out of court.
- Using information gained through guardian ad litem interviews and court records to stalk the abused party.
- Long speeches about all the abused party's behaviors that "made" the perpetrator do it.
- Statements of profound devotion or remorse to the abused party and to the court.
- Requesting repeated delays in proceedings; dragging out parenting plan proceedings over two to three years.
- Requesting changes of counsel, or not following through with appointments with counsel.
- Requesting mutual orders of protection as a way to continue control over the abused party and to manipulate the court.
- Continually testing limits of visitation/support agreements (e.g., arriving late or not showing up at appointed times and then, if the abused party refuses to allow a following visit, threatening court action).
- Threatening and/or implementing custody fights to gain leverage in negotiations over financial issues.
- Using any evidence of harm resulting from the abuse as evidence that the abused party is an unfit parent (abused party's counseling records, etc.).

[66] P. Letellier, "Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence," *Violence and Victims* 9, no. 2 (1994): 95-106; K. Lobel, ed., *Naming the Violence: Speaking out about Lesbian Battering* (1986); C. Renzetti, *Violent Betrayal: Partner abuse in lesbian relationships* (1992).

DOMESTIC VIOLENCE IS A PATTERN OF STRATEGIC, PURPOSEFUL BEHAVIOR WHICH IS USED BECAUSE IT IS EFFECTIVE

There are many misconceptions about domestic violence that can lead to errors in identifying it, assessing its effects, and developing appropriate responses. These include misconceptions what causes domestic violence, and thus, how it can be addressed.

Domestic Violence is not "Out of Control" Behavior

There are often misperceptions about domestic violence being the result of the perpetrator "losing control." However, domestic violence perpetrators make choices even when they are supposedly "out of control," which indicates they are actually in control of their behavior. For example, the great majority of domestic violence perpetrators have not had ongoing problems outside of their intimate partner relationships.[67] Some perpetrators will batter only in particular ways, e.g., hit certain parts of the body, but not others; use specific methods that do not leave obvious marks; only use violence towards the victim even though they may be angry at others (their boss, other family members, etc.); break only the abused party's possessions, not their own.

Domestic violence involves a pattern of conduct. Certain tactics require a great deal of planning to execute (e.g., stalking, interrogating family members, etc.). Some batterers impose "rules" on the victims, carefully monitoring their compliance and punishing victims for any "infractions" of the imposed rules.[68] Such attention to detail contradicts the notion that perpetrators "lost" control or that their abusive behavior is the result of poor impulse control.

Some battering episodes occur when the perpetrator is not emotionally charged and are done intentionally to gain victim compliance.[69] Perpetrators choose to use violence to get what they want or to get that to which they feel entitled. Perpetrators use varying combinations of physical force and/or threats of harm and intimidation to instill fear in their victims. At other times, they use other manipulations through gifts, promises, and indulgences. Regardless of the tactic chosen, the perpetrator's intent is to get something from the victims, to establish domination over them, or to punish them. Perpetrators selectively choose tactics that work to control their victims.[70]

Domestic Violence is Not about Anger, or Caused by "Stress," Alcohol, or Drugs

The role of anger in domestic violence is complicated and cannot be simplistically reduced to cause and effect. Some battering episodes occur when the perpetrator is upset and others when the perpetrator is not angry or emotionally charged. Some abusive conduct is carried out calmly to gain the victim's compliance. Some displays of anger or rage by the perpetrator are merely tactics used to intimidate the victim and can be quickly altered when the abuser thinks it is necessary (e.g., upon arrival of police).

---

[67] L Bancroft & J. Silverman, *The Batterer as Parent-Addressing the Impact of Domestic Violence on Family Dynamics* (Sage Publications) 2002.
[68] K. Fischer, N. Vidmar and R. Ellis*, The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2174 (1993).
[69] N. Jacobson and J. Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (Simon and Schuster, 1998).
[70] E. Pence and M. Paymar, *Educational Groups for Men Who Batter: The Duluth Model* (1993).

Current research indicates that there is a wide variety of arousal or anger patterns among identified domestic violence perpetrators, as well as among those identified as not abusive. [71] These studies suggest that there may be different types of batterers. Abusers in one group actually reduced their heart rates during observed marital verbal conflicts, suggesting a calming preparation for fighting rather than an out of control or angry response. Such research challenges the notion that domestic violence is merely an anger problem and raises major questions about the efficacy of anger management programs for batterers.

Remembering that domestic violence is a pattern of behaviors rather than isolated, individual events helps to explain the number of abusive episodes that occur when the perpetrator is not angry. Even if experiencing anger at the time, perpetrators still choose to respond to that anger by acting abusively. Ultimately, individuals are responsible for how they express anger or any other emotions, and for how they try to control adult victims through intimidation or force.

Nor is domestic violence caused by "stress." We all face different sources of stress in our lives (e.g., stress from the job, stress from not having a job, marital and relationship conflicts, losses, discrimination, poverty, etc.) but we do not all respond by engaging in domestic violence. People respond to stress in a wide variety of ways (e.g., problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.).[72] People choose ways to reduce stress according to what has worked for them in the past.

It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence or other illegal behaviors. Just as one would not excuse a robbery or a mugging of a stranger, because the perpetrator was "stressed," one should not excuse the perpetrator of domestic violence because he or she was "stressed." Moreover, as already noted, many episodes of domestic violence occur when the perpetrator is not emotionally charged or stressed. When we remember that domestic violence is a pattern of behavior consisting of a variety of behaviors repeated over time, then citing specific stresses becomes less meaningful in explaining the entire pattern.

Alcohol and drugs such as marijuana, depressants, anti-depressants, or anti-anxiety drugs do not cause non-violent persons to become violent. Many people use or abuse those drugs without ever battering their partners. Alcohol and drugs are often used as the excuse for the battering, although research indicates that the pattern of assaultive behaviors which comprise domestic violence is not being caused by those particular chemicals.[73]

There does seem to be some conflicting evidence that certain drugs (e.g., speed, cocaine, crack, meth) may chemically react within the brain to cause violent behavior in individuals who show no abusive behavior, except under the influence of those drugs. Further research is needed to explore the cause and effect relationship between these drugs and violence.

---

[71] N. Jacobson, J. Gottman, J. Waltz, R. Rushe, J. Babcock and A. Holtzworth-Munroe, "Affect, Verbal Content, and Psychophysiology in the Arguments of Couples With a Violent Husband," *Journal of Consulting and Clinical Psychology* 62 (1994): 982-88.
[72] A. Bandura, *Aggression: A Social Leaning Analysis* (1973).
[73] B. Critchlow, "The Powers of John Barleycorn: Beliefs About the Effects of Alcohol on Social Behavior," *American Psychologist* 41 (1986): 751, 764.

While research studies cited above have found high correlation between aggression and the consumption of various substances, there is no data clearly proving a cause and effect relationship. There are a wide variety of explanations for this high correlation.[74] Some say that the alcohol and/or drugs provide a disinhibiting effect, which gives the individual permission to do things they ordinarily would not do. Others point to the increased irritability or hostility which some individuals experience when using drugs and which may lead to violence. Others state that the high correlation may merely reflect the overlap of two widespread social problems: domestic violence and substance abuse.

Regardless of the exact role of alcohol and drugs, it is important to focus on the violent behavior and not allow substance use or abuse to become the justification for the violence.

While the presence of alcohol or drugs does not alter the finding that domestic violence took place, it is relevant to certain court considerations and in dispositions of cases. The use of substances may increase the lethality of domestic violence and needs to be carefully considered when weighing safety issues concerning the abused party, the children, and the community.

Interventions and recommendations in cases where the domestic violence perpetrator also abuses alcohol and/or drugs must be directed at both the violence and the substance abuse. For individuals who abuse alcohol and drugs, changing domestic violence behavior is impossible without also stopping the substance abuse.

Domestic Violence is Not Caused by Problems Inherent in the Relationship Between the Two Individuals or by the Abused Party's Behavior

People can be in distressed relationships and experience negative feelings about the behavior of the other without choosing to respond with violence or other criminal activities.

Looking at the relationship or the abused party's behavior as a causal explanation for domestic violence takes the focus off the perpetrator's responsibility for the violence, and unintentionally supports the perpetrator's minimization, denial, externalization, and rationalization of the violent behavior.

Blaming the abused party or locating the problem in the relationship provides the perpetrator with excuses and justifications for the conduct. This inadvertently reinforces the perpetrator's use of abuse to control family members and thus contributes to the escalation of the pattern. The abused parties are placed at greater risk, and the court's duties to protect the public, to assess damages, to act in the best interests of children, and to hold perpetrators accountable are greatly compromised.

Many batterers started bringing this pattern of control into their early dating relationships. They bring these patterns into their adult intimate relationships and tend to repeat those patterns in all their intimate partnerships, regardless of the significant differences in the personalities, or

[74] A. Ito, N. Miller and V. Pollock, "Alcohol and Aggression: A Meta-Analysis of the Modulating Effects of Inhibitory Cues, Triggering Events and Self Focused Attention," *Psychological Bulletin* 129 (1996): 60-82.

conduct of their intimate partners, or in the characteristics of those particular relationships. These variables in partners and relationships support the position that, while domestic violence takes place within a relationship, it is not caused by the relationship.

Research indicates that there are no personality profiles for battered women.[75] Battered women are no different from non-battered women in terms of psychological profiles or demographics. Once again this challenges the myth that something about the woman causes the perpetrator's violence. Furthermore, one research study indicates that no victim behavior could alter the perpetrator's behavior.[76] This also suggests that the victim's behavior is not the determining factor as to whether or not the perpetrator uses violence and abuse in the relationships. Domestic violence in adolescent relationships further challenges the belief that the abuse is the result of the victim's behavior. Often the adolescent abuser only superficially knows his victim, having dated only a few days or weeks before abuse begins. Such an abuser is often acting out an image of how to conduct an intimate relationship based on recommendations from peers, music videos, or models set by family members, etc. The adolescent's abusive conduct is most likely influenced more by that image than by the victim's actions.

Both adult and adolescent batterers bring into their intimate relationships certain expectations of who is to be in charge and what mechanisms are acceptable for enforcing that dominance. It is those attitudes and beliefs, rather than the victims' behavior that determine whether or not persons are violent.

Domestic Violence is a Learned Behavior

Domestic violence behaviors, as well as the rules and regulations of when, where, against whom, and by whom domestic violence is to be used, are learned through observation and reinforcement (i.e., as in cases of the male child witnessing the abuse of his mother by his father, or in the proliferation of images of violence against women in the media, or from the judge colluding with the perpetrator in blaming the victim and by not holding the perpetrator accountable for the conduct).

Domestic violence is learned not only in the family, but also in society. It is learned and reinforced by interactions with all of society's major institutions: the familial, social, legal, religious, educational, mental health, medical, child welfare, entertainment, media, etc. In all of these social institutions, there are various customs that perpetuate the use of domestic violence as legitimate means of controlling family members at certain times (e.g., religious institutions that state that a woman should submit to the will of her husband; laws that do not consider violence against intimates a crime, etc.). These practices inadvertently reinforced the use of violence to control intimates by failing to hold the perpetrator accountable for the violence and by failing to protect the abused party.

[75] G.T. Hotaling and D.B. Sugarman, "An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge," *Violence and Victims* 1, no. 2, (1986): 101-124.
[76] N. Jacobson, J. Gottman, J. Waltz, R. Rushe, J. Babcock and A. Holtzworth-Munroe, "Affect, Verbal Content, and Psychophysiology in the Arguments of Couples With a Violent Husband," *Journal of Consulting and Clinical Psychology* 62 (1994): 982-88

PARENTING IN THE CONTEXT OF DOMESTIC VIOLENCE

Parents' capacities to meet children's emotional needs are impacted by the presence of domestic violence. In many abusive relationships, in addition to the risks to children of exposure to domestic violence, as discussed in more detail below, children are exposed to the risk of irresponsible parenting. Published studies demonstrate that there are various recurring themes that consistently emerge when evaluating parenting behaviors on the part of perpetrators. For example, in domestic violence cases, children often face the following risks:

Risk of rigid, authoritarian parenting.
Children who have been traumatized are best able to recover in a nurturing, loving environment that also includes appropriate structure, limits, and predictability. A domestic violence perpetrator may be severely controlling toward children[77] and is likely to use a harsh, rigid disciplinary style,[78] which may intimidate children who have been exposed to domestic violence and can trigger the reawakening of traumatic memories, setting back post-separation healing.

Risk of neglectful or irresponsible parenting
Domestic violence perpetrators may have difficulty focusing on their children's needs, due to their selfish and self-centered tendencies. [79] For example, when a child is born, the abusive parent may continue to assert his or her needs over the needs of a crying infant, or a child who is frightened or hurt, especially when the abusive parent is the source of the fear or injury.[80] In post-separation visitation situations these parenting weaknesses may come to light, as abusers may be caring for children for much longer periods of time than have been accustomed to. In some situations, perpetrators may engage in intentionally lenient parenting as a way to win their children's loyalty, for example by not imposing appropriate safety or eating guidelines, or by permitting the children to watch inappropriate violence or sexuality in media. Neglectful parenting by domestic violence perpetrator may often take the form of intermittently showing interest in their children and then ignoring them for extended periods. Post-separation, perpetrators with this parenting style tend to drop in and out of visitation, which can be emotionally disruptive to their children.[81]

Risk of psychological abuse and manipulation.
Domestic violence perpetrators have also been observed to tend towards verbally abusive parenting styles and towards using the children as weapons against the other parent.[82] Frequently, in abusive relationships, the perpetrator repeatedly usurps the abused partner's

---

[77] C. McGee, *Childhood experiences of domestic violence*. Philadelphia, PA: Jessica Kingsley (2000).
[78] G. Margolin, R. John, C. Ghosh, & E. Gordis, Family interaction process: An essential tool for exploring abusive relationships. In D. Cahn & S. Lloyd (Eds.), *Family violence from a communication perspective,*at 37-58, Thousand Oaks, CA: Sage, (1996).
[79] N. Jacobson & J. Gottman, When Men Batter Women: New Insights into Ending Abusive Relationships. New York: Simon & Schuster (1998).
[80] L. Bancroft & J. Silverman, *The Batterer as Parent, Addressing the Impact of Domestic Violence on Family Dynamics,* 3 (2002)
[81] ***Id.***
[82] C. McGee,*Childhood experiences of domestic violence*. Philadelphia, PA: Jessica Kingsley (2000); E. Peled, The experience of living with violence for preadolescent children of battered women. *Youth and Society, 29*(4), 395-430 (1998).

autonomy and right to independent decision-making.[83] As a consequence, children may feel unsafe or that the world is unpredictable.[84] After the parents have separated, this tendency tends to increase, with visitation becoming an opportunity for a perpetrator to manipulate the children in continuing efforts to control the other parent.[85]

Risk of abduction.
A majority of parental abductions take place in the context of domestic violence, and are mostly carried out by perpetrators or others acting on their behalf.[86]

In examining a parent's capacity to meet the children's needs, it is important to recognize and understand the impact of an abusive parent's assaultive and coercive behaviors on the children and the vulnerable parent; as well as understand that a vulnerable parent is often able to meet the children's needs more effectively once safe from further violence or abuse.

THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN AND PARENTING

There is a common misconception that as long as children are not abused directly, they are not harmed by exposure to domestic violence. However, the reality is that even when they are not themselves physically or sexually abused, when there is violence at home, children are aware of and affected by it. As a significant and growing body of research attests, exposure to physical violence at home hurts children, although the extent of that injury differs from child to child,[87] even within the same home. The term "exposure" is used here to mean that children are affected not only when they are present at the violent incident, but also when they hear it, see it, or see or feel the after effects.

The Overlap of Domestic Violence and Child Abuse

Researchers estimate that the extent of overlap between domestic violence and child physical or sexual abuse, ranges from 30 to 50 percent.[88] In cases in which mothers are assaulted by the father, daughters are five to six times more at risk of sexual abuse than daughters in homes without domestic violence.[89] Some shelters report that the first reason many battered women give for fleeing the home is that the perpetrator was also attacking the children.[90] Adult victims

---

[83] E. Stark, A Failure to Protect: Unraveling the Battered Mother's Dilemma, *Western State University Law Review,* 29-110 (1999).
[84] E. Stark, The Battered Mother in the Child Protective Service Caseload: Developing and Appropriate Response. *Women's Rights Reporter,* 23(2), 107-131 (2002).
[85] J. Erickson, & A. Henderson, "Diverging realities: Abused women and their children. In J. Campbell (Ed.), *Empowering survivors of abuse: Health care for battered women and their children* (pp. 138-155). Thousand Oaks, CA: Sage. (1998).
[86] G. Greif, & R. Hegar, *When Parents Kidnap*. New York: Free Press. (1993).
[87] J. Edleson, Studying the Co-Occurrence of Child Maltreatment and Domestic Violence in Families. *Domestic Violence In the Lives of Children,* Washington, D.C.: American Psychological Association (2001).
[88] J. Edleson, The overlap between child maltreatment and woman battering. *Violence Against Women, 5*(2), 134-154 (1999); L.M. Williams, Understanding child abuse and violence against women. *Journal of Interpersonal Violence, 18*(4), 441-451 (2003).
[89] L. Bowker, M. Arbetel and J. McFerron, "On the Relationship Between Wife Beating and Child Abuse," in *Feminist Perspectives on Wife Abuse*, ed. K. Yllo and M. Bograd (1988).
[90] *Resident Survey* (Seattle, WA: New Beginnings Shelter, 1990).

report multiple concerns about the impact of spousal abuse directly on the children.[91] Furthermore, the more severe and fatal cases of child abuse overlap with domestic violence.[92]

In cases involving known or suspected domestic violence, as in most disputed parenting plan cases, it is crucial for the guardian ad litem to investigate and report specifically how and to what extent each child has been affected by what has gone on inside the family; the quality of the child's relationship with each parent (both historically and at the present time); each parent's capacity to meet the child's needs; and how best to assure the child's ongoing physical, psychological and emotional well-being.[93]

How Domestic Violence Impacts Children

Children do not merely witness domestic violence, but also are at risk of being victims of physical or sexual abuse by domestic violence perpetrators, and/or of being victimized by the perpetrator's use of children to control the adult victim.[94] The early literature in the field made note that male children of battered spouses may be more at risk to grow up to be abusers, but little attention was initially given to the immediate effects on children of the perpetrator's abusive conduct. Current research indicates that domestic violence impacts children in a wide variety of ways.[95]

And they are affected by a parent's use of abusive behaviors that stop short of physical violence, whether those behaviors are directed primarily toward a partner, or characterize the abusive parent's relationships with partner and children alike.

This is why in the development of parenting plans, courts are required to consider the presence of domestic violence in determining the bests interests of children.[96]. Where domestic violence is present, courts are obligated to restrict the residential time of a perpetrator of domestic violence.[97]

Consequences of the abuse vary according to the age and developmental stage of the child.[98]

---

[91] N. Z. Hilton, "Battered Women's Concerns About Their Children Witnessing Wife Assault," *Journal of Interpersonal Violence* 7 (1992): 77-86.

[92] S. Schechter and J. Edleson, *In The Best Interests of Women and Children: A Call For Collaboration Between Child Welfare and Domestic Violence Constituencies* (briefing paper prepared for the Conference Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, 1994, available through the National Council of Family and Juvenile Court Judges, Reno, NV).

[93] RCW 26.09.187.

[94] P. Jaffe, C. Crooks, S. Poisson, "Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes," *Juvenile and Family Court Journal,* Fall 2003, 59-60.

[95] J. Edleson, The overlap between child maltreatment and woman battering. *Violence Against Women, 5*(2), 134-154 (1999)

[96] RCW 26.09.191.

[97] RCW 26.09.191

[98] P. Jaffe, D. Wolfe and S. Wilson, *Children of Battered Women* (1990); J. L. Edleson, "Children's Witnessing of Adult Domestic Violence," *Journal of Interpersonal Violence* 14 (August 1999): 839-70.

1. Infants

During this stage, one crucial developmental task for the very young child is the development of emotional attachments to others. Being able to make attachments to others provides a foundation for healthy development of the individual. This attachment and appropriate stimulation increases infant brain development. Domestic violence not only interrupts the infant's attachment to the abuser, but also can interrupt the child's attachment to the abused party. The perpetrator often intervenes on the abused party's care of the young child. The violence may not permit the bonding between either parent and the child. This results in the child having difficulty forming future relationships and can block the development of other cognitive, emotional, and relational skills and abilities.

2. Toddlers 2 to 4 years old

At these ages, toddlers are developing a separate sense of self and agency ("No" and "Me do."). The perpetrator's abuse of the adult victim may interfere with the toddler's separation, and contribute to anxious attachment to either parent and/or interrupt learning to do tasks for oneself.

3. Children 5 to 10 years old

The primary tasks of children at this age are problem-solving development and cognitive development. The perpetrator's violence and pattern of control can impede or derail both of these tasks. For example, a child may have difficulty learning basic concepts in school because of her or his anxieties about what is happening at home.

4. Teenagers

The central developmental task of teenagers is becoming autonomous and developing relationships. This partly occurs as teens separate from their relationships with parents and establish peer relationships. Often, the learning from family relationships is duplicated in peer relationships. Consequently, for teens who are coping with the domestic violence perpetrator's abuse against the other parent, there are no positive models within the family for learning the relationship skills necessary for establishing mutuality in healthy adult relationships (e.g., listening, support, non-violent problem-solving, compromise, respect for the other, acceptance of differences, etc.).

The negative effects of the perpetrator's abuse in interrupting childhood development may be seen immediately in cognitive, psychological, and physical symptoms, such as:[99]

1. Eating/sleeping disorders;
2. Mood-related disorders, such as depression or emotional neediness;
3. Over-compliance, clinging, withdrawal;

[99] Barnett, O. W., Miller-Perrin, C. L., & Perrin, R. D. (1997). Children exposed to marital violence. In O. W. Barnett, C. L. Miller-Perrin & R. D. Perrin (Eds.), *Family violence across the lifespan*. Thousand Oaks, CA: Sage Publications.

4. Aggressive acting out, destructive behavior;
5. Detachment, avoidance, a fantasy family life;
6. Somatic complaints, finger biting, restlessness, shaking, stuttering;
7. School problems; and
8. Suicidal ideation.

The children's experience of domestic violence also may result in changes in perceptions and problem-solving skills, such as:

1. Young children incorrectly see themselves as the cause of the perpetrator's violence against the intimate partner.

2. Children using either passive behaviors (withdrawal, compliance, etc.) or aggressive behaviors (verbal and/or physical striking out, etc.) rather than assertive problem-solving skills.

There also may be long-term effects as these children become adults.

1. Since important developmental tasks are interrupted, these children may carry these deficits into adulthood. They may never recover from getting behind in certain academic tasks or in interpersonal skills. These deficits impact their abilities to maintain jobs and relationships.

2. Recent research indicates there are long-term health effects from experiences of family violence during childhood.[100]

3. Male children in particular are affected and have a high likelihood of battering intimates in their adult relationships.[101]

Perpetrators May Physically or Psychologically Traumatize Children in the Process of Battering Their Adult Intimates

While the children may not be the specific target of the domestic violence perpetrator, domestic violence perpetrators may traumatize children in the process of battering their adult intimate partners in the following ways:

a. The perpetrator intentionally injures (or threatens violence against) the children, pets, or the children's loved objects, as a way of threatening and controlling the abused parent. For example, the child may be used as a physical weapon against the victim, is thrown at the victim, or is

[100] A. L. Coker, P. H. Smith, L. Bethea, M. King, R. E. McKeiwn, "Physical Health Consequences of Physical and Psychological Intimate Partner Violence," *Archives of Family Medicine* 9, no. 5 (2000): 451-57.
[101] C. T. Hotaling and D.B. Sugarman, "An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge," *Violence and Victims* 1, no. 2 (1986): 101-24.

abused as a way to coerce the victim to do certain things; or The children's pets or loved objects are damaged, or are threatened with damage (e.g., attacks against pets or loved objects are particularly traumatic for young children who often do not make a distinction between their own bodies and the pet or loved object). An attack against the pet is experienced by the child as an attack against the child.

b. The perpetrator unintentionally physically injures the children during the perpetrator's attack on the adult victim, for example, when the child gets caught in the fray (e.g., an infant injured when mother is thrown while holding the infant); or when the child attempts to intervene (e.g., a small child is injured when trying to stop the perpetrator's attack against the victim).[43]

c. The perpetrator uses the children to coercively control the adult victim by isolating the child along with the abused parent (e.g., not allowing the child to enter peer activities or friendships); engaging the children in the abuse of the other parent (e.g., making the child participate in the physical or emotional assaults against the adult); forcing children to watch the abuse against the victim; interrogating the children about the other parent's activities; taking the child away after each violent episode to ensure that the abused party will not flee the abuser, etc.; and asserting that the children's "bad" behavior is the reason for the assault on the intimate partner.

d. Assaulting the abused parent in front of the children.

In spite of what parents say, children have often either directly witnessed the acts of physical and psychological assaults, or have indirectly witnessed them by overhearing the episodes or by seeing the aftermath of the injuries and property damage. Research reveals that children who "merely" witness domestic violence may be affected in the same way as children who are physically and sexually abused.[102]

CIVIL AND CRIMINAL COURT PROCESSES RELATING TO DOMESTIC VIOLENCE

Records from civil and criminal court processes relating to domestic violence may provide useful information regarding the presence and effect of domestic violence on children, including information relating to whether there is a behavioral pattern of abuse, the severity of abuse, or whether on parent is fearful of the other. While the existence of court records relating to domestic violence may provide useful information, they are only the starting point for a guardian ad litem's investigation. It is crucial to remember the distinction between the legal definition and behavioral definition of domestic violence, and guardians ad litem must investigate more thoroughly and consider how the violence has affected or will affect the children in the future.

In addition, the existence of ongoing civil or criminal court processes may affect the parties' willingness or ability to participate in a guardian ad litem investigation. In particular, parents who have been charged with a domestic violence crime may feel limited in their ability to

[102] G. Goodman and M. Rosenberg, "The Child Witness to Family Violence: Clinical and Legal Considerations," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. Sonkin (1986).

provide information to a guardian ad litem if doing say may interfere with their Constitutional rights against self-incrimination.

The following is an overview of some possible civil and court processes that may be relevant to the guardian ad litem's investigation.

Civil Court Processes

Domestic Violence Protection Order

Washington's Domestic Violence Protection Act provides that a victim of domestic violence (as defined in RCW 26.50.010, above) may petition for a protection order on behalf of himself or herself, or on behalf of minor children or household members. Individuals over the age of sixteen can petition the court for a protection order on his or her own behalf.[103]

A protection order can[104]:
1. Restrain an abuser from committing acts of domestic violence;
2. Exclude the abuser from the parties' shared dwelling, or from the residence, workplace, or school of the person seeking protection, or from the daycare or school of children named in the order;
3. Order an abuser to participate in batterers' treatment;
4. Restrain the abuser from having any contact with the victim, the victim's children, or any other member of the victim's household, or from coming within a certain distance from a specifically named location;
5. Designate residential provisions regarding the minor children of the parties;
6. Order that the abuser submit to electronic monitoring;
7. Order that one party have the possession and use of essential personal possessions;
8. Order that one person have use of the vehicle
9. Order the individual to pay costs, including attorneys' fees
10. Order the abuser to surrender any firearms;
11. Order any other necessary relief to protect the victim and other family or household members.

Domestic violence victims may obtain an emergency, temporary order, which takes effect immediately if they can show the court that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the other party. Temporary (ex-parte) protection orders can[105]:

1. Restrain a party from committing acts of domestic violence;
2. Restrain any party from going onto the grounds of or entering the dwelling that the parties share, from the residence, workplace, or school of the other, or from the day care or school of a child until further order of the court;
3. Prohibit a party from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

[103] RCW 26.50.020(1)
[104] RCW 26.50.060
[105] RCW 26.50.070

4. Restrain a party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;
5. Restrain a party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household; and
6. Order the abuser to surrender any firearms;

Violation of any of the provisions of a domestic violence protection order which:

1) restrain a party from acts or threats of violence against, or stalking of, a protected party,
2) restrain a party from contact with a protected party;
3) exclude a party from a residence, workplace, school, or day care
4) prohibit a person from knowingly coming within, or knowingly remaining within, a specified distance of a location; or
5) violation of a provision of a foreign protection order specifically indicating that a violation will be a crime, are criminal acts and may subject the violator to arrest and imprisonment.[106]

Violations of other provisions of a domestic violence protection order are enforceable through contempt of court.

Washington law does not place a time limit within which an abused party must file for a protection order.[107]

Protection orders under RCW 26.50 can be issued as part of any dissolution of marriage, non-parental custody, or parentage action, and are enforceable in the same way as stand-alone protection orders.[108]

In the context of ordering parenting plans, the weight given to the existence of a protection order issued under RCW 26.50 is within the discretion of the court.[109]

Anti Harassment Orders

Washington's anti-harassment statutes, codified at RCW 10.14, authorize civil court orders to restrain respondents in situations not covered under RCW 7.90 (Sexual Assault Protection Orders), RCW 10.99 (criminal no-contact orders) or RCW 26.50 (Protection Orders). Some victims of coercive, controlling behavior may be able to obtain an anti-harassment order in situations where there has not been physical harm, a threat of physical harm, or stalking, which are required for a domestic violence protection order. Anti-harassment orders may be issued to protect a victim of unlawful harassment, defined as, "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause

[106] RCW 26.50.110 (2007).
[107] ***Spence v. Kaminski***, 103 Wn.App.325 (2000); ***Muma v. Muma,*** 115 Wn. App. 1 (2002); ***Barber v. Barber,*** 136 Wn. App. 512 (2007)
[108] RCW 26.50.025.
[109] RCW 26.09.191(2)(n).

substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child."[110]

Restraining Orders

The statutes governing marriage dissolutions and parentage actions also authorize courts to enter restraining orders, temporary and permanent, in the context of those proceedings. The relief available with a restraining order may be broad or narrowly tailored to the individual circumstances of each case. A restraining order can:

1. Prevent the restrained person from disposing of property or changing insurance policies.
2. Prohibit the restrained person from "molesting or interrupting the peace" of the other person or any child named in the order
3. Prohibit the restrained person from entering the property, home, place of employment or school of the other person, or from coming near the school or daycare of a child named in the order;
4. Order the restrained person not to remove a child named in the order from the court's jurisdiction

Child abuse as distinguished from intimate partner violence

In investigating a parenting plan matter, guardians ad litem may be faced with allegation of child abuse. It is not unusual for child abuse allegations to arise, given the high overlap of domestic violence and child maltreatment.[111] Child abuse as defined in RCW 26.44.020(12) specifically addresses the treatment of or actions taken against children.[112] The relationship between the perpetrator of the abuse and the child victim is not an element of the definition. However, some families experience both intimate partner violence and child abuse simultaneously. Those families have complex issues and needs. Guardians ad litem should remember that the safety of the child is often directly linked to safety of the care giving adult.

However, if the action of the perpetrator directed at the child has the desired and/or end result of controlling the behavior of the intimate partner parent or care giver, that action can be both child abuse and domestic violence. Perpetrator actions such as using children as pawns in coercing behaviors from their caregiver or using visitation as way to control the child's caregiver can be domestic violence. Emotional or psychological abuse of a child can also be domestic violence. Actual physical or sexual injury of the child is child abuse, and can also be domestic violence. In other words, as the domestic violence perpetrator continues the pattern of coercion and control of the domestic violence victim, some child abuse is so intertwined with intimate partner violence as to meet the definitions for both child abuse and domestic violence.

---

[110] RCW 10.14.020.

[111] J. Edleson, The Overlap Between Child Maltreatment and Woman Battering. *Violence Against Women, 5,* 134-154 (1999).

[112] RCW 26.44.020 (12) provides a definition of child abuse: "Abuse or neglect means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed, excluding conduct permitted under RCW 9A.16.100. An abused child is a child who has been subjected to child abuse or neglect as defined in this section."

Criminal Law Processes

In the course of their investigations, guardians ad litem may encounter parties with pending domestic violence criminal charges or convictions. Some parts of the behavioral pattern of domestic violence are crimes in Washington State. Washington law does not create a separate crime of domestic violence, but rather relies on other existing criminal laws that define criminal activity, and specifies that those crimes committed by one family or household member against another constitute domestic violence.[113] These include:

(a) Assault in the first degree (RCW 9A.36.011);
(b) Assault in the second degree (RCW 9A.36.021);
(c) Assault in the third degree (RCW 9A.36.031);
(d) Assault in the fourth degree (RCW 9A.36.041);
(e) Drive-by shooting (RCW 9A.36.045);
(f) Reckless endangerment (RCW 9A.36.050);
(g) Coercion (RCW 9A.36.070);
(h) Burglary in the first degree (RCW 9A.52.020);
(i) Burglary in the second degree (RCW 9A.52.030);
(j) Criminal trespass in the first degree (RCW 9A.52.070);
(k) Criminal trespass in the second degree (RCW 9A.52.080);
(l) Malicious mischief in the first degree (RCW 9A.48.070);
(m) Malicious mischief in the second degree (RCW 9A.48.080);
(n) Malicious mischief in the third degree (RCW 9A.48.090);
(o) Kidnapping in the first degree (RCW 9A.40.020);
(p) Kidnapping in the second degree (RCW 9A.40.030);
(q) Unlawful imprisonment (RCW 9A.40.040);
(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
(s) Rape in the first degree (RCW 9A.44.040);
(t) Rape in the second degree (RCW 9A.44.050);
(u) Residential burglary (RCW 9A.52.025);
(v) Stalking (RCW 9A.46.110); and
(w) Interference with the reporting of domestic violence (RCW 9A.36.150).

In cases involving pending criminal charges, it may be difficult to interview the relevant party due to the concern that the party may relinquish the right against self incrimination. If it is not possible to interview the relevant party within the timeframes set by the court, to the extent possible, guardians ad litem may seek information regarding the effect of the domestic violence on the children and the family through collateral sources (see below, section V.A and B.) and note in the report the inability to interview the party.

[113] RCW 10.99.020.

ROLE OF THE GAL IN DV CASES

Routine Identification of Domestic Violence

Domestic violence may not be easily detectible in relationships where the abuse is unseen, or where most of the abuse is not physical in nature. Abusive partners can often appear charming and sincere in their commitment to their families even when their behavior, if known, would relay a different picture. On the other hand, partners who have suffered abuse may appear to be unreliable witnesses, often seeming to be unappealing, disheveled and disorganized or emotionally unstable. The parties are likely to hold radically different views of their relationship and of one another; and abusers are often motivated to deny or minimize their abusive behavior.[114] It is particularly important in these cases for guardians at litem to evaluate what the parties say against other available evidence, including patterns of assaultive and coercive behaviors in past relationships, in relationships with other family members, or in relationships outside the family. Even if none of the collateral contacts has ever witnessed the abuse or violence, the absence of witnesses to the violence or its aftermath does not conclusively prove that it did not take place.

In some cases, there will be public records of violence or abuse (police reports; 911 calls; criminal court pleadings, or protection order case information) and private records (from medical, mental health, substance abuse, shelter, and other service providers). In many others there will be explicit allegations of domestic violence or child abuse, and often counter-allegations; in still others there will be indications of disturbance in the family that may or may not, upon further investigation, be related to violence or abuse. In many cases, domestic violence may not be easily detectable because it is not formally raised, or other collateral issues, such as allegations of mental illness or substance abuse, may obscure the presence of domestic violence. However, the absence of witnesses or corroboration does not conclusively prove that domestic violence did not take place. Furthermore, an absence of convictions for domestic violence or violations of protection or no-contact orders does not mean that a parent is not abusive.[115]

Victims may not acknowledge that violence exists: they are ashamed; they feel they are to blame; they think that violence is normal; cultural norms keep them from discussing the abuse with strangers; they are trying to protect themselves from increase violence and/or loss of their children; they are trying to keep their family together.

Given the prevalence of domestic violence and its potential impact on children as well as the parties, guardians ad litem should routinely screen for domestic violence in all cases. If domestic violence is identified, then screening should also identify the domestic violence perpetrator and the adult victim in the case. Routine screening should include questions of the parties as well as

---

[114] Am. *Psychol. Ass'n, Violence And The Family: Report Of The American Psychological Association Presidential Task Force On Violence And The Family 1*00 (1994) (stating that custody and visitation provide domestic violence abusers with an opportunity to continue their abuse, and that such abusers are twice as likely to seek sole physical custody of their children and more likely to dispute custody if there are sons involved).

[115] See E. Aldarondo & F. Mederos, "Common Practitioners' Concerns About Abusive Men," in *Programs For Men Who Batter: Intervention And Prevention Strategies In A Diverse Society* 2-4 (2002) (stating that many physically abusive men are never arrested or brought to trial even though they have a long history of violence toward a partner).

review of relevant records. Evaluations that are based solely on interviewing and/or observing the parties and their children are significantly less reliable. Guardians ad litem should supplement basic information with interviews with relevant collaterals, a thorough review of all pertinent written records, assuming they are non-privileged or that any privilege attaching to them has been properly waived.

When domestic violence is suspected or known, interview family members in the following order if possible. First, interview the adult victim (unless the guardian ad litem believes that this will cause risk to children If so, begin with the children). Next, interview the children. End by interviewing the alleged domestic violence perpetrator.

Sample Interview Comments and Questions

Some initial questions and statements about domestic violence may include the following:

a. All families disagree and have conflicts. I am interested in how your family resolves conflict. I am interested in how you and your partner communicate when upset.

b. What happens when you or your partner disagree and your partner wants to get his/her way?

c. Have you ever been hurt or injured in an argument? Has your partner ever used physical force against you or anyone else or broken or destroyed property during an argument? Have you ever felt threatened or intimidated by your partner? How?

d. If your partner uses physical force against a person or property, tell me about one time that happened. Tell me about the worst or most violent episode. What was the most recent episode? Are you afraid of being harmed or injured?

e. Have you ever used physical force against your partner? If so, tell me about the worst episode. What was the most recent episode? Is your partner afraid of you?

f. Have the children ever been hurt or injured in any of these episodes? Have the children been present? Are the children afraid of your partner? Afraid of you?

g. How frequently do the violent episodes occur? Have there been any changes in the frequency or severity of the abuse in the last month or the last year? Is any of the abuse (physical, sexual, psychological) getting worse or happening more often? Have the police or any other agency been involved?

Adult victims may be reluctant to talk with guardians ad litem because of fears of being punished by their abusers. By focusing on the safety concerns, guardians ad litem may be able to build an alliance with the adult victim. Also, some adult victims minimize and/or deny the violence as a way to survive the abuse. In interviews with the adult victims and older children, explain any that it is likely that the domestic violence perpetrators will also be interviewed. Ask adult victims if they will feel endangered by interviews of the perpetrators. Explain to an adult victim how and

when the guardian ad litem will conduct an interview with the domestic violence perpetrator. Ask the victims about possible consequences to them and the children of such interviews with the perpetrator. If it appears that an interview about domestic violence with the alleged perpetrator will endanger adult victims or the children, delay it until their safety is secured.

Interview the alleged abusive party in a way that encourages him/her to disclose his/her own abusive conduct. ***Do not confront the domestic violence perpetrator* with *information provided by a victim***. While guardians ad litem can sometimes use police reports or other agency reports about the domestic violence in the interviews with perpetrators, try not use any information from a victim's statements.

If an identified perpetrator denies domestic violence, do not try to force disclosure, but move on to other subjects. Angry confrontations with the domestic violence perpetrators often result in retaliation against the child or adult victims. The guardian ad litem does not need the perpetrator's disclosure to confirm that domestic violence occurred. Such confirmation comes from adult and child victim statements and other collateral sources.

In addition, helpful collateral sources may include:

1) Family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not have been disclosed to others yet;

2) Professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors;

3) Professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.

Pertinent records that may also help may include:
1) police reports
2) child abuse/child protection reports;
3) court files in the present case and any relevant prior civil or criminal cases involving either party;
4) medical, mental health, and dental records; and
5) school records.

In extraordinary circumstances, guardians ad litem may seek court permission for further evaluation through psychological testing—although this must be relevant and approached with caution, as psychological testing (e.g. MMPI's or other personality measures) is not helpful in predicting domestic violence aggressive behavior or dangerousness. In addition, the results of psychological testing must be interpreted in the context of domestic violence.

ACCESSING FILES RELATED TO DOMESTIC VIOLENCE

In the course of a thorough investigation, and depending on the facts of each case, guardians ad litem will look at files and materials related to domestic violence from a variety of sources, including, but not limited to;

School Records: Schools will often share information with a guardian ad litem after initial contact is made by telephone, and the school receives a copy of the Order of Appointment. Many schools will accept copies via facsimile, so this process can occur fairly quickly.

Medical/Mental Health Records (including perpetrator treatment programs): Most providers of medical and mental health care, as well as providers of substance abuse and domestic violence assessments and treatment, will have their own specific release forms. The parent, step-parent or third party custodian should be directed to go to the provider and execute a release of interest allowing that provide to share information with the guardian ad litem. It is also appropriate to provide a copy of the court Order of Appointment to the provider.

Criminal Records: Guardians ad litem should do a criminal background check as a routine part of every investigation. Criminal Conviction data can be accessed through the Washington State Patrol website: http://www.wsp.wa.gov/crime/crimhist.htm. There is a $10 fee for each search. There may be a way to do a criminal background check through the court which made the appointment. Practices vary from county to county, but it is worth asking questions of court staff.

Probation Records: A guardian ad litem may also need to obtain information from Probation Services. Most probation officers should be able to speak freely with a court appointed guardian ad litem upon verification of appointment.

Employment Records: On some matters, it may be significant to look at a domestic violence perpetrator or victim's employment records. An employee's privacy is protected by law, and employers are likely to be very cautious in this arena. Practices will vary from employer to employer, and a release from the former employee may meet any requirements.

Miscellaneous Children's Records: Day care, preschool, camp and extra-curricular activity records may also be important, and a Guardian ad litem should be able to access these by providing a copy of the court order.

Child Protective Service Records: CPS records may show prior reports of abuse or violence in the home and may be significant. CPS should allow a guardian ad litem access to the files related to any parties in an action. This may mean a trip to the CPS office to actually review a paper or electronic file.

Please remember that any child who is the subject of an action and is over the age of twelve years needs to execute a Release allowing the Guardian ad Litem access to their medical and mental health records.

A guardian ad litem has the option of getting back in front of a judicial officer with a motion for an Order allowing access to specific records. Most judicial officers, while careful to protect confidentiality, will be generous in allowing a guardian ad litem access to relevant information upon a careful showing of need, and meeting the overriding standard of in the best interests if the children.

Confidentiality and Privilege

In cases involving domestic violence, the abused party and children may not be able or willing to disclose information that may put themselves or others at risk. Thus, in some cases, the abused party may not be able to share various pieces of information, including addresses (theirs or those of others), employers, children's school or daycare, support groups, substance abuse treatment providers. Some of the information about the parties and the children may be protected by confidentiality or privilege laws, including information held by health care providers, mental health counselors, domestic violence or sexual assault advocates. It is crucial for guardians ad litem to become familiar with these confidentiality laws and legal privileges, so that appropriate releases may be developed, and so that guardians ad litem do not violate the privacy and confidentiality rights of the parties and the children.

In addition, in some cases, the abused party or others may be increasing the risk of danger to themselves or the children because domestic violence is being disclosed to an outside party for the first time. In order for the abused party to appropriately plan for his or her own safety, the guardian ad litem must be explicit and procedures must be transparent so that he or she will know as much about what information will be disclosed, to whom, and when.

Investigation Protocols that Increase Safety

With care, the guardian ad litem should be able to shield the parties from any contact or unsafe communication with one another during the process of investigation and developing recommendations. In many cases, the guardian ad litem should be able to seek corroboration of adverse information disclosed by one party about the other without disclosing the source of that information. It is important, however, to ensure that the parties understand the lack of confidentiality in the process. It is crucial that, in order to try to minimize the risk of retaliatory abuse, the guardian ad litem inform all individuals who are interviewed that the guardian ad litem's file may be discoverable (requested by the parties), and thus any reports and notes regarding interviews may become available to the court and the parties. Guardians ad litem are also likely to be called as a witness at trial in contested cases and may be asked questions about any statements made by any person the guardian ad litem interviewed or any documents that guardian ad litem reviewed. In order to best protect the safety of the parties and children, guardians ad litem should:

- Make initial contact with each party separately;
- Reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- Respect the terms of existing restraining/protection orders;
- Assist unrepresented litigants understand the evaluation process, the risks of

disclosing information that may be shared with the other party, and the risks of not disclosing information;

- Inform the parties of an evaluator's duty to report suspected child abuse (if relevant);
- Whenever possible, avoid identifying one party as the source of negative information
- about the other;
- Seek to corroborate information obtained from the abused party or children, so that it appears to have been obtained from multiple sources;
- If it becomes clear that information must be disclosed that may put one of the parties at risk, the guardian ad litem should alert that party to the disclosure in advance, so that he or she may take whatever safety precautions are warranted and available;
- Avoid attributing direct quotes to children; and
- Use specialized techniques and understanding to obtain and interpret information from children (see below).

Special considerations apply to interviews of children and the use of information obtained from them. First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the guardian ad litem must build into his or her report the understanding that, while children may provide accurate information, their answers may also involve misinterpretations (or developmentally appropriate but immature interpretations) of events, statements or dynamics, or be influenced by input from one or both parents. Recognize that children may never feel safe disclosing negative information or feelings about a parent; at a minimum, they should be interviewed separately in cases where there are allegations of abuse, even if they are also interviewed, or observed, with one or both parents. From a safety perspective in the context of domestic violence, it is also critical that the guardian ad litem not attribute direct quotes to children, in order to reduce the risk that a parent will use the children's words against them or against the other parent.

Washington State Court rules provide guidance about the importance of privacy and confidentiality in the scope of the responsibilities of the Guardian ad Litem. GALR 2(n) directs guardians ad litem to maintain the privacy of the parties. The rule states, "[a]s an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem."

In addition, in cases involving domestic violence, the guardian ad litem shall "maintain the confidential nature of identifiers or addresses."[116] This is not limited to only the identifiers or addresses of the parties and children, it can also apply to information about other persons interviewed.

Determine whether all or a portion of the report should be submitted under seal

In cases where the guardian ad litem is concerned about the safety or confidentiality of the parties or witnesses, the guardian ad litem may recommend that the court seal the report or a portion of the report.[117] In addition, if the guardian ad litem is concerned about the safety of a witness, the guardian ad litem may ask that the court establish conditions to protect witnesses

[116] GALR 2(n)
[117] *Id.*

from harm, or address other concerns relating to confidentiality while maintaining the ability of the parties to challenge the truth of the information.[118]

Guardians ad litem may need to provide the abused party with information or referrals on safety planning, —which may include referring the abused party to a domestic violence program or shelter. (See, section VI, below).

ASSESSESSMENT OF THE DOMESTIC VIOLENCE RISK POSED TO CHILDREN

Given the range of physical and psychological danger to children and the many elements necessary for recovery, assessing the risk of danger to children is complex.[119] The guardian ad litem should gather information from many sources.

Factors to be considered in assessing risk to children

In particular, guardians ad litem should be gathering information regarding the following:[120]

1) Level of physical danger to the non-abusing parent, because the higher the severity or frequency of a batterer's level of violence, the greater the risk of child abuse.
2) History of physical abuse towards the children.
3) History of sexual abuse or boundary violations towards the children.
4) Level of psychological cruelty to the non-abusing parent or the children**.** Research indicates that the degree of emotional abuse in the home is an important determinant of the severity of difficulties developed by children exposed to domestic violence.[121]
5) Level of coercive or manipulative control exercised during the relationship. Research indicates that the more severely controlling individuals are towards their partners, the more likely they are to draw the children in as weapons of the abuse.[122]
6) Level of entitlement and self-centeredness, meaning an abuser's perception of himself as deserving of special rights and privileges within the family. Highly entitled and self-centered abusers have been observed to chronically exercise poor parenting judgment and to inappropriately expect children to take care of their emotional and physical needs.[123]
7) History of using the children as weapon, such as manipulating the victim by threatening to abuse or take away the children, hurting partner by hurting children, not allowing partner to comfort children or have physical contact with them, teaching children to use insulting language towards the non-abusing partner, and of undermining the other parent.

---

[118] *Id.*
[119] Bancroft and Silverman, *Assessing the Risk to Children from Batter* (2002).
[120] Bancroft, L., & Silverman, J. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage.
[121] Hughes, H., Graham-Bermann, S., & Gruger, G. (2001). Resilience in children exposed to domestic violence. In S. Graham-Bermann & J. Edleson (Eds.) *Domestic violence in the lives of children: The future of research, intervention, & social policy* (pp. 67-90). Washington, DC: American Psychological Association.
[122] Bancroft, L., & Silverman, J. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics.* Thousand Oaks, CA: Sage.
[123] *Id.*

8) History of placing children at physical or emotional risk while abusing the other parent.
9) History of neglectful or severely under-involved parenting.
10) Refusal to accept the end of the relationship, or to accept the other parent's decision to begin a new relationship, as such behavior often is accompanied by severe jealousy and possessiveness, and has been linked to increased dangerousness in batterers. [124]
11) Level of risk to abduct or murder the children.
12) Substance abuse history.
13) Mental health history, with recognition that psychological tests and evaluations do not predict parenting capacity well even in the absence of domestic violence, and that mental health testing cannot distinguish a batterer from a non-batterer, or assess dangerousness in batterers.[125]

Guardians ad litem should also address the lethality risk of domestic violence perpetrator. One of the more troubling aspects of responding to domestic violence is assessing how dangerous the domestic violence may be in a specific individual case. Research indicates that not infrequently, domestic violence may cause death or severe injury to the adult victim, the perpetrator, the children, or others due to the behaviors of the perpetrator, or the adult victim, or the children. A threat of suicide indicates high lethality, although suicide is uncommon.

What domestic violence fatality reviews in various states[126] have shown is that much of the salient information related to the homicides or severe injuries was known prior to the homicides by various community systems, but too often decision-makers did not understand the connection between the domestic violence and individual factors or knew only part of the information.

When the courts and the community are weighing the safety needs of the children and abused parent, they must consider all the factors and must gather information from multiple sources: the adult victim, children, other family members, perpetrators, and others (probation, counselors, and anyone having contact with family).

What follows is a list of factors to consider when attempting to assess the danger to any party, either through significant injury or death (not just related to DV perpetrator homicide potential) in a particular domestic violence case:

---

[124] Weisz, A., Tolman, R., & Saunders, D. (2000). Assessing the risk of severe domestic violence: The importance of survivors' predictions. *Journal of Interpersonal Violence, 15*(1), pp. 75-90.
[125] Bancroft, L., & Silverman, J. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics.* Thousand Oaks, CA: Sage.
[126] K. Starr, M. Hobart and J. Fawcett, "If I had One More Day," *Washington State* Domestic *Violence Fatality Review 2006;* K. Starr, M. Hobart and J. Fawcett, "Every Life Lost is a Call for Change," *Washington State Domestic Violence Fatality Review 2004*; M. Hobart, "Tell the World What Happened to Me," *Findings and Recommendations from the Washington State Domestic Violence Fatality Review 2002*; M. Hobart, "Honoring Their Lives, Learning from Their Deaths," *Findings and Recommendations from the Washington State Domestic Violence Fatality Review 2000* (Seattle, WA: Washington State Coalition Against Domestic Violence, 2006, 2004, 2002, 2000), http://www.wscadv.org/projects/FR/index.htm, www.wscadv.org.

LETHALITY ASSESSMENT: FACTORS TO CONSIDER[127]

Perpetrator's access to the victim
Pattern of the perpetrator's abuse
Frequency/severity/escalation of the abuse in current, concurrent, past relationships
Use of weapons and use of dangerous acts
Threats to kill adult victim, children, self
Imprisonment, hostage taking, stalking
Perpetrator's state of mind
Obsession with victim, jealousy
Ignoring negative consequences of their abusive behavior
Depression/desperation

Individual factors that reduce behavioral controls of either adult victims to protect themselves or perpetrators to monitor consequences:

Substance abuse
Certain medications
Psychosis
Brain damage
Suicidality of victim, children, or perpetrator
Adult victims' use of physical force
Children's use of violence

Situational factors

Separation violence/victim autonomy
Presence of other stresses
Past failures of systems to respond appropriately

Considering Additional Information

1. Psychological Testing

In the ***rare*** case in which it is a relevant and necessary aspect of an evaluation, a guardian ad litem may determine that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.[128] If psychological tests are used, the test(s) should be administered and interpreted by a psychologist who has expertise in the use of psychological testing in the context of contested child custody cases with allegations or evidence of domestic violence. As a general rule, psychological testing is not appropriate in domestic violence situations. Some of these standard tests may measure and confuse psychological distress or dysfunction induced by

[127] A. Ganley, Ph.D., *Domestic Violence: National Curriculum for Children's Protection Services* (Family Violence Prevention Fund, 1996).
[128] See Daniel W. *Shuman*, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment,* 36 Fam. L. Q. 135 (2002).

exposure to domestic violence with personality disorder or psychopathology. Such testing may misdiagnose the non-abusive parent's normal response to the abuse or violence as demonstrating mental illness,[129] effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent.

Many of the tests appearing in evaluations are psychological tests regarding personality. Domestic violence is a behavior problem, not a personality problem, exhibited by individuals from a wide variety of personality types, including those who test clinically normal. It is impossible to determine whether or not someone is domestically violent by looking at a personality test. Being a victim of domestic violence is due to the behavior of another, and victims of domestic violence can have any personality type. Some victims may test with clinically significant characteristics, as a result of living with domestic violence, and these so-called personality traits disappeared when victim is free of the abuse and coercion. Often the tests need to be interpreted in light of the information about the perpetrator's domestic violence tactics.

Furthermore, psychological tests cannot rule out risk to adult victims posed by domestic violence perpetrators, or determine risk to children from domestic violence. While there have been some instruments designed to measure risk of child maltreatment, these tools were not designed to measure risk to children posed by intimate partner violence. Whenever psychological tests are used in domestic violence evaluations, or in other evaluations used for custody evaluations, or for parenting plans, they have to be interpreted in the context of a detailed assessment of the domestic violence.

Psychological tests may be helpful for treatment purposes. Understanding how a person functions or their personality style may suggest which approaches may need to be used. Alone, they just are not helpful in identifying whether or not there is domestic violence and whether or not there is future risk.

Safety During the Process

Even after separation, perpetrators often use the children as pawns to control the abused party. When the abused party and perpetrator are separated, the perpetrator's main vehicle for continued contact and control of the adult victim is through the children (whether they are the legal parents of the children or not). Consequently, perpetrators often seek out control of the children in the legal context in order to maintain control over the adult victims. And, courts are often reluctant to set limits on parental access to children by the domestic violence perpetrator. When adult victims have separated from perpetrators without the perpetrators being held accountable for their abusive tactics, they often focus their control of the adult victims through the children. In these cases, the intent is to continue the abuse of the adult victim, with little regard for the damage to the children resulting from this controlling behavior.[130] Consequently,

---

[129] See, Nancy S. Erickson, ***Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?*** 39 Fam. L.Q. 87 (Spring 2005).

[130] E. A. Walker and G. Edwall, "Domestic Violence and Determination of Visitation and Custody in Divorce," in *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, ed. D. Sonkin (1986); J. L. Edleson, "The Overlap Between Child Maltreatment and Woman Battering," *Violence Against Women* 5 (February 1999): 134-54.

separation may increase, rather than decrease, the children's exposure to abusive tactics. Examples include:

a. Using lengthy court battles as a way to continue control over the other parent (e.g., repeated challenges to parenting plans, visitation schedules, court ordered parenting evaluations, domestic violence evaluations, etc.).

b. Making or threatening false reports against the adult victim to Child Protective Services, ordering children not to tell the adult victim what is happening during visitation, etc.

c. Holding children hostage or abducting the children in efforts to punish the abused party or to gain the abused party's compliance.

d. Some visitation periods become nightmares for the children because of physical abuse by the perpetrator, or because of the psychological abuse that results when the abuser interrogates the children about the activities of the victim, etc. During visitation, some perpetrators will go into tirades about the abused party's behaviors, or will repeatedly break into sobbing because the abused party is "causing" the separation or exposing children to their abusive conduct toward new partners

e. Insisting that the children take care of all perpetrator's emotional needs, or expecting unlimited visitation or access by telephone/email/school visits/etc. in order to avoid being alone (e.g., one perpetrator persuaded the court to order each of his two adolescent sons to stay alternate nights with him after the separation, ignoring the children's needs for time with each other or with their friends).

f. Actively undermining the parenting of the adult victim by setting up expectations of the child to directly contradict the parenting of the adult victim (e.g., bedtimes, school work schedules, social activities, excessive indulgences). Sometimes, this takes the form of intervening in their relationships with step siblings or other family members.

RECOMMENDATIONS/ PARENTING PLANS

Because domestic violence is a pattern of behavior with a range of effects and posing a range of risks, any assessment that determines that domestic violence occurred or did not occur, based solely on the *legal definition* of domestic violence applied to one incident, does not address the impact on the safety of the child or other party.

For example, many think there is no domestic violence unless there has been significant documented physical injury to adult victim or child and therefore claim there is no domestic violence in the case. They base their determination on outcome rather than on behavior engaged in by the offender, and in doing so, may place individuals at risk for future harm. Others think there is no domestic violence unless there has been an arrest or conviction for domestic violence. Or they focus solely on the physical assaults. At a minimum, the guardian ad litem should state the definition of domestic violence used in the reports to the court.

In developing recommendations for a parenting plan where domestic violence has occurred, the primary focus of the parenting plan should account for safety of both the children and adult victim, and nurture resiliency. RCW 26.09.191(2)(m)(i) provides that in situations where courts have found a history of domestic violence, "limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child."

In developing a parenting plan, consider that in the context of domestic violence, the parenting plan is *not a process* to provide the abuser equal and unrestrained residential time with the children. The foundation for successful, regular visitation: trust, communication, and respect may have been seriously eroded by the abuser's past battering behavior.

In developing recommendations for parenting plans, things to consider include:

A. Providing a context for the children's recovery:

Sense of safety and providing that the children reside with the non-abusing parent.
Restrictions under RCW 26.09.191 that are *mandatory*.
Providing for structure, limits, predictability.
such as specific times and processes for (supervised) residential time if any, clarity regarding priorities within parenting plan
Allowing for strong social relationships with existing playmates, friends, grandparents.
Strong sibling relationships.
Specialized therapy.
Contact with the battering parent if strong protection for the children's physical and emotional safety is ensured.
Access to community resources and activities.

B. Parenting services can help support the non-abusing parent:

Providing opportunities to safety plan and learn about coercive control.
Develop new rituals and support networks.
Learn how to parent without aggression.

C. Safe parenting time options for the battering parent

No residential/parenting time.
No residential/parenting time until demonstrated history of changed behavior has been documented.
No overnight residential time.
Supervised visitation center with training and history of working in domestic violence situations.
Professional supervised visitation by professionals with training and history of working in domestic violence situations.
cost to be borne by abusive parent.

D. Conditions during residential/ parenting time might include:

No alcohol or drugs.
Telephone contact with residential parent during visit.
Public place for visitation.
No gifts (to avoid non-abusive parent of coercion).
Limit third parties present.
Short duration.
No derrogatory remarks or comments about other parent.
No discussion of parenting arrangements with children.
Children not to be used to relay messages.

E. Satisfaction of certain conditions before residential time is permitted.

Successful completion of Washington State certified batterers' intervention program, pursuant to RCW 26.50, WAC 388-60. This is *not* anger management.
Substance abuse evaluation, with residential time to be determined following the outcome.
Sexual deviancy evaluation, with residential time to be determined following the outcome.
Successful completion of comprehensive parenting classes.
Successful compliance or completion of probation and parole.

F. Minimization of opportunities for contact between the parents

Supervised visitation exchanges.
Pick up and drop off only at school or daycare.
Contact between parents through email only.

G. Surrender of weapons.

H. Requiring the perpetrator to post a bond to ensure the children's safe return.

In considering a parenting plan that becomes less restrictive over time, there should be a reason for unsupervised parenting. It is not sufficient that the visits have gone well. There must be change in the abuser which can be assessed by looking at a number of different factors:

- Has the abuser has made full disclosure of the history of physical and psychological abuse?
- Has the abuser recognized that abusive behavior is unacceptable?
- Has the recognized that abusive behavior is a choice?
- Does the abuser show empathy for the effects of his or her actions on his or her former partner and children?
- Can the abuser identify what the pattern of controlling behavior and entitlement has been?
- Has the abuser replaced abuse with respectful behaviors and attitudes?
- Has the abuser been willing to make amends in a meaningful way?
- Does the abuser accept the consequences of his/her actions?

COMMUNITY RESOURCES

Here is a partial listing of statewide resources. Each one of these organizations has links to other resources about the many facets of domestic violence. You can also find links to local resources in each community through the state, including domestic violence shelters and local programs.

Department of Social and Health Services (DSHS funded DV programs and Perpetrator Intervention Programs)
http://www1.dshs.wa.gov/ca/dvservices/index.asp

National Domestic Violence Hotline:
1-800-799-SAFE (7233)
http://www.ndvh.org/

Northwest Justice Project
CLEAR- 1-888-201-1014
http://www.nwjustice.org

CHAPTER 11
PERSONAL SAFETY

PERSONAL SAFETY

Submitted by Joan Middleton and Jean Cotton

I. INTRODUCTION

The nature of the situation that has caused the Court to appoint a guardian ad litem (GAL) should alert every guardian ad litem to be prepared for and minimize situations that may arise that pose danger to them, to their employees and co-workers, and to those with whom they come in contact in the performance of their duties.

As a guardian ad litem, you will likely be dealing with families in high-conflict family law matters. At best, these families are going to be under extraordinary stress and anxiety. At worst, they may have issues associated with mental health, physical health, chemical dependency and substance abuse, alcohol abuse, physical or sexual abuse, emotional abuse, domestic violence, financial difficulties, intimacy, fear of the Court system, and miscellaneous baggage from past experiences. It is highly unlikely that only one of these issues or similar difficulties may be facing these individuals – more often the case will involve a combination of the above as well as issues not listed here. In other words, it should not be surprising to you that those involved in the case with whom you will be having contact may not be at their best.

While bearing the above in mind, you must remember that you not only have a job to do but that your personal safety as well as those around you must be at the forefront of your thoughts at all times.

What follows are suggestions to help you place yourself in the best possible position to avoid someone getting hurt. These suggestions are not intended to be an all inclusive list of things to do but rather an overview of tools available to help you assure a safe and healthy outcome for all concerned.

II. GENERAL SUGGESTIONS TO KEEP IN MIND

Always be alert to your surroundings and what is going on around you!

- If you are walking down the street, notice what is going on around you. It's easy. When walking past a window, you can observe reflections in the glass. Notice if someone stops each time you do or if they turn every corner you do. Listen for sounds coming from behind you, such as footsteps or breathing. If someone is close behind you, turn and give them a glance to see who it is.

- If you carry a purse, hold it close to the front of your body and keep it closed – fastened or zipped if possible. For men, carry your wallet in your front pant pocket or in a buttoned rear pocket. You may want to wear a waist pouch instead of a handbag if you are in an unfamiliar neighborhood. Some people use small backpacks as purses, too. If

so, make sure all the zippers are closed and the pack is securely on your back. No one will be able to grab it and run away.

- If you can carry your keys in your hands, position the keys between your fingers so that you could use them as a defensive weapon to jab an attacker if possible. If you have a keyless entry system for your car, you may want to carry your car keys in your pocket. Remember that your car keys with a keyless entry system all have a small red panic button. If you press this button either on purpose or by accident, your car will make loud noises if you are in the vicinity. The lights may switch on and off, depending on your car model. To deactivate the panic button, you need to press it again.

- Avoid talking on your cell phone (unless you're calling 911) – it's too easy to become distracted by a conversation and miss the stalker behind you. Pretending to talk on your cell can, however, be a deterrent to an attack as the attacker often does not want you to be able to notify anyone that there is a problem or have you be able to give any kind of a description of the attacker to the person they think may be on the other end of your call.

- If you must use your cell phone in your car, get a Blue Tooth system for hands free phone use, if possible. It is not safe to drive your car while holding your cell phone. If you must use your cell phone while driving, a hands free system should be utilized, if possible. One with voice activation for calls is the safest system. The microphone and speakers are installed in your dashboard or on your visor above the drivers' seat. Newer model cars are now sold with this new technology but you can also buy retrofit kits at your favorite electronics store or you can shop online.

- Avoid being alone after dark if possible. If you have to walk outside, especially in an unfamiliar neighborhood or other place you don't know well, stay in well-lit areas as much as possible and where there are other people around (unless the other people are obviously not upstanding citizens). Carrying a flashlight or whistle are also good ideas.

- Never, ever visit a residence or meet a person you know little about at night – especially if you are going to be alone. You might want to have your first interview during the day either at your office (if you have one) or at a neutral location. You can meet at a court house where there may be security screening. You can also consider meeting in a public library or at a police station if a community resource room is available. Churches sometimes have rooms or empty offices available for community use.

- If you must conduct a home visit or meet with an interviewee away from your office, check out the location of the home ahead of time.

    - Drive by the address before you actually conduct the visit so that you know where it is located, what the neighborhood looks like, what cars should be in the driveway (and what cars should not), and whether you need to take any unusual or special precautions.

- Carefully map your travel to the location so that you do not get lost. Always carry a good road map with you or have a GPS navigation system in your car. There are portable systems now available for reasonable prices at electronics stores or online. This is a business expense well worth making.

- If the residence is in a location that is considered a high-crime neighborhood or you just feel unsafe, have someone go with you that can stay in the car and observe for you *OR* just don't conduct the meeting at that location – period!

- If there are allegations of methamphetamine use or manufacturing in the home, do not do a home visit. These substances are extremely flammable and are bio-hazards – avoid them whenever possible. Remember that law enforcement will wear hazardous materials suits and protective clothing when visiting these locations. Methamphetamine manufacturing and use is extremely dangerous to you and to the environment. These toxic materials must be disposed of properly.

- Be sure someone knows where you are at all times. You can let this person (we refer to this person as your secretary) know when you arrive at the home; set a prearranged time for either your secretary to call you or for you to call the secretary if the appointment is more than the time you anticipated; let your secretary know when you have left the appointment and what to do if you don't call at the prearranged time or within some other time frame.

- Keep in mind that many home visits are in the evenings and on Saturdays. That's when children are home from school and when adults are generally home from work, unless they work non-traditional hours. If you don't have a secretary or work partner in the evening, you may have to ask a friend or family member to go with you and they should sit in the car and wait for you. Establish a protocol for leaving the address of where you are going when you go out for a home visit regardless of whether it is a day or evening one. For example, if your visit is during the day, tell your co-worker what case you are on and leave important file information on your desk. If you are ever in a compromised position, you can tell the angry person that you are expected at a certain time and your location is already known. Never leave a home visit to go elsewhere with a party without first notifying someone so that you can be found if something happens.

- You may also consider meeting with a child privately at school This may or may not require obtaining permission from the parent(s) and/or the school. Very often, guidance counselors will provide a meeting room for you during the school day. This depends on the age of the child and whether they are receptive to this idea. Some children may be embarrassed by having a GAL show up for a school meeting. Children don't want to stand out or be different from their peers.

- Keep your cell phone handy during the appointment – perhaps in a jacket pocket. Some phones have 1 button dialing of preassigned numbers – others use voice

cues – or just pre-dial and have it ready to press and send a message in an emergency.

- If the meeting is not at a home, but simply at a public location – checkout various locations that might be safe. Many local libraries have small meeting/reading rooms that are available to the public for their use and that are enclosed in Plexiglas so that you are visible at all times. Restaurants can be a good location but do not offer much privacy except in the corners and that is not a safe place to be. Many courthouses have witness interview rooms that could be reserved. Also, many courthouses have law libraries where you may find some private space or research rooms. Sometimes churches and police offices will provide a meeting space for members of the public as a community service. Check out as many possibilities as you can so that you always have an option available to you.

- Never accept any food or drink offered to you during a home visit. A polite 'no thank you' should be sufficient.

- If you are concerned about safety and behaviors of a party, you can also arrange to meet a party at a convenience store in front of the video surveillance system. Some high-conflict cases do exchanges at convenience stores for just this reason. A security video exists of the event as the child is being passed from one party to the other.

- **Wear comfortable shoes and clothing – you may need to move quickly to get out of a dangerous situation!**

  - Avoid wearing high heels or slick soled shoes if possible. Unless you are an excellent runner in such shoes, they will not facilitate a prompt withdrawal from danger. On the other hand, if you find yourself in heels, there are things you can do to convert them from a handicap to a protective device. A self-defense course can teach you how to do this.

  - Tight dresses, skirts, or slacks can also problematic but so can overly flowing dresses and wide-legged slacks. Think about what you wear and whether it will help or hinder you in an emergency situation.

  - You should dress in a way that your clients can be comfortable with you. For example, if you are meeting a child, a business suit might be too formal. Nice jeans or casual wear with a sweater over a nice shirt or blouse may be calming to them and comfortable for you.

- **Avoid carrying files and other unnecessary articles that will slow you down!**

  - Some suggest not even carrying a purse, but sometimes a purse can be a nice weapon if you need to strike at an attacker so that you can get away. If you do carry a purse, keep as little personal or valuable contents as possible in it that

could be used to discover where you live or to steal or that could result in identify theft

.

- A waist pouch with a small flashlight, a pen, your cell phone, a small wallet and a whistle can be helpful to have. Some people carry a small Swiss Army knife, not as a weapon, but because the small tools can be helpful if you are in a rural remote area. You may want to keep your cell phone in an easily accessible pocket. Remember that you may lose cell phone service in certain areas. Not all cell phones have complete coverage in all locations. If this is the case, know where the local pay phones are located along the way.

- **Take a self-defense course if you can.**

  - Many larger communities offer self-defense training through the Y or a community center. If there is no such place in your community, talk to the local law enforcement agencies to see if they can teach you how to protect yourself.

- **Never EVER give out personal information about yourself or your family to the people you are investigating or any other persons involved in your investigation!**

  - Don't tell them your home address or telephone number, the names of your family members or partner, where you shop or go to church, where you workout or go to school, etc. If you work out of your home, don't tell anyone involved in the case that you do.

- **Never make a home visit by yourself in cases involving allegations of illegal activity, substance abuse, or mental health concerns!**

  - If there are allegations of illegal activity or substance abuse or dangerous mental health issues, exercise EXTREME CAUTION. Ask one of the attorneys of record to be present, take an 'assistant' with you, or contact local law enforcement and request a civil assist during the visit. Otherwise, simply arrange for the meeting elsewhere.

  - Advise the court when your concern for safety may compromise the investigation. You can always note a motion and ask for court instruction regarding an investigation where there are security concerns that put you outside of your comfort zone. Do not hesitate to seek court instruction if needed. Judges and Commissioners know these cases can be challenging. They have security concerns of their own and will be understanding of yours.

  - Know when to identify safety concerns to the court when they arise. This might be in cases involving suspected drug activity or suspected mental health issues. You can always recommend an enhanced security presence in court, especially if your local court house does not have a security screening system. Cases

involving allegations of domestic violence or suspected domestic violence should be mentioned to the court.

- Park your car so that you are positioned to drive away quickly, if necessary. Do not allow another car to block you in the driveway. Park on the road in front of the home, if possible. If you are visiting a home on a dead end, always park your car so that you are facing the way out to the main road.

- **Meet children in an environment that will make them comfortable.**

  - Some GALs have a special, child-friendly room at their office where they can sit at a child-sized table to meet with children while playing or coloring with the child(ren) to put the child(ren) at ease. If you don't have one of these kinds of rooms, check with other local GALs to see if they do and perhaps you can arrange to use their room from time to time for free or pay a small fee to have access to it on a more frequent basis.

  - If the parent(s) agree, meeting a child at McDonalds or Burger King or a similar fun/relaxing public place can often assist in building a rapport with the child.

  - Many schools will allow you to meet with a child at the school using a counselor's office or a private meeting room.

  - Local public libraries often have meeting rooms available that might be comfortable for the child.

  - Try to meet with children without their parents standing by in the same room or noticeably nearby. If you cannot avoid having a parent bring the child to you and if both parents have visitation rights, then be sure to have at least one visit with the child where the other parent provides the transportation. This may reveal whether either or both parents are coaching the child prior to the meetings with you. It's a good idea to observe the child with both parents, if possible, and spend an equal amount of time with each parent-child observation. You can ask to have some private moments with the child in the parents' home(s) by sitting in the living room and asking the parent to go to another part of the house out of hearing range. If you go to a child's bedroom, do not close the door. You can ask the child to show you his or her room but then go to a more public part of the home for conversation.

  - Do not provide transportation to any party or child. Avoid being in a position where you are transporting the child to/from meetings with you. Transporting a child could put you in a position of liability should an injury occur or expose you to other possible negative consequences.

III. YOUR WORKPLACE

You have to work from somewhere, but with each such scenario there can and should be a plan on how to be safe and secure. Following are some suggestions for keeping your workplace a safe, well-organized location for you and all with whom you are in contact.

A. The Office Environment

If you are an attorney-GAL or if you work with a group of non-attorney-GALs, the odds are that you work in an office environment with or without other attorneys or staff. You may office share with another attorney. You may have your own staff or work alone in a professional suite of some type. You may be one of several attorneys and staff members in a large firm. In any event, if you are working in an office outside of your home, here are some things you can do to protect yourself and those with whom you work.

You may also have a 'virtual office' which is a popular way for attorneys and other professionals to minimize overhead office costs in urban areas. With a 'virtual office', the office manager will handle your mail, phone and faxes. You are there by appointment only and can use the conference rooms on a hourly basis. They provide administrative assistance that you can use on an 'as needed' basis. These office spaces are often listed in the yellow pages as Executive Office Suites.

You may also be able to speak with local attorneys about using their firm's conference room for your meetings. Very often, attorneys may extend this favor for a small fee or free as a community service. To avoid a potential conflict of interest, if the attorney whose office you are considering using is involved in any case with you, first obtain approval from everyone involved in such cases prior to arranging to use the office for your meeting.

1. Whenever possible, schedule appointments to meet with the parties and any others involved in your investigation in your office when someone else is nearby; i.e. your secretary or paralegal or another co-worker of some kind. Schedule these appointments during the regular work day rather than after hours.

2. Have an alert system pre-arranged in your office that will allow you to notify someone that there is a problem and that either assistance is required (they need to come into your office) or that law enforcement needs to be called. This can be a buzz word or phrase; it can be an intercom button, it can be a pre-assigned button on your phone to dial '911', it can be a 'panic button' located under your desk that can be activated with or without use of your hands, or some other system. If your secretary or co-worker that is nearby hears the buzz word or is otherwise alerted that there is a problem, that person should already be prepared to take the next step and do so without hesitation.

3. Remind your staff and co-workers what the pre-arranged alert system is from time to time. Conduct an orientation for new staff so that they know what the system is and how to respond. Consult with other GALs to see what their system is and adjust yours when new, better ideas are brought to your attention.

4. Arrange the office or space where you are meeting with the interviewee so that office supplies that could be used as a weapon are not easily accessible to the interviewee; i.e. scissors, letter openers, etc.

5. Minimize the opportunity to find yourself trapped or cornered without an easy exit. Arrange chairs so that anyone who wishes to leave may do so without being trapped from direct access to the door.

6. If you are going to keep a weapon in your office for self-protection, be properly trained in its use and have it readily accessible to you. Keeping it in a locked drawer will do you no good – an attacker is not going to wait for you to fumble with a key to open the drawer and retrieve your weapon! If you don't know how to properly use a weapon or feel uncomfortable with one, then don't have one! DON'T TRY TO BE A HERO – it will probably backfire and could increase the potential for danger or harm to you and others. Focus on defensive moves that provide an opportunity to depart the scene and the situation quickly! If you must use force, use only as much as is necessary to get out of the situation – don't try to control the situation, you usually cannot. If the interviewee tells you they have a weapon, assume it to be true and resort to your pre-arranged safety plan and avoid a confrontation.

7. If a dangerous situation has occurred, once the danger is over – if it is safe to do so, try to observe in what direction the person went and whether a vehicle was involved. Getting a vehicle description as well as an accurate description of the perpetrator is extremely valuable. Immediately sit down as soon as possible and write as much as you can remember before discussing it with anyone! Discussing the matter may alter your memories and thus make them less reliable. Have each member of your staff do the same thing. When the police arrive, you will have the best possible, unadulterated information to give them that will also assist them in their duties.

B. Working Out of a Home

Many non-attorney GALs, in particular, work out of their home. These individuals conduct much of their business over the internet and via telephone. The question of having to meet with persons involved in your investigation in addition to protecting the identity of your location at home becomes an issue for the GAL with a home-based business to address.

1. Have a business line installed in your home office – the address published in the directory for this line (if you use yellow pages) should simply be a post office box and not a street address. Most telephone directories will publish a number without an address – some charge an extra fee to keep the physical address confidential. It's worth it to keep your physical address private. This is part of your cost of doing business and lets you

avoid compromising your personal safety by spending the extra money for address confidentiality.

2. Always use caller ID and block your identity with outgoing calls when appropriate such as when you use a personal cell phone to place the call. If you intend to make a lot of calls from a cell phone, have a second phone just for business purposes and keep the address unpublished. Assuming you have high speed Internet in your home or office, you can also have a VOIP phone line. This is a Voice Over Internet Phone and there are popular providers such as Vonage. You pay a flat fee for unlimited long distance and you can choose your outbound phone number identification including any area code you want to use. Some GALs have a business line, 1 or 2 cell phones plus VOIP which you can use for outbound calls without location identification. This is a good way to keep your location confidential. The added bonus is you keep your business long distance bills down, too.

3. Never, ever give out your home address to an individual involved in a case.

4. Never, ever meet with anyone involved in the case at your home. Many local libraries have small meeting/reading rooms that are available to the public for their use and that are enclosed in Plexiglas so that you are visible at all times. Restaurants can be a good location but do not offer much privacy except in the corners and that is not a safe place to be. Many courthouses and sometimes police offices have witness interview rooms that could be reserved. Some churches may also provide public meeting rooms as a community service. But, if it is your church, do not tell your client. Your private life is to be kept private at all times. Check out as many possibilities as you can so that you always have an option available to you.

5. Arrange the office or space where you are meeting with the interviewee so that office supplies that could be used as a weapon are not easily accessible to the interviewee; i.e. scissors, letter openers, etc.

6. Minimize the opportunity to find yourself trapped or cornered without an easy exit.

7. If you are going to keep a weapon in your office for self-protection, be properly trained in its use and have it readily accessible to you. Keeping it in a locked drawer will do you no good – an attacker is not going to wait for you to fumble with a key to open the drawer and retrieve your weapon! If you don't know how to properly use a weapon or feel uncomfortable with one, then don't have one! DON'T TRY TO BE A HERO – it will probably backfire and could increase the potential for danger or harm to you and others. Focus on defensive moves that provide an opportunity to depart the scene and the situation quickly! If you must use force, use only as much as is necessary to get out of

the situation – don't try to control the situation, you usually cannot. If the interviewee tells you they have a weapon, assume it to be true and resort to your pre-arranged safety plan and avoid a confrontation.

8. If a dangerous situation has occurred, once the danger is over – if it is safe to do so, try to observe in what direction the person went and whether a vehicle was involved. Getting a vehicle description as well as an accurate description of the perpetrator is extremely valuable. Immediately sit down as soon as possible and write as much as you can remember before discussing it with anyone! Discussing the matter may alter your memories and thus make them less reliable. Have each member of your staff do the same thing. When the police arrive, you will have the best possible, unadulterated information to give them that will also assist them in their duties.

9. Regarding weapons, when you are doing a home visit, always assume there is a gun in the home. Many Americans exercise their Second Amendment right to bear arms. Perhaps you keep a gun in your own home or office. Some law enforcement agencies indicate 50% of all American homes have guns. Additionally, many people have permits to carry concealed weapons. Even if they don't have permits to do so, some people carry guns illegally either on their person or in their cars. If you assume there is a gun in a home when you are doing a home visit, then be mindful of the fact that you don't know where it is but they do.

IV. TOOLS FOR COMMUNICATING WITHOUT NEGATIVE RESULTS

They way in which you explain your role in the legal proceedings and the way in which you present yourself to those involved in your investigation can and often will set the tone for how those meeting with you will react.

Communicate Effectively

Learn to clear up confusion and frustration before it develops into a hostile encounter.

1. Take time early on to explain that the judge is the decision-maker, not you. Explain that your report will be only one piece of evidence the judge will be considering before making his or her ultimate ruling. This alone can often diffuse tension and misapprehension before it has time to develop into anger and frustration.

2. Define your role and abilities. Explain that just because one county may expect one thing from its GALs, this may not be the same set of expectations in your county. For example, some courts expect GALs to conduct home visits in all cases, whereas other counties only allow home visits on a case by case basis based on very limited circumstances. Knowing

what the playground rules are in advance can eliminate fears based on ignorance or speculation and therefore reduce anxiety and tension.

3. Explain how your services are going to be paid for up front. Some counties have no program for guaranteeing payment of the GAL's fees and costs by the county whereas others have extensive programs. Some GAL cases are privately paid by the parties without the county guaranteeing payment and in such cases, a sizeable retainer is required up front. Still other cases are assigned to persons who have agreed to charge nothing for their services.

4. If the court has authorized you to conduct random drug testing, explain what your standard procedures are and what is expected from the individuals involved. Generally, GALs will refer clients to drug testing labs where Certified Drug Professionals are employed. They oversee the collection of the specimens which are then sent to a lab for evaluation with the results mailed or faxed to the GAL, the court and counsel. The client must sign a release with the testing center to have lab results sent. Do not republish drug test results by filing them or telling others. You may be violating federal law. Become informed about HIPAA and privacy rights regarding the transmission of medical information.

5. Listen carefully and patiently whenever possible. Just knowing that someone is really listening to them will often ease a tense, frustrated, or confused individual and open the door to a more meaningful exchange of information.

6. Redirect responses to the question when necessary rather than allowing a person to ramble or become agitated. But in redirecting, be courteous and understanding rather than terse and rigid.

7. Ask open ended questions rather than leading ones. If the response is difficult to follow, paraphrase what you think you are hearing to be sure you are in sync with the speaker.

8. Demonstrate empathy. If you let the frustrated person know you understand that they are frustrated and that you care about how they feel, that you want to help - the frustration will often dissipate and the person will relax.

9. Review and clarify whenever you are unsure about what the person wants or what they are trying to say.

Diffuse Anger

1. If tempers flare, the best response is often saying nothing – simply listen with a non-aggressive affect. Let the person vent appropriately. This will often diffuse the anger and

allow a meaningful exchange to follow. If the anger continues to build, it may be best to end the meeting and try again another day.

2. When people you are dealing with appear angry, remember that they are more likely to be angry with the situation rather than with you – it is not normally a personal attack. Avoid contributing to their stress and your own by getting defensive or taking their anger personally. Be objective and remain the calm force in the room.

3. If you make a mistake, admit it. An honest acknowledgement that you made an error can calm an angry person. Remember, however, to choose your words carefully because you will probably be held accountable for them.

4. Let the angry person know that you are recording their concerns or complaints in writing. This does not indicate that you are in agreement with what they are saying, but it does show that you are taking what they say seriously rather than viewing it as unimportant or dismissing it. Dismissing their concerns suggests the speaker is being dismissed as well and can create hostility.

5. You do not have to tolerate personal attacks on who you are or who you are perceived to be. If the interviewee resorts to verbal attacks, terminate the meeting and reschedule for another day if possible. Explain that you have a job to do; that you want to help but that until the tone is more calm, communication cannot be effective. If the situation escalates rather than diminishes, and IF YOU FEAL YOU ARE IN IMMINENT PHYSICAL DANGER, remove yourself from the situation immediately. Activate your safety plan and call 911 if necessary.

When Violence Occurs

1. Try to remain calm and remember your safety plan. Decide on a strategy that includes a physical escape route, if possible. Watch for opportunities to maneuver yourself into a physically advantageous or benign position.

2. DON'T BE A HERO! Do not physically or verbally confront the violent person unless absolutely necessary to protect yourself from injury. Focus on defensive moves that could open up an escape route for yourself.

3. If you must use force, use only as much as is necessary to control the situation and establish safety for yourself and innocent bystanders. Your reaction should be one that a reasonable, prudent professional who deals regularly with the public would take.

4. If you are not trained in the use of deadly weapons or deadly force and competent to exercise its use, don't use either! There are pros and cons to carrying guns or other

deadly weapons. Consider these carefully before bringing one into your workplace situation. If you choose to carry a weapon, know where and when it is allowed and the laws that govern its use.

5. After the violent person has departed, make a written record of all facts you can recall including a description of the person, the situation, which way they went when they left, what mode of transportation they were using and a description of it. In the case of an assault, robbery, or other dangerous circumstance, lock the doors after the person has left to prevent their re-entry.

Behavioral Cues for Identifying Violence

Anger responses vary as widely as any other emotional or personality traits. There is no way to determine with any degree of certainty whether a disgruntled person's anger will escalate into violence. When judging a person's violence potential, watch for verbal and non-verbal signs. Are the words, vocal tones, and body language logical and consistent or does the individual appear to be erratic and in danger of losing control?

The following nonverbal clues should be viewed as indicators not absolutes:

FACIAL EXPRESSIONS

- Jaws tense, clenched teeth, biting lip, pursed or quivering lips
- Frowning
- Eye contact vigilant, staring with no break, dilated pupils
- Skin flushed red or blanched looking (more obvious with lighter skin tones)
- Facial sweating, especially if it is not warm in the room
- Pulsing carotid artery or temple blood vessels
- Lips drawn tight or showing teeth (not smiling)

BREATHING PATTER CHANGES

- Breathing becomes shallow or rapid

BODY LANGUAGE

- Attitude changes
- Squaring off – facing you in a confrontational style
- Tensing that appears to be preparation for action
- Restlessness
- Pacing
- Becoming withdrawn or 'stony'
- Head held back – a sign of aggression
- Arms crossed tightly high across chest

EXTREMITIES

- Hands clenching or signs of being tensed or wringed
- White knuckles
- Noticeable shift from related to tense or tight position
- Hiding hands
- Pounding fists, stomping feet, kicking at objects

V. DEALING WITH ANIMALS

If you are familiar with animals, you will likely know how to react when coming across an unfamiliar animal during your investigation. Determining whether the animal is friendly or not may be more important than you think. The most common situation you will likely encounter is having an encounter with an unfamiliar dog. Following are some suggestions for what to do and what not to do in such a situation:

- STAY CALM!! This may be difficult but how you react initially will often determine the outcome of the situation. Be confident, steady, and firm. It must appear to the animal that you are the one in control; not the animal.

- Don't turn and run – no matter how much you want to. Running may indicate to the animal that you are weak and vulnerable; something that wants to be conquered. Some dogs may also consider this a playful act and an invitation to engage in play or a chase.

- Don't flail your arms and legs about as this may heighten the animal's excitement and cause them to bite.

- Don't flail to the ground and curl up into the fetal position for protection. Playing opossum with a dog will not work. The dog may attack you on the ground and you will be at a greater disadvantage than if you were upright and erect.

- Don't yell and scream at the dog – emotional tones and volume may heighten the animal's excitement and prompt an attack.

- Don't move suddenly or act hesitant as this may indicate that you are afraid and weak resulting in an attack.

- Don't extend your hand out to the dog – not all dogs understand this as a friendly gesture.

- Stand firm and steady – fight the desire to run.

- Keep your hands in close to your body. Don't give the animal any distractions like moving hands, fingers, or specific focal points to attack.

- Move slowly and calmly. This may help relax the stressful situation for both you and the animal.

- Back out of the situation facing the dog. Maintain control and confidence.

- Tell the dog "NO" or "STOP" or "HALT" in a strong, confident, low pitched voice.

If a dog does attack you, kick, hit, or knee the soft parts of the dog's body. Keep fingers rolled under and in a fist if possible and keep fighting. After the attack, call 911 for assistance.

As a related issue, when you are doing a home visit, look at the pets. Are they well-nourished and clean? Does the house smell like animal waste? Ask a child about his or her pets. Do they have any pets, where are they, what happened to them? How a family treats a pet may be helpful information to you in your investigation. Animal abuse is marker behavior and you should be aware of how people treat their animals. Also, there are often many dogs in homes where drug use is an allegation. Be vigilant and cautious if you enter a home with 'too many' pets. Although you are court appointed to work for the best interests of a child, that does not mean you can not call animal control as a concerned citizen if you see animal abuse or neglect. Furthermore, a neglected or abused animal can be dangerous to you or the children and adults in the home.

VI. SUMMARY

You need to be at your best. When working with families under stress, at a minimum, be unfailingly polite, be kind, look and listen, do not be judgmental, and be respectful.

CHAPTER 12
CULTURAL COMPETENCY

CULTURAL COMPETENCE

Submitted by Padmaja Akkaraju Ph. D.

INTRODUCTION

The Guardians ad Litem (GAL) will work with professionals and families from diverse cultural and socio-economic backgrounds. Their responsibilities span over a variety of functional areas such as investigation; interviewing; report writing; testifying in the court; communicating with children and family members; collaborating with other professionals involved in the case; assisting the court in decision making including specific recommendations for court action based on the findings of the interviews and independent investigation.

The following awareness, knowledge and skills enable the GALs to perform their duties effectively:

- knowledge of their cultural heritage and upbringing and how it shaped their world views and personal biases
- willingness to challenge and transform their world views and biases with the belief that change is necessary and positive (Pope and Reynolds, 1997)
- awareness of the impact of their worldviews and behavior on their perception of people with different cultural backgrounds
- actively seek out educational experiences to increase knowledge of diverse cultures in the contexts of history (trail of tears: American Indians; slavery, Asian American immigration; GI Bill; etc.) and the socioeconomic (poverty, gentrification, etc.) status
- recognize the role of a person's identity (race, ethnicity, religion, sexual orientation, ability, age, etc.) and socio-economic status in his or her experiences, family structure, functioning and child rearing practices
- recognize the institutional barriers (such as lack of health care; lack of legal sanction for second parent adoption by same-sex parents) in the society and how they may limit access to opportunities to minority populations which in turn may affect their family structure and child rearing practices; behavior and functioning
- recognize the impact of racism on the domestic violence
- mindful of personal biases and power hierarchies in their working relationships with children and families
- acquire the ability to go out of personal comfort zone in communication and developing trust-based working relationships with children, families, and professionals involved in the case while fully acknowledging their identity attributes and cultural differences
- recognize the impact of Indian Child Welfare Act and the Multicultural Placement Act on placement decisions and acquire the ability to advocate for the children while assisting the court in decision making

- acquire the ability to make decisions and administer interventions that support the integrity and strengths of the culture of the child and the parties (McPhatter, 1997) while being mindful that each case is unique

The above mentioned awareness, knowledge and abilities are indicative of the GALs' cultural competence. Culture is an integration of people's history, customs, communications, moral values, philosophies, and myths that may be transmitted from generation to generation as well as identity attributes that may include gender, race, ethnicity, language, religion, sexual orientation and ability. Culture is a way of living "informed by the historical, economic, ecological, and political forces" on a group of people (American Psychological Association, n.d.). We develop our thinking patterns, values and behaviors from our culture and view the world through our cultural lens. We learn about culturally different people through the social conditioning imposed by the family and the society (educational system, media, etc.). Our culture becomes the frame of reference when we interact with people thus affecting the way we may interpret the meaning of their values and behaviors.

Cultural competence is the acquisition of congruent knowledge, attitudes, behaviors (Cross, Bazron, Dennis, & Isaacs, 1989; Sue, 2001) that enables us to think, act, and interact with people from different cultural backgrounds with an open-mind while respecting their dignity and recognizing the power dynamics . At the organizational level, cultural competence enables us to actively advocate for institutional policies and practices that are equitable and responsive to all people.

Cultural Competence Attainment

Derald Wing Sue, an eminent psychologist and a leading researcher on cultural competence, posits that the term, acquisition, in the definition of cultural competence indicates that cultural competence is the "process of becoming" (Sue, 2001). Bryant and Peters (2001) point out that developing competence in cross-cultural lawyering is a lifelong process. To begin the process, the GALS need to acknowledge and accept the role culture plays in shaping their worldviews and perceptions of people from different backgrounds. Self-awareness is the key to cultural competence and enables the GALs to be mindful of possible biases in performing their diverse responsibilities.

Need for culturally competent practice

The primary responsibility of the GALs' is to work and advocate on behalf of children and represent their best interest to assist the court in the decision making process. GALs can accomplish their purpose only by staring their journey toward achieving cultural competence. The cost of cultural incompetence is both institutional and personal. Cultural incompetence perpetuates the prevalent societal inequities and does nothing to help the neediest children and their families. Despite having lofty goals, culturally incompetent individuals and organizations provide disservice to children, too often by devaluing their families and communities into which they are born (Green and Appell, 2006). Cultural competence makes us socially responsive and responsible human beings with an enlightened consciousness. McPhatter (1997) says:

> The real payoff is the realization that we are more effective in our efforts and more energized toward goal attainment when we are not constantly trying to protect our fears, trying to say or do the politically correct thing, and trying to avoid the most frightening prospect-being thought of as a bigot. We begin to develop a foundation of trust at the core of which is equality, resulting in more creative solutions to difficult problems. (p.275)

VOCABULARY

It is critical to learn the definitions of terms related to multiculturalism and social justice since people tend to confuse and misuse them.

Race: Race is the category to which others assign individuals on the basis of physical characteristics, such as skin color or hair type, and the generalizations and stereotypes made as a result. Thus, "people are treated or studied as though they belong to biologically defined racial groups on the basis of such characteristics" (Helms & Talleyrand, 1997)

Ethnicity: Ethnicity is an identity attribute that a group of people having a common ancestral origin may share on the basis of their shared history, regional, linguistic and cultural characteristics.

Sex: Sex refers to the genetic and anatomical characteristics which define humans as female or male. These biological characteristics tend to differentiate humans as males and females but they are not mutually exclusive since there are people who possess both

Gender: Gender refers to culturally based expectations of the roles and behaviors of men and women. The term distinguishes the socially constructed identity from the biologically determined aspects of being male and female.

Gender identity: The gender that one believes oneself to be. An individual's innermost sense of self as male or female, as lying somewhere between these two genders, or as lying somewhere outside gender lines altogether.

Transgender: Refers to those whose gender expression and/or anatomies may not confirm to predominant gender roles. Transgender is a broad term that includes transsexuals, cross-dressers, drag queens/kings, and people who do not identify as either of the two sexes as currently defined. When referring to transgender people, use the pronoun they have designated as appropriate, or the one that is consistent with their presentation of themselves.
Pronouns when referring to transgender individuals: Use "ze" to replace he or she and "hir" to replace him or her.

Transsexuals: Transsexuals are individuals who do not identify with their birth-assigned genders and sometimes alter their bodies surgically and/or hormonally.

Minority: A group of people who, because of their physical, cultural characteristics or sexual orientation experience differential and unequal treatment thus becoming objects of collective discrimination.

Majority: Group that holds the balance of social, economic and political power (including the three branches of government: judicial, executive and legislative); controls access to power and privilege and determines which groups will be allowed access to the benefits, privileges and opportunities of the society.

Individualism: Individualism holds that the individual is the primary unit of reality and the ultimate standard of value. Society is a collection of individuals. Values include self-reliance and personal independence.

Collectivism: Collectivism holds that individual is connected to the family and kinship which are the primary units of reality. Values include interdependence, harmony with family and kin as well as with nature. Harmony within the family and nature leads to harmony within the self.

Privilege: Any entitlement, sanction, power, immunity and advantage or right granted or conferred by the dominant group to a person or a group solely by birthright membership in prescribed identities (Black and Stone, 2005).

Oppression: The state of keeping down, making invisible and ignoring of the minority by unjust use of force, authority or the dominant group's norms. Racism, sexism, heterosexism, accentism, ableism are oppression of people based on their race, sex, sexual orientation, language, and disability respectively.

Equity: Equity is about removing institutionalized barriers to provide fair access to opportunities (college education, for example) and privileges (marriage, for example) for all the members of the society.

Multiculturalism: Accepts the existence of multiple worldviews and belief systems, understands behaviors in a social context. As a social movement, multiculturalism includes principles of social justice (Sue, 1999 as cited in Parker and Fukuyama, 2007).

IDENTIFYING THE GAL'S WORLDVIEWS AND PERSONAL BIASES

Identifying the Dominant Culture/Defined Norm

Dominant culture is practiced by the members of the dominant group or the majority who hold the balance of social, economic and political power (including the three branches of government: judicial, executive and legislative). The dominant group controls access to power and privilege and determines which groups will be allowed access to the benefits, privileges and opportunities of the society.

Indicators of dominant culture:

- Standard of rightness and righteousness

- Educational system (philosophy, curriculum, teachers, and leaders)
- Language that everyone must learn
- Religion and spirituality that are dominant
- Conscious and unconscious suppression of other cultures
- The racial and ethnic background, gender, sexual orientation, educational level, class, religion and ability of people who occupy positions of economic and political (governing, judicial, etc.) power

Exercise

Based on the above indicators, identify what is the dominant culture in the United States of America.

Self-exploration exercise

1. Identify your identity attributes: race, class, and gender. When did you become aware of your identity attributes and in what context/situation?

2. Using the dominant culture indicators, identify your membership in dominant or non dominant groups.

	Dominant	Nondominant
Race		
Gender		
Sexual orientation		
Education		
Class		
Religion/Spirituality		
Ability		

3. Read Peggy McIntosh's article, "White privilege: Unpacking the invisible knapsack." Identify your privileges

4. What are your standards for rightness regarding family, relationships, sexuality, child rearing, and spirituality?

5. What are your views about meritocracy and about pulling oneself up by one's bootstraps?

6. How does your culture shape your attitudes, values, biases and assumptions about your work as a GAL and about others who come from a different cultural background?

Cultural bias in the GALs' work

One's good intentions toward others may not always result in outcomes that are free of discrimination. The distinction between intentions and effects is crucial to developing cultural competence (Weng, 2005). Research evidence points out that despite their beliefs about their open-mindedness, people tend to unconsciously harbor prejudice against racially or ethnically different groups that may result in subtle discriminatory behaviors (Ridley, 2005; Weng 2005). Some culturally biased assumptions that are harbored by western trained professionals (Pedersen, 2002) are: (1) measuring people against one "normal" standard of behaviors irrespective their cultural differences; (2) valuing rugged individualism; (3) emphasis on independence while dependency is undesirable or neurotic condition; (4) neglecting client's support system such as extended family members; (5) only "cause and effect" thinking considered as scientific and appropriate; (6) minimization or ignorance of the historical roots of the client's background; (7) focus on changing the individuals, not the system; (8) Assumptions that the professionals and their work are free of cultural biases. Very often the inequities in education, class and power become the invisible barriers in the professional-client interaction.

Avoiding gender, same-sex and transgender biases

Identification of hidden biases creates mindfulness. The following list of questions enable the GALs to make an honest assessment of their sexist and heterosexist attitudes and beliefs:

1. How did your culture play into your understanding of gender?
2. Do you have religious beliefs that guide your values about gender and sexual orientation?
3. What are your views about same-sex and transgender relationships and parenting?
4. Have you interacted with gay/lesbian/bisexual/transgender parents?
5. What are your views about child placement and adoption by same-sex couples or transgender people?

Once the GAL identifies her or his worldviews and biases, she or he needs to make an informed decision about the limits of her or his effectiveness working with same-sex or transgender couples – especially if her or his religious or spiritual beliefs disapprove same-sex relationships.

While working with the same-sex or transgender parents, mindfulness of the role of individual and institutional heterosexism is the key to prevent biases. The following checklist may help the GALs in avoiding the biases:

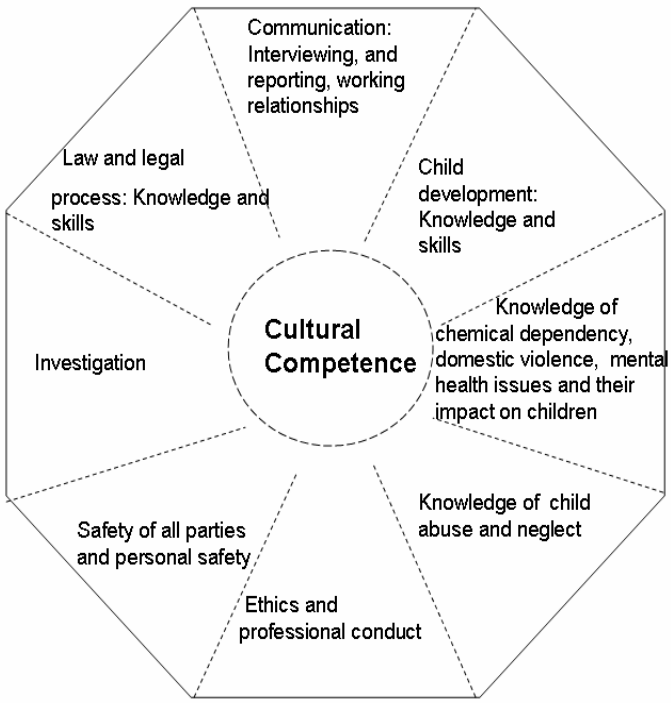
1. Think about the child in context of the family. Same-sex or transgender parents are parents first.
2. Use inclusive language in communication and reporting
3. Increase your knowledge of the same-sex and transgender parents

4. If you have personal biases for whatever reasons, look at the research evidence and listen to the professionals. All the major professional organizations and medical experts support the gay, lesbian and transgender parenting.

BRIDGING THE GAP BETWEEN INTENTIONS AND OUTCOMES

Model for understanding the central role of cultural competence in the GALs' functional responsibilities

Substantial research evidence from various service professions such as counseling (Ridley, 2005), law practice (Bryant and Peters, 2001; Weng, 2004), health care and social work (McPhatter, 1997) points out that cultural competence plays a crucial role in the efficaciousness of the professional. Cultural awareness, knowledge and skills form the core part of a service professional's functioning since people are cultural beings. GALs' cultural competence development influences their effectiveness in all the responsibilities that the GALs undertake in their child advocacy. The following model gives a visual presentation of various functions of the GALs:



Guardian ad Litem Competencies

The model presented here identifies the central role of cultural competence in achieving the GAL standards. Cultural competence occupies the core or the hub of the model thus signifying that without the development of cultural competence, the GAL standards would fall short of the best practices thus doing disservice to the child and defeating the very purpose of the GALs' work. The GALs' cultural competence development affects how they understand the legal system and practices, observe, interact, communicate, investigate, report to the court and assist the court in making a culturally competent decision that serves the best interests of the child. The model therefore indicates the need for cultural awareness, knowledge and skills in all areas of the GALs' professional performance as discussed in the following sections:

Personal safety assessment

The GALs' assessment of personal safety depends on his or her worldviews and biases which may affect her or his comfort level and the ability to go out of comfort zone while working with people from a different race or sexual orientation. Without achieving some level of cultural competence, any assessment of personal safety made by the GAL would not be valid and reliable thus falling short of the best practice

Communication

The GALs' work involves interviewing the family and others involved in the case; analyzing and reporting the information. Self-awareness including the power hierarchy between the GAL and the family members; knowledge of the cultural background, historical roots of the family and the systemic oppression that may be affecting the family members all required for developing effective communication skills and for building trust-based working relationships.

Cultural competence enables GALs to develop trust-based relationships with family members and professionals involved in the case, and to be mindful of the unconscious cultural biases that may creep into the investigation and to work toward fixing the systematic disparity in services provided to the minority children.

Ethics and Professional Conduct

The GALs need to be cognizant that ethics and standards for professional conduct may have implicit cultural norms and values. In maintaining fairness, the GALs need to be mindful of the reasons, such as racial bias, for the overrepresentation of minority children in the foster care system.

The law and the legal process

The law and the legal process require the GALs to represent the child and assist the court in the decision making process. Cultural competence of the GALs enables them to be sensitive to the autonomy and possible mental trauma of the child during the process, help the court see the child in the context of family and community by "framing and supporting alternative approaches to dispute resolution – non judicial processes that allow children and their families to have an authentic voice in decision making (Olson, 2006 as in Green and Appell, 2006). The GALS need

to see how the laws that are based on individualistic model of rights and responsibilities (Bryant and Koh Peters, 2001) may affect the families that may have collectivist views and behaviors.

Knowledge of child development

Culturally appropriate knowledge of child development needs to include the minority child development and address the cultural differences in child rearing practices and family structures and values. As the UNLV (Green and Appell, 2006) recommendations point out, children must be understood in the context of their families, communities and their historical roots.

Knowledge of child abuse and neglect

Knowledge and analysis of child abuse and neglect need to be free of personal biases against others' cultures and stereotyping. In addition, cultural competence enables the GALs to look at the effect of systemic oppression in the form of inequitable policies and disparate services that they may wish to address at the organizational level. Culturally competent GALs would be able to sort out culture-influenced processes of child rearing from harmful behaviors.

Knowledge of chemical dependency, domestic violence, mental health issues and their impact on children

Cultural knowledge enables the GALs to study how cultural factors as well as systemic oppression are interrelated to the issues of chemical dependency and mental health among the minorities. Knowledge about domestic violence must include contextual factors such as poverty, single parenthood, and histories of previous intimate partner violence, as well as the double bind situation faced by the white women as well as women of color while facing the issue of domestic violence. The double bind situations include the risk of children being placed in foster care because of lack of financial resources if the battered women seek help. In the case of women of color, their responses to violent and abusive behavior may also be influenced by the chronic experiences of racism, and the social contexts in which they live. GALs need to be mindful of the cultural and socioeconomic context of domestic violence and the impact on battered mother and child.

The UNLV children's conference recommendations (Green and Appell, 2006), caution against the lawyers making assumptions of what the children need and want and how best to serve the children because these assumptions may be based on stereotyping or the lawyer's own personal experiences, worldviews and biases. The UNLV recommendations posit that children must be understood in context – as developing human beings with families and complex multiple identities. Cultural competence enables the GALs to be mindful of making assumptions while learning and applying their knowledge of chemical dependency, domestic violence and mental health issues and their impact on children.

Investigation

Cultural competence will enable the GALs to become aware of distractions and biases that might detract them from representing the best interests of the child, and will develop strategies for avoiding them.

The central role of cultural competence thus emphasizes the connection between personal and professional development and makes it imperative that the GALs find ways to address the role of cultural competence in all of their functions

Sorting individual biases, systemic oppression and cultural norms from harmful behavior that impacts children

There is substantial research evidence (Hill, n. d.) that racial bias among the child welfare professionals and the child protective services system results in disparity in services provided to the minorities, especially African Americans, whose children are overrepresented in the foster care system. The minority overrepresentation in the child welfare system results from the cultural insensitivity and biases of workers, policies and institutional racism. Blacks are twice as likely to be investigated for child maltreatment as whites. Most research studies suggest that race alone or race in addition to other factors is strongly related to the higher rates of investigations for the African Americans.

Fontes (2002) reported that in the United States, most child welfare professionals hold a highly individualistic view of child maltreatment by assuming that it is inflicted by parents on their children. Thus they disregard the systemic issues such as child poverty; inadequate housing; poor health care; overcrowded and under funded schools; dangerous neighborhoods and lack of opportunities for parents to get out of the cycle of poverty and racial oppression which result in social stress. Fontes (2002) suggests that professionals caring for these families may also work to bring about systemic changes for social justice.

When the GALs suspect child maltreatment, in addition to being mindful of the social stress, they need to be cognizant of the cultural differences child rearing practices (Fontes, 2002). For example, while spanking children with a stick or a broom may be considered as child abuse by the European American culture, leaving the infants to sleep on their own or male infant circumcision is perceived as abusive by many cultures. While the corporal punishment, defined as the use of physical force to inflict pain, may be seen as an acceptable form of discipline among some minorities, information about the frequency of such punishment, its intensity as well as the context would help the GALs in recognizing if there is physical abuse.

Cohen (2003) provides a check list of critical considerations when child welfare professionals work with diverse families. The following list is adapted from Cohen's frame work.

Critical considerations to sort cultural factors from harmful behaviors:

- What are the GAL's standards of norm for child rearing practices and how are they different from that of the child's family?
- Has a conflict occurred because of different child-rearing beliefs and behaviors?
- Are there any language barriers or religious differences that are affecting the GAL's interaction with the child and the family?
- Is the parenting leading to neglect, medical neglect, inadequate nutrition and supervision thus endangering the physical and mental health of the child?
- Are conditions related to safety, neglect, supervision and nutrition the result of poverty factors?
- Is substance use affecting the safety, physical and mental health, nutrition and education of the child?
- Have other caregivers, extended family members or teachers expressed concerns about the child's wellbeing?
- Does the child give indications of being affected by witnessing violence or experiencing psychological maltreatment?

Role of GAL in assessing behavior resulting from cultural differences

Bryant and Koh Peters (2001) identified five habits for cross-cultural lawyering based on the core principles that are necessary for lawyering: people are cultural beings and cultural competence is imperative for lawyering; open-mindedness; lawyers need to remain with the individual client, always respecting her dignity, voice and story. The five habits identified by Bryant and Koh Peters (2001) have been adapted for GALs' work practices with an additional sixth habit. These habits enable the GALs to effectively assess the behaviors arising from the differences in the cultural norms in the GAL-client-Law triad.

1. Identify how the similarities and differences between the GAL and the client's backgrounds may affect the GAL-client interaction. By identifying differences, GALs can become aware of potential misunderstandings or personal biases. By identifying similarities, GALs can recognize their connection with the clients. This process may enable the GALs to analyze the effect of similarities and differences on their functional responsibilities such as information gathering and analysis and presentation. By identifying similarities and differences GALs can explore the ways they connect with the clients and the ways they might judge, misunderstand or misinterpret clients.

2. Identify and analyze the similarities and differences of two different dyads: client-law and the lawyer-law. Make a list of the similarities and differences and compare the dyads with the lawyer-client dyad. The comparison will enable the GALs in assessing the credibility of the client's story; plan appropriate legal strategies; identify the agreements and disagreements with the cultural values and norms implicit in the law and how it applies to the client; analyze if the GAL is probing for clarity using all the three frames of reference: Client, GAL and the law.

3. The parallel universe habit enables the GALs to challenge themselves to identify many alternatives to the interpretations they may come up with, in the absence of sufficient information. This habit enables the GAL not to be judgmental about their client or family's behavior. For example, people working for minimum wage may not be able to spend time or have a flexible work schedule to meet with the GAL during the work day since they have to earn their living.

4. Be mindful of the communication and be on the alert for the red flags when interpreting the information.

5. Recognize that there are numerous factors that may adversely affect the GAL-client interaction. The GAL who proactively addresses these factors may prevent the interaction from reaching s breaking point.

6. Use the cultural asset paradigm: It is also critical that the GALs look at their client and their family from the cultural assets paradigm thus valuing the strengths of their cultural background. For example when working with a bilingual Latino child, the GAL can focus on their ability to speak two languages and the support of the community. Looking at the strengths of a different culture may help the GALs to build a trust-based relationship with the child and the family.

REFERENCES

American Psychological Association (2002). *Guidelines on Multicultural Education, Training Research, Practice, and Organizational Change for Psychologists*. Retrieved July 6, 2007 from http://www.apa.org/pi/multiculturalguidelines/definitions.html

Black, L. L. & Stone, D. (2005). Expanding the definition of privilege: The concept of social privilege. *Journal of multicultural counseling and development*, *33*, 243-255.

Bryant, S. & Koh Peters, J. (n. d.). *The Five Habits: Building Cross-Cultural Competence in Lawyers*. Retrieved July 1, 2007 from http://www.cleaweb.org/documents/multiculture.pdf.

Cohen, E. P. (2003). Framework for Culturally Competent Decision making in Child Welfare. *Child Welfare*, *82* (2), 143-155.

National Technical Assistance Center for Children's Mental Health. (1989). *Towards a Culturally Competent System of Care*. Washington, D.C: Cross T., Bazron, B., Dennis, K., & Isaacs, M.

Green, B. A., & Appell, A. R. (2006). : Special issue on legal representation of children: Representing Children in Families—Foreword. Nevada Law Journal *6*(3). 571-590.

Helms, J. E., & Talleyrand, R. (1997). Race is not ethnicity. *American Psychologist ,52*(11), 1246-1247.

Hill, R. (2006). Synthesis of research on disproportionality in the child welfare system: An update. Retrieved July 7, 2007 from http://www.casey.org/NR/rdonlyres/053CD4C6-300D-402A-8C18-7E476C929D2A/990/0226_CC_BobHillPaper_FINAL.pdf

McPhatter, A. R. (1997). Cultural competence in child welfare: What is it? How do we achieve it? What happens without it? *Child Welfare*. *76*(1), 255-279

Olson, K. B. (2006). The importance of using alternative dispute resolution techniques and processes in the ethical and informed representation of children, *Nevada Law Journal* 6 (3), 1333-1348.

Parker, W. M. & Fukuyama, M. A. (Eds.) (2007). *Consciousness – Raising: A primer for multicultural counseling*. Springfield, Illinois: Charles C. Thomas. Publisher, LTD.

Pedersen, P. B. (2002). The making of a culturally competent counselor. In W. J. Lonner, D. L. Dinnel, S. A. Hayes, & D. N. Sattler (Eds.), *Online Readings in Psychology and Culture* (Unit 10, Chapter 2). Retrieved June 30, 2007 from http://www.ac.wwu.edu/~culture/Pedersen.htm

Peters, J. K. (2001). *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*. LexisNexis.

Roberts, D. (2003). *Shattered bonds: The color of child welfare*. New York: Basic Civitas Books.

Pope, R. & Reynolds, A. (1997). Multicultural competencies in student affairs: multicultural awareness, knowledge and skills. *Journal of College Student Development*. *36*, 266-277.

Ridley, C. R. (2005). *Overcoming unintentional racism in counseling and therapy : a practitioner's guide to intentional intervention*. Thousand Oaks, CA: Sage Publications.

Sue, D. W., & Sue, D. (1999). *Counseling the culturally different: Theory and practice*. New York : John Wiley & Sons

Sue, D. W. (2001). Multidimensional facets of cultural competence. Journal of Counseling Psychologist, 29*, 790-821.*

Weng, C. (2005). Multicultural lawyering: Teaching psychology to develop cultural self-awareness. Retrieved January, 2007 from Boston College Law School Faculty Papers Web site: http://lsr.nellco.org/bc/bclsfp/papers/46/

CHAPTER 13
PUTTING IT ALL TOGETHER

PUTTING IT ALL TOGETHER

Submitted by Carol Bailey and Dr. Marsha Hedrick

An individual becomes a Guardian ad Litem by virtue of a court order. Thus, the role of a Guardian ad Litem is from its inception one defined by statutes and court rules. There has been controversy regarding guardian ad litems in family law cases because some people object, *inter alia,* that the guardian ad litem prejudges the facts which is the province of the court.[1]

The role of guardian ad litem in a family law case is a relatively new concept in the law because divorces were uncommon before the1960s.[2] Historically, under Roman law and Anglo-Saxon law guardians for children were limited to care for children following parental death. "The Early History of the Law of Guardianship of Children: From Rome to the Tenures Abolition Act 1660", UWSL Law Review. So long as parents were living, it was assumed by the law that they knew what was best for their children and society was reluctant to intervene in the matters of an individual family. Guardian ad Litem in Child Abuse and Neglect Proceedings, Heartz, R., National CASA (1997). With the publication in 1962 of the book The Battered Child Syndrome by Dr. Henry C. Kempe our society became more willing to allow court intervention in family affairs to protect children, in this case for physical abuse. Id. In 1971 the Wisconsin legislature was the first to require by statute that a guardian ad litem be appointed in dissolution child custody disputes.

Practitioners are sometimes confused about what their role is. "The distinguishing feature of the attorney appointed as a guardian ad litem in these contexts [family law cases] is that he or she makes decisions in the case based on that attorney's view of what is in the best interests of the child client. The attorney need not be bound procedurally or substantively by the child's expressed desires. In this regard, the attorney acts almost as much as a social worker as an attorney. However, the guardian ad litem should consider the child's wishes and should inform the court of those wishes even when they conflict with the guardian ad litem's position." Haralambie, A.M., The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases, page 6. American Bar Association, 1993.

Thus, the guardian ad litem is to use his or her judgment, after investigating all relevant facts, to develop recommendations concerning some or all aspects of parenting arrangements that will be in the best interest of the children. This is a very serious responsibility and one whose execution through a Parenting Plan, should the parties or the judge accept your recommendations, can have an enormously significant impact on the course of a child's development. The guardian ad litem is most helpful by conducting a thorough investigation and reporting the information to the court. A thorough investigation means checking and cross checking on the accuracy of all important information and reporting to the court what you learn. Almost all cases in which there is a guardian ad litem involve one or more significant events about which the parents have very different stories. The guardian ad litem is not the judge and is not a decision maker. The guardian ad litem is to assist the judge. If you find yourself feeling personally invested in the outcome of the case this is something you must examine and if this occurs repeatedly this might indicate you are not suited to the role of a guardian ad litem. It is the judge's responsibility to listen to the testimony of witnesses, determine their credibility and make a decision about

parenting arrangements for the children. Your job is to give the judge relevant information which may be hard to obtain in a courtroom so the judge can make a sound ruling.

Although the guardian ad litem should almost always speak with the children and observe them with the parents, one must be very careful about asking the children what parenting arrangements they want. Asking children questions related to their preference sets up an expectation in them that what they say is what will occur. This can be damaging to children both if they get what they say they want and if they do not. It is inadvisable to ask younger children (less than 13) what their ideas are for the residential schedule. Since cases in which a guardian ad litem is involved are generally not typical cases, not "normal divorcing families", the situation is not a straight forward one where you can ask the children for information and then recommend what they say. The children in these cases are almost always very confused and often have become directly involved in the parental conflict and feel the need to protect or advocate for a parent, sometimes the parent who is unable to care for them. In the latter situation rather than be cared for by the parent as the child should be, the child begins to care for the parent who does not function well. It is not in the best interest of children to take on the role of parenting their own parents and children placed in this position often do not know what is in their best interest.

In order to develop sound recommendations, the knowledge base of the Guardian ad Litem should go well beyond knowledge of the law, i.e., the priorities for determining parenting arrangements established by the legislature. Because the fundamental questions in a family law case obviously concern children and parenting the Guardian ad Litem must also be able to fairly assess the degree to which each adult can perform the parenting functions the legislature has established as primary considerations. This assessment involves knowledge of psychology, child development and other information developed in the social sciences as well as the ability to form practical recommendations that will work in real life. Each Guardian ad Litem has the obligation to the court and the families in whose lives they become involved to continuously consult with colleagues to ensure to the extent possible that his or her ability to assess fairly is not distorted by bias concerning traits or characteristics of the adults that is not a priority established by the legislature for determining parenting arrangements. In particular gender bias in favor of mothers as primary parents remains a prevalent concern.

Developing sound judgment and ensuring that your analysis is not influenced by personal bias of any kind usually takes many years of work in this highly charged environment. These cases are not "typical" family law cases. Most family law cases are resolved by the parties and/or attorneys and do not require the services of a Guardian ad Litem. The cases in which there is a Guardian ad Litem almost always involve complex issues. Aside from knowing and applying information from social science research, effective recommendations involve an analysis of intangible factors specific to the family (such as geographical distance of residences, work schedules, extended family support, etc.) and a common sense, practical, bias free synthesis of information.

The legislative priorities seek first to protect the child from harmful influences, then to support the child to become a responsible citizen by providing emotional nurturance and stability and finally, and optimally, to assist the child or children to develop their unique talents and gifts to their full potential. The discussion below is divided into these three areas.

As set forth below the two most harmful influences specific to children in family law cases and from which they must be protected are 1) compromised mental health on the part of parents or parental figures and 2) exposure of the children to high conflict between the parents or parental figures. It is your obligation as a guardian ad litem to investigate both of these areas thoroughly and seek the services of a mental health professional if there is evidence of possible mental health concerns and you are not a mental health professional.

Child sexual and physical abuse are beyond the scope of this chapter. Except as it is related to parental mental health, the topics of parental substance abuse, domestic violence and neglect of children are not specifically covered in this chapter.

I. LIMITING DAMAGING INFLUENCES

A. Mental health of each parent

In studies looking at the types of parents who, in order finalize their divorce, require substantive intervention in the form of GAL appointment and/or parenting evaluation, it becomes apparent that this group does not represent the normal divorcing population. Joan Kelly, Ph.D., a prominent researcher in assessing the impact of divorce and conflict on children, has estimated that in 75% of the cases requiring this kind of intervention, one or both parents have a personality disorder. Understanding the nature of personality difficulties and other mental health issues is important for at least two reasons: 1) These issues are often central to the parents' inability to resolve custody issues on their own 2) The mental health status of the primary parent may be the biggest factor affecting a child's wellbeing in the aftermath of divorce. The mental health of each parent, then, becomes crucial to designing appropriate, child-focused parenting plans.

In custody evaluations, it is not often the case that we see parents with severe mental disorders such as schizophrenia. However, personality disorders, bipolar disorder, and depressive disorders are frequently an issue. Character disorders are firmly entrenched, long-term, learned ways of relating that create a pattern of interpersonal dysfunction. They are difficult to treat and are most often not directly amenable to amelioration by medication. Bipolar disorders and depressive disorders, on the other hand, may be fully managed by medication management in many cases but recalcitrant to medication in others. Critically important to understanding the role of any mental health issue in a parenting context is a detailed and complete psychosocial history that provides information regarding the extent and nature of the dysfunction. Information may be acquired from interviews of each parent, medical records, and collateral contacts that have information about interpersonal functioning in areas both inside and outside of the parenting context.

While mental health professionals may use diagnoses to communicate effectively with one another about an individual's mental health status, it is not generally effective to use diagnostic categories to communicate about parenting issues in a family court setting. Much more effective is a clear, detailed description of the specific ways in which a parent's issues impact his/her functioning with the children. For instance, little relevant information can be gleaned from the

statement, "This mother suffers from a bipolar disorder". Much more informative is the statement, "This mother's functioning is compromised and does not allow her to consistently provide her children with predictability in their daily schedule. She sleeps erratically and is often unable to get up in the morning to make sure the children are at the bus stop on time. She keeps the children up late with loud music and grandiose plans to stage theater productions or with late night trips to music stores. Meals, as such, are non-existent and the children are allowed to 'graze' at will when there is food available".

In order to inform the court process, statements about a parent's mental health functioning must be tied directly to the impact on the children in question. A mental health issue that does not impact the children, for instance a bipolar disorder that has been stabilized on medication for years, is irrelevant. There are some parents who do a very good job of parenting despite some degree of mental illness. In this context, it should be noted that use of pornography does not, in and of itself, constitute a mental health issue. Unless the pornography is focused on children, or the parent does not safeguard the children from the pornography, or the parent is involved in pornography to the extent that it impacts their ability to provide adequate parenting, the issue is irrelevant.

The importance of considering the mental health status of each parent becomes apparent in light of the literature regarding the link between the emotional functioning of the primary parent and the well being of children in the aftermath of divorce. Several studies have suggested that emotional problems in the custodial parent, such as anxiety, depression, and personality disorder, are often correlated with a diminished post divorce adjustment in their children. (Johnston 1996. Johnston, J (1996) Children's adjustment in sole custody compared to joint custody families and principles for custody decision- making. *Family and Conciliation Courts Review, 33, 415-425*).

It is worth noting that the impact of one parent's mental health status may have had little impact on the children during the marriage. This may be because the other parent was successful in buffering the children from the impact of the other parent's emotional difficulties-- for instance a mother who over-functions in the household and camouflages the father's chronic depression. Once parents are living in separate households, a parent cannot provide this function for the children and the children are then apt to receive an undiluted dose of the other parent's dysfunction. Another possibility is that the parent with psychological difficulties may have functioned relatively well up until the emotional trauma related to separation and divorce. Individuals who are emotionally intact may have a relatively brief period of dysfunction in the aftermath of the separation. However, individuals with underlying difficulties whose disturbance surfaces as a result of the divorce may become chronically dysfunctional and never regain the level of functioning that was provided by the structure of the marriage.

It is important to remember that emotional difficulties in one parent do not preclude emotional difficulties in the other parent. In fact, particularly in long-term relationships, it is not unusual for parents to have competing mental issues. The issue then becomes which issues are most detrimental to the child and which parent is most likely to benefit from intervention.

The mental health status of each parent post divorce can impact children's adjustment in several ways. Parents suffering from chronic anxiety and depression are apt to have less energy to focus

on the physical and emotional needs of their children. They may rely unduly on children to function beyond their developmental level in providing nurturance and support to the parent and to younger children. The household may be chaotic and unpredictable with insufficient structure provided for optimal school functioning and involvement in extracurricular activities.

Personality disorders in parents may compromise the wellbeing of children by modeling ineffective interpersonal interactions. For instance, parents with borderline personality disorders often have chaotic intimate relationships and expose their children to a series of volatile, unstable relationships with transient partners. They may model intense anger, preoccupation with abandonment, and self-destructive behaviors. Narcissistic parents may exhibit a bottomless need for admiration and a need for their children to behave in ways that enhance the parent's esteem rather than the child's. They are apt to have difficulties with empathy and little capacity to model attention to the feelings of others.

Finally, mental health difficulties in one or both parents can have a profound impact on each parent's ability to avoid excessive conflict with the other parent and buffer the children from parental conflict. Difficulties with empathy may leave a father unable to comprehend that a child's feelings about the mother are not the same as the father's feelings about the mother. Preoccupation with abandonment may make it difficult for a mother to allow a child to spend extended periods of time with the father.

In considering the role of mental health issues in formulating parenting plans, it is important to consider chronicity and severity of the disorder, the specific manner in which it impacts the children involved, and the likelihood that available interventions will be effective. When severity and impact is high and the likelihood of remediation low, consideration should be given to limiting time between the effected parent and the children. When this is the outcome, efforts should be made to provide a structure that will enhance a troubled parent's ability to function in an optimal way over shorter periods of time.

B. Exposure of child to conflict between parents

The legislature has determined (consistent with social science research) that exposing the children to conflict between the parents is damaging to children. R.C.W. 26.09.191(3) provides:

> A parent's involvement or conduct may have an adverse effect on the child's best interests and the court may preclude or limit any provisions of the parenting plan if any of the following factors exist:….(e) the abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

Note in this provision that the court's ability to require limitations in the parenting plan is discretionary by use of the word "may".

In addition R.C.W. 26.09.191(2) provides:

> The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:….. (ii) physical, sexual or a pattern of emotional abuse of a child.

Note in this provision that the court must require limitations in the parenting plan if emotional abuse is found by use of the mandatory word "shall". In addition to these provisions the legislature has established as an objective of the parenting plan "minimizing the child's exposure to harmful parental conflict". R.C.W. 26.09.184.

There are three main ways in which parents involve their children in parental conflict. One is that the parents fight repeatedly with each other in front of the children. The second is that the parent talks directly to the child about the other parent by making direct statements to the child or in front of the child about the other parent such as the father saying: "Your mother is a liar. She lied to the Judge". This can take the form of a parent constantly complaining to the children about what the other parent did or did not do such as the father saying "Your mother never sends you with enough clothes. She doesn't care how you look. She only thinks about herself." The third way of involving children in parental conflict is the more subtle means of psychological manipulation of the child against the other parent, for example the mother telling the child: "We hate fat people", when the father is overweight. Other examples are the mother telling the child "Gay people are abnormal" when the father is in a gay relationship; the mother saying: "Your father likes his friends more than he likes you. That's why he always plays golf."; and the mother telling the children: "Your father doesn't love us. He left us for his girlfriend, Susan." All three of these (and other ways of involving the children in parental conflict) can arise to the level of emotional abuse of the child. The latter form of subtle manipulation is more common with younger children whose perceptions of reality are less firm and who depend on their parents for emotional security. For this reason, the latter category of involving children in parental conflict through subtle manipulation often arises to the level of emotional abuse because it has a predatory quality and completely violates the child's need for emotional security with both parents. When any of these situations are frequent and do not subside after the initial stage of the dissolution, the behavior arises to the level of emotional abuse and requires mandatory restrictions on contact in the parenting plan. This also applies to parents who generate conflict at exchanges including persistently calling the other parent names and making accusations about the other parent in front of the children. Although it was a domestic violence case review the facts in In re Marriage of Stewart, 133 Wn. App. 545 (2006).

Why is this damaging to children? 1) Children need to feel valued and loved by both parents. Children need to feel good about both of their parents to internalize this positive perception of one's parents and later feel good about themselves. 2) Children become confused about what is real because their parents inappropriately share different versions of events with them. They begin to doubt their own perception of reality which undermines their ability to trust their own judgments. When children do not know who to believe they feel very confused and are often angry. 3) They develop guilt in taking one parent's side against the other. They often assume a caretaking role for the parent who presents him or herself as a victim of the situation or of the

other parent. 4) Children develop a fear of sharing and begin to "compartmentalize" their lives. When one parent gets mad at them or exudes hostility when the child says something positive about the other parent or the other parent's friends or family, children learn to stop sharing and/or discussing anything that takes place with the other parent. This makes the child constantly aware of the dysfunction and negativity in his or her family and can damage the child's developing sense of self.

Children should not have to carry these burdens. It takes their focus and energy away from their own social, academic and emotional development which should be both parents' primary concern, not trying to "win the child over" or get the child or children to align with the parent's point of view or opinion about the other parent. This is why involving the children in the parental conflict is considered abusive. The child's focus becomes trying to decide things like which parent is telling the truth, concerns about finances, and concerns about parental infidelity, which are adult issues the parents should handle outside the experience of the child. Children need to be able to develop and concern themselves with reading a favorite book, loving a sports star, studying dinosaurs, mapping the stars, or planning a party with friends and not preoccupied with parental arguments and the resulting fears for their security.

C. Ability to buffer child from divorce conflict and support other parent's relationship

Washington state has rejected the "friendly parent" concept, In re Marriage of Littlefield, 133 Wash. 2d 39 (1997) but our courts have found that bringing the child into the parental conflict is an "abusive use of conflict" necessitating R.C.W. 26.09.191 restrictions. See for example In re Marriage of Burrill, 113 Wn. App. 863, 56 P.3d 993 (2002).

The "friendly parent" doctrine holds that "primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent. See In re Marriage of Lawrence, 105 Wn. App. 683, 20 P. 3d 972 (2001). The problem with rejection of this concept is that the notion of "friendly parent" was tied to the concept of "frequent and continuing contact" with both parents. What the Washington legislature has rejected is that "frequent and continuing contact with both parents is in the best interest of the child" because our legislature does not want to use "visitation privileges to reward or penalize parents for their conduct". Lawrence, supra, at p. 687.

To be clear, when a parent brings the child or children into parental conflict (as described specifically above) this is damaging to the child or children and when done egregiously or over a period of time this behavior should be the basis for restrictions of a parent's time with the child or children.

The heart of the problem with bringing the child into the parental conflict is that the parent's emotional need for vindication or to be "right" overshadow the parent's ability to care for the child. Thus, the parent is acting immaturely to serve his or her own interests to the disregard of and damage to the child's interests. This is why egregious examples of parental behavior or continuous parental behavior and/or comments over a period of time both constitute emotional abuse of the child.

Parents must learn to manage their own emotional reaction to the family situation and not force the child to share in their view and/or participate in their emotional distress. Parents must also be mature enough to recognize that the child's relationship to the other parent is different, i.e., that of a child not a former spouse. Both spouses no doubt contributed to various aspects of the former relationship as adults. The child is not a part of that dynamic and is in an entirely different relationship to each of the parents than they are in with each other as former partners or spouses. Parents must recognize this difference and be able to move beyond their own self centered issues (through psychotherapy if necessary) to allow the child to learn and love what is best in the other parent.

II. SUPPORTING CHILD'S "CARE AND GROWTH" TO BECOME A RESPONSIBLE MEMBER OF SOCIETY

A. Parental ability to meet emotional needs of child

1. Quality of parent's emotional relationship with child – engagement vs enmeshment, empathy, recognition of individuality

Often overlapping issues of attachment and child preference, are considerations relating to the quality and nature of each parent's relationship with the child. Important considerations have to do with a parent's ability to maintain appropriate boundaries between child and parent issues, particularly when it comes to conflict with the other parent. A daughter may have an emotionally close relationship with her mother, but if that closeness is exploited or maintained by the mother's denigration and exclusion of the father, this closeness may not be an asset to the child. Distinctions should be made between a parent/child relationship whose closeness is based on affectionate, mutually rewarding interactions with clear parent/child roles and those based on meeting the parent's emotional needs at the expense of appropriate parent/child distinctions. This latter dynamic is often referred to as 'enmeshment', in which the boundaries between parent and child are blurred.

Alternatively, a father may have been substantially disengaged from a child prior to the separation, but begin making exceptional efforts to rehabilitate the relationship once the marriage is over. It is not apt to be in a child's best interests to assume the father's belated interest is merely strategic and therefore likely to be short-lived. It is not unusual for disengaged parents to reorder their priorities after divorce and sustain that change. For the child, this can be an important and positive outcome of the divorce, offsetting some of the negative outcomes. On the other hand, disengaged parents who have little ability to make authentic, enduring changes in their priorities are apt to demonstrate that, even in the process of the evaluation. They often have little ability to accurately assess their child's individuality and specific needs, have trouble setting aside their own needs, and blame others for their deficits.

2. Attachment to each parent

Assessing attachment between parents and children is an exceptionally difficult and complex task, particularly in this context. Much of the information regarding this factor comes from

theoretical considerations that are decades old and unsupported by reliable research. Moreover, there are no good tools for assessing attachment in children over the age of two.

Attachment theory generally defines attachment as a strong emotional connectedness between children and their primary caretaker(s) that endures over space and time, and is necessary for physical survival and emotional well being. Attachment is a reciprocal process in which both the child and caretaker are active participants. Attachment figures serve as a secure base from which the child feels safe to explore and master the environment. When the child perceives a threat in his surroundings during exploratory activity, he will retreat to the attachment figure for reassurance and comfort. (Barone, N. M., Weitz, E. I., & Witt, P. H. (2005). Psychological bonding evaluations in termination of parental rights cases. *Journal of Psychiatry and Law*, *33*, 387-412.)

Historically, attachment theory has often been interpreted to mean that a child has one primary attachment and the strength of that attachment will be diminished by the attachment figure's absence, even if there are other important figures available. However, more recent research does not support this view. Children appear to form a hierarchy of attachments, the strength of which depends on amount of contact, needs met by the attachment figure, temperament of the child, and developmental status of the child. It appears to be the case that in most intact families, the child has a substantially equivalent attachment to both parents after the first few months, regardless of the amount of time spent with each parent. (cite) Although one parent often provides more caretaking, the other parent is apt to become increasingly important, even during the first year, as the baby's need for diversion, entertainment, and physical play increases. Mothers and fathers interact with their infants in different ways and most children benefit from the differences in these styles and form attachments based on that diversity. For instance, a child may seek out the mother when tired or ill and seek out the father for 'rough housing'. Both types of interaction are important to the child and form the foundation for stable, complex relationships in the future.

In assessing the importance to the child of relationships to each parent, it is vital to understand the complexity of this issue. Particularly with young children, if the child has had a reasonably adequate relationship with both parents prior to separation, one of the goals of a parenting plan should be to support and enhance the relationship with each parent after the divorce, other factors permitting. It is not sufficient to simply assess who has spent more time with the child with the assumption that they are therefore the primary parent. Even if a 'primary attachment' can be determined, it does not therefore follow that one parent should have a substantial majority of the parenting time, while the other parent plays a much lesser role.

With older children, the issue of 'attachment' may better be discussed in terms of 'preference'. Temperamental similarities, mutual interests, as well as the child's experience of which parent has historically met which emotional needs are apt to all play a role in understanding a child's attachment to each parent. Again, the goal should be to maximize the maintenance of the child's relationship with each parent, not the allocation of primary importance to one parent at the expense of the other.

When relationships in a family have been troubled prior to the divorce, and/or children are caught in conflict between the parents after the separation, the difficulties in assessing

attachment issues may be greatly increased. Children who have had a solid, secure attachment with one parent and an insecure attachment with the other parent may become concerned about the less secure relationship as one parent leaves the home. As a result, the child may work to avoid rejection by consolidating the insecure relationship. They may do this by allying with the more distant parent and even denigrating the parent with whom they have a more secure attachment. Careful assessment of this issue will include both historical information about the nature of the relationship between the child and each parent, as well as current information about parental agendas and the impact of those on the child.

3. Supporting Relationships Aside from Parents: Ability to Facilitate Involvement in Other Important Relationships: Siblings, Extended Family, Neighbors, Former Step-Siblings and Half Siblings

Sibling relationships can be an important, and complicating issue in making custodial recommendations. In general, efforts should be made to minimize the disruption of important sibling relationships whenever practical, regardless of the legal status of those relationships. For example, if a child has always been raised with a step-sibling as though they were a full sibling, recommendations should be made with consideration given to the child's emotional attachment to that sibling. Similarly, a parent's willingness to disregard the emotional attachment of a child to a former step-sibling may reflect poorly on his/her capacity for empathy.

Evaluators are, at times, faced with the issue of splitting full siblings between two parents. Such a recommendation should be considered only after careful review of the potentially negative short term and long term effects of splitting siblings. Research has suggested that siblings can provide important emotional support to one another, particularly during stressful times such as parental separation and divorce. As Kaplan notes, "Siblings spend more time interacting with one another than they do with their parents. A common family history, age, and long-term nature of the relationship make sibling relationships qualitatively different from other kinship relationships". (Kaplan et al 1993). In addition, sibling relationships may be important in later life as a source of assistance (Borland, 1989). However, siblings are only likely to see one another as a resource if they spend significant time together during childhood. For these reasons, splitting siblings should be done only in exceptional situations.

There are factors, however, that support splitting siblings. These include: (1) children and parents are divided into warring camps and there is little likelihood that contact will improve the schism (2) there is little or no relationship between siblings, often because of age differences or prior living situations (3) siblings have already been living apart for an extended period (4) neither parent is able to manage primary custody of all the children (5) there are substantial differences between the parents in their ability to handle the emotional, physical, or disciplinary needs of different children in the sibling group (6) older children have strong preferences for different parents that appear well-reasoned (7) siblings have a detrimental effect on one another. When splitting siblings appears to be the best option, efforts should be made to maintain contact between siblings that might maintain or improve sibling bonds. This might mean having the siblings divided during the school week, but spending every weekend together, alternating between the parents.

In addition to siblings the legislature has made "Assisting the child in developing and maintaining appropriate interpersonal relationships" a specific category of parenting functions. R.C.W. 26.09.004(3)(d). What this means most directly to the child is helping the child form and maintain both adult and childhood friends. This involves arranging "playdates" or family gatherings at which children are included. Especially for younger children, the parents are largely responsible for managing young children's social lives and arranging to take other families children to the zoo, to a movie, etc. This begins the development of social relationships that can last throughout childhood. Sometimes parents who are ending a second (or later) marriage are angry at the soon to be ex-spouse and cut their children off from contacting former step-siblings. When the children shared a positive relationship this can be very destructive and teaches the children that relationships are of no lasting value. The latter is true of cutting the children off from any significant, positive relationships because the parent is angry with someone. These positive relationships outside of the immediate family can be of enormous support to children whose families are involved is dissolution and they should be encouraged.

B. Parental Ability to Discipline and Establish Rules, Boundaries and Structure in Daily Life

1. Authoritative vs. authoritarian vs. permissive discipline

Comparative parenting skills is another factor to be considered in formulating parenting plans since parenting skills have been shown to be empirically related to the adjustment of children in the aftermath of divorce. Four general types of parenting have been identified in the literature.

An authoritative style of parenting is high on warmth and high on control. Parents with this style enforce rules with warmth, nurturance, and encouragement of children's autonomy through the use of appropriate choices. These parents provide consistent guidelines for behavior and follow through on consequences but encourage communication about rules and give rationales. They provide structure but can be flexible and do not promote a sense of their own infallibility. In addition, these parents encourage children to see issues from other perspectives and emphasize self-regulation rather than obedience.

Authoritarian parents are low on warmth and high on control. They tend to emphasize obedience to authority and do not encourage questioning of rules or allow flexibility. These parents often believe in the efficacy of punishment to enforce behavior, rather than 'natural consequences', which are more apt to result in a child's internalization of standards.

Permissive parents are high on warmth and low on control. They tend to place few restraints on their children and often believe that children's self-regulation will result in greater creativity and spontaneity. They are responsive to their children but do not provide firm guidelines or emphasize consequences.

The final type of parenting identified in the literature is indifferent or neglectful parenting. This is characterized by behaviors that are low on warmth and low on control. With this style, parents are often disengaged and exercise little control and display little warmth. They are not available to their children as a resource and often prioritize other activities over parenting.

For the most part, parents who demonstrate an authoritative parenting style tend to have children who are better socialized, more self-confident, more self-controlled and more achievement oriented. The exception to this may be children in 'high-risk settings—i.e. urban ghettos—who may do somewhat better with authoritarian parenting styles.

2. Ability to provide appropriate structure and predictability

One of the most important aspects to providing stability for children is establishing and maintaining a daily routine. Children develop more securely when they know what to expect. This involves establishing a regular time to wake up for school, a nutritious breakfast of some kind before school, predictable after school care, a regular study time and clear expectations regarding school work, a regular meal time, a regular time for bathing and teeth brushing and a regular bed time. It is very important that children learn early on that it is important to be on time to school and that the parent does what is necessary to get the children to school on time. The same applies to teaching children to complete tasks on time. Lifelong habits that can profoundly affect one's ability to work effectively as an adult are formed in childhood through the structure the parents provide or fail to provide through the daily routine.

The rules of the house need to be set and maintained, within reason for occasional interruptions. Matters such as friends coming over on school nights, television viewing, viewing of rated movies and television, acceptable music genres, choice of friends, where the children can go without the parents, cell phone use, with whom they can ride and/or drive in a car, etc. All of these rules need to be discussed, established and enforced. If the children know what the rules are and the rules are enforced by the parents it provides secure boundaries within which the child can grow.

3. Ability to model pro-social values and behavior as well as an effective lifestyle *C*

Children learn how to behave and what is acceptable behavior by watching their parents. Parents with serious mental health problems, in general, do not model pro-social behavior and the child should be protected from learning to emulate this behavior. Children need to be protected from parents who engage in repeated angry outbursts, frequent promiscuous sexual relationships, substance abuse, stealing and other unlawful behavior, and lying. On the positive side parents should demonstrate through their words and actions the values of our culture: tolerance for differences, caring for others, forgiveness, helpfulness, contribution to the betterment of the community, honesty, consistent employment, and other attributes that make one a productive member of society.

Teaching children an effective lifestyle begins by establishing a predictable daily routine and enforcing consistently a known set of rules as discussed in the preceding section. As the child gets older he or she, by high school age, should have internalized this structure and be able to manage completing most aspects of his or her school work. The parent's can model more subtle aspects of an effective lifestyle that will serve the child into adulthood such as good eating habits, exercise, stress management, religious values to the extent they are practiced in the

family, enjoying social gatherings, artistic enjoyment and expression and other elements that complete a balanced adult life.

C. Recognizing Child's Individual Attributes

1. Temperament relative to temperament of each parent *M*
2. Temperament relative to ability to manage/benefit from complexity and change – special needs *M*

III. MAXIMIZING CHILD'S UNIQUE TALENTS AND GIFTS

A. Ability to meet physical and logistical needs of child

A parent must be able to physically care for the child or arrange for someone else to physically care for the child. This includes not only feeding, bathing and comforting of infants but also scheduling and attending necessary medical appointments. As the child ages the parent must provide or arrange for proper day care. As the child approaches school age the parent must know or find out what the child's academic needs are and make the best selection available. Almost all public schools have counselors who are trained to assess children and recommend appropriate school placement. Teachers and school counselors almost always know when a child has special needs. If a parent is advised that his or her child has special needs it is the parent's responsibility to access all resources available to give the child what he or she needs. In addition to school choice, a parent must know or seek assistance to learn the child's specific abilities and aptitudes and arrange appropriate activities for the child such as sports, arts, tutoring, Boy Scouts, modeling, therapy, etc. It is not a good sign if a parent spends so little time with the child that the parent does not know what the child's interests and talents are. In addition to arranging for activities that encourage the child's interests, the parent needs to be available, share with other parents or find someone else who is available to take the child so he or she can participate in appropriate activities.

To the extent possible parents need to arrange their work schedules so they are available to supervise younger children after school, or arrange for someone else to do this. The parents need to know what the child's logistical needs are. When does school start? Who is the child's teacher? What are test days? When are projects due? What does the parent need to do to contribute in the classroom? Who does the parent talk to if the child is having difficulty with a teacher or student? Who are the child's friends? In what subjects do they excel, or struggle? How often does the child need to have his or her teeth checked? Who is the pediatrician? When are shots or other healthcare needs required?

B. Financial Considerations

Providing financial support for the child is one of the primary parenting functions identified by the legislature. R.C.W. 26.09.004(3)(f). Parents have an obvious obligation to support their

children by providing or paying for housing, clothing and food. Beyond that, parents should use their talents, education and training to not only provide income to enrich the child's life if that is achievable, but also to model the life of a working parent for the child.

---

[1] For example see: Raven Lidman and Betsy Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6:2 George Mason Law Review 255, 279 (1998); Margaret K. Dore, *Court-Appointed Parenting Evaluators and Guardians ad Litem: Practical Realities and an Argument for Abolition*, Divorce Litigation, Volume 18, No. 4, April 2006; Robert E. Emery, Randy K. Otto, William T. O'Donohue, *A Critical Assessment of Custody Evaluations: Limited Science and a Flawed System*, Psychological Science in the Public Interest, Vol. 6, No. 1 (2005) www.psychologicalscience.org/pdf/pspi/pspi6_1.pdf at page 3); References on Dr. Hagen's website: http://www.bu.edu/hagen/ and her book: Whores of the
Court: The Fraud of Psychological Testimony and the Rape of American Justice and the following cases: Toms v. Toms, 98 S.W.3d 140, 144 (Tenn. 2003) (guardian ad litem reports were hearsay; trial court erred to rely upon the reports); C.W. v. K.A.W., 774 A.2d 745, 749 (Pa. Super. 2001) (the trial court's reliance on the guardian ad litem constituted "egregious examples of the trial court delegating its judicial power to a nonjudicial officer"); Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001) (the guardian ad litem so tainted the family court decision, the wife was denied due process of law); S v. S, 571 N.W.2d 801, 809 (Neb. App. 1997), overruled on other grounds (no merit in giving credence to guardian ad litem opinion based on hearsay); In Re B.S. and J.S., 829 P.2d 939, 940 (Mont. 1992) (hearsay elicited from the guardian ad litem should not have been considered); Gilbert v. Gilbert, 664 A.2d 239, 243 (Vt. 1995) (error to rely on guardian ad litem report based on hearsay); Pirayesh v. Pirayesh, 359 S.C. 284, 596 S.E.2d 205 (2004) (reversing because the guardian ad litem's recommendation was not the product of an independent, balanced and impartial investigation); Hastings v. Rigsbee, 875 So.2d 772, 777 (Fla.2d DCA 2004) (reversing because the trial court delegated its authority to the "parenting coordinator" who improperly acted as finder of fact); In Re Schiavo, 780 S.2d 176, 179 (F1. App. 2001)(affirming decision to proceed without a guardian ad litem because "a guardian ad litem . . . might cause the process to be influenced by hearsay"); Heistand v. Heistand, 673 NW.2d 541, 550 (Neb. 2004) (error to admit guardian ad litem's opinion testimony and related hearsay where guardian ad litem had not qualified as an expert); John A. v. Bridget M., 79 N.Y.S.2d 421, 427 (2005) (noting "ongoing debate" as to the proper role of expert psychological opinions in custody litigation) and Higgenbotham v. Higgenbotham, 857 So.2d 341, 342 (Fla. App. 2003) ("it is difficult to grasp how it is in the best interest of the child to deplete the resources of the family [with a $20,000.00 parenting assessment]".

[2] See discussion of historical development of role of guardian ad litem in: *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, Lidman, R. and Hollingsworth, B. 6:2 George Mason Law Review 255, 279 (1998)

WASHINGTON STATE

GUARDIAN AD LITEM TRAINING CURRICULUM

Title 26 Facilitator's Guide

Effective January 1, 2007

Developed by:
Washington State Administrative Office of the Courts
1112 Quince Street SE
PO Box 41170
Olympia, WA 98504-1170

PROGRAM DESCRIPTION

PURPOSE

In 1996, the Washington State Legislature in RCW 2.56.030(15) required the Administrative Office of the Courts (AOC) to develop a curriculum for prospective guardians ad litem (GALs) in family law cases under Title 26 RCW. The requirement was mandatory as of January 1, 1998. That curriculum has been used without revision up until this first revision in 2007. In 2005, stakeholders in the GAL program called for a revision in the curriculum. AOC convened a Title 26 Revision Committee to review and revise the original curriculum. What follows is the result of that process.

The requirements set out in this Facilitator's Guide go into effect as of January 1, 2007. The original curriculum mandated as of January 1, 1998 will continue to be in effect until May 31, 2007. Training providers will have the option during the time frame January 1, 2007 to May 31, 2007 to use either set of curriculum requirements. As of June 1, 2007, all prospective Title 26 GALs must complete training in this curriculum or an equivalent program approved by the AOC before applying to a county Title 26 registry. Title 26 GALs already trained under the earlier curriculum will *not* be required to take this new curriculum.

The Title 26 Curriculum Revision Committee, chaired by Pierce County Superior Court Judge Kitty-Ann van Doorninck, consists of Jorge Chacon, GAL in Wenatchee; Marilyn Finsen, Assistant Administrator, Snohomish County Superior Court; Margaret E. Fisher, Court Program Analyst, AOC; David M. Hardy, Administrator, Spokane County Superior Court; Peter J. Karademos, Attorney at Law; Karen Kirk, Family Court Services Coordinator, Benton County Superior Court; Roxanne Mennes, GAL Training Provider, King County Bar Association; and Commissioner Tracy Waggoner, Snohomish County Superior Court. In addition, the results of the committee's work were circulated to experienced professionals who work in various areas of education, family law, juvenile services, and juvenile law.

Definitions: Guardians ad litem are persons or programs appointed under the law of Washington to represent the best interest of a child, an alleged incapacitated person or an adjudicated incapacitated person. GALs do not include attorneys appointed to represent a person.

Under the direction of the court, GALs perform an investigation and prepare a report for the court of their findings and recommendations. There are three types of GALs: Title 11 GALs, Title 13 GALs and Title 26 GALs. The Title refers to an area of law specified by the Revised Code of Washington. Title 11 is probate and trust law, Title 13 is juvenile courts and juvenile offenders, and Title 26 is domestic relations or family law.

Title 11 GALs represent persons in guardianship proceedings who are alleged or determined to be incapacitated. In other words, they are at significant risk of harm based on their inability to provide for their own nutrition, health, housing, or physical safety or they are at significant risk of financial harm because they are unable to manage their property or financial affairs.

Certified professional guardians are appointed by the Superior Court to assume long-term responsibility for an incapacitated person.

Title 13 GALs represent dependent children's best interests (as opposed to representing the children) in dependency actions (child abuse and neglect cases). This includes Court Appointed Special Advocates (CASAs).

Title 26 GALs are appointed by the court to represent the best interests of minor children in family law cases. King County has a family law CASA program.

The curriculum requirements set out here apply only to Title 26 GALs.

AOC REQUIREMENTS FOR TITLE 26 GALs

INITIAL TRAINING

- **Completion of training curriculum or equivalent program**
  - ⇒ **19.5 hours of live training, OR**
  - ⇒ **13 hours of live training plus 6.5 hours of moderated video presentation**
- **Completion of writing requirement within initial training**
- **Practicum**
  - ⇒ **When Title 26 GAL mentors available: 5 hours of mentoring and 5 hours of court observation of Title 26 cases, OR**
  - ⇒ **When Title 26 GAL mentors unavailable, 10 hours of court observation of Title 26 cases**

CONTINUING EDUCATION

- **6 hours annually**

CONTENT OF INITIAL TRAINING

The curriculum has been divided into thirteen topical areas:

- Introduction to Service as a GAL
- Ethics and Professional Conduct
- The Law and Legal Process
- Investigation
- Interviewing
- Report Writing
- Systems and Resources
- Child Development
- Chemical Dependency and Mental Illness
- Child Abuse and Neglect
- Domestic Violence
- Personal Safety
- Cultural Competency

Prospective GALs are required to complete a writing assignment during the training. Prospective GALs will prepare a segment of a GAL report on a hypothetical dissolution case, developed by

the training provider. The individual reports will be attached to the prospective GAL's certificate of completion of the training. This writing sample may be used by the GAL manager in each county to determine suitability for the Title 26 registry.

A revised practicum is required to assist new GALs in acquiring the skills taught in the curriculum and to provide the new practitioner with an identified resource person to help with development of basic skills. When no Title 26 mentors are available in the community, court observation of Title 26 proceedings, preferable in which GALs are appointed, may be substituted.

The curriculum can be divided into *knowledge* needed for proficient practice, such as understanding the law related to representing children; *skills* required for completing responsibilities, such as interviewing and report writing; and *abilities* necessary to perform complex decision-making, such as adhering to ethical standards and engaging in self-evaluation.

NO BIFURCATION

Each person serving as a GAL comes before the court with unique skills. Many GALs are licensed attorneys familiar with the law, civil procedure, and investigative techniques. Others are clinicians, social workers and psychologists, well-versed in child development, interview techniques, and evaluative tools. Still others are volunteers whose compassion for children provides a unique compass throughout the life of a case. This curriculum seeks to provide a baseline, a minimum standard, for all persons in this field. The curriculum requirements do not allow for bifurcation. That is, all individuals seeking to become Title 26 GALs must take the 19.5 hours of the curriculum and comply with the practicum requirements as stated.

GAL MANUAL

This training will benefit from the use of a Title 26 Manual to be available and applicable statewide. It is intended that initial training for Title 26 GALs include this manual and that GALs have low-cost or free access to this manual. The AOC has no responsibility for developing or updating such a manual.

METHODS

INTERACTIVE METHODS

Training providers are encouraged to use interactive methods in the presentation of this curriculum. This might include small group work, case studies, role-play, or other adult education best practices.

VIDEO OPTION

In response to the pleas from more rural counties to reduce the cost and time required for prospective GALs to be out of county for Title 26 training, the curriculum is now designed so that the trainees can take three 6.5-hour days of live training OR they can take the first two days of live training and then attend the third day in a moderated video format. The third day must consist of trainees coming to a central location to watch the videos that are moderated by an individual who is knowledgeable in Title 26 issues. The AOC has no responsibility for developing or updating such videos.

REQUIREMENT OF CONTINUING EDUCATION

Six hours of continuing professional education is required annually. The topics may include any of the existing AOC curriculum or any that relate directly to Title 26 GAL work. Updates on case law should be addressed in the continuing education. Additionally, program managers should devise ways for delivering notification of these changes to GALs in their registry. GALs must submit annually to GAL program managers, for each county in which they are registered, a statement made under penalty of perjury that they have complied with this requirement.

ALTERNATIVE CURRICULUM

Volunteer GALs and court-appointed special advocates may complete an alternative curriculum approved by the Administrative Office of the Courts (RCW 26.12.177). The alternative curriculum must provide comparable training in the thirteen topic areas set forth in this program description. The AOC shall establish a process to review alternative curriculum.

PROGRAM GOALS

In order "to improve the guardian and GALs systems currently in place for the protection of minors" (per RCW 2.56.030 and 26.12.177), this curriculum seeks to improve the knowledge, skills, and abilities of prospective GALs. Specifically, the well-trained GALs will be able to:

- Represent consistently the best interests of the child within the five types of Title 26 cases: nonparental custody, relocation, paternity, modification, and basic dissolution.
- Understand and uphold the law as it pertains to GALs.
- Maintain the highest standards of ethics and professional conduct.
- Within the scope of authority defined by statute or court order, plan, carry out, document, and complete thorough, appropriate, and fair investigations in a timely fashion.
- Know what to do if the scope of authority is not clear, if party/attorney/other person makes request outside that scope, or if court makes order that seems inappropriate.
- Identify physical, psychological, and social development stages of children; document the impact of conflict and changed family relationships on children.
- Define and identify indicators of chemical dependency, mental illness, child abuse, child neglect, and domestic violence (DV); specify how these behaviors impact children.
- Work effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
    - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services;
    - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or medical needs of a child; making referrals to appropriate specialists or treatment programs;
    - ⇒ Requesting educational testing of, or an individualized education plan, for a child;
    - ⇒ Understanding reports related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or the special needs of a child;
    - ⇒ Understanding scientific data related to paternity and/or medical needs of a child;
    - ⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.
- Communicate in a developmentally appropriate way with the child; advocate that steps are taken to protect the child from harmful communication.
- Make appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspire confidence in GALs as agents of the court by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicate effectively with the court in motions, reports, recommendations, and testimony.
- Individualize each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

TITLE 26
SCOPE AND SEQUENCE

TOPIC AREA	SUMMARY
Introduction to Service Minimum Time: 30 minutes	• What is a Title 26 GAL. • Initial expectations. • Five types of cases. • What GALs might see. • Responsibilities and authority of GALs. • Principles and introductory terms.
Ethics and Professional Conduct Minimum Time: 1 hour	• Code of professional conduct, general rules, and GAL rules. • Ethical standards and decision-making. • Reasons and processes for removal.

The Law and Legal Process
Minimum Time: 2 hours
	• Overview of the courts and legal terminology.
	• Overview of a case: procedural steps and players.
	• Relevant statutes and codes, including: Title 26, Indian Child Welfare Act (ICWA), Violence Against Women Act, and Immigration Act.
	• Define "best interests" from statute and case law.
	• Checklist, differentiation, and outline of report for five types of cases:
	  • Nonparental custody case, including ICWA.
	  • Relocation.
	  • Paternity.
	  • Modification.
	  • Basic dissolution.
	• How to get orders revised.
	• Family reconciliation and mediation services.
	• Applicable case law and changing nature of case law.
	• Preparing motions and providing notice.
	• Review sample forms and reports.
	• Evidentiary standards: weighing the relevance, reliability, and significance of information gathered.
	• Lawyers as advocates in the adversarial process.
	• Roles in court of attorney, GAL, experts, self-represented litigants, parties.
	• Appearing in court: documents, how to testify in court–direct and cross-examination.

TOPIC AREA	SUMMARY
Investigation Minimum Time: 2 hours	• Planning an investigation. • Maintaining records of an investigation. • Accessing information and records. • Maintaining confidentiality of reports as required, including the Health Insurance Portability and Accountability Act (HIPAA). • Maintaining fairness and the appearance of fairness. • Following leads while avoiding distractions. • Understanding, summarizing, and incorporating findings from expert reports, including DNA evidence. • Working with other professionals.
Interviewing Minimum Time: 1.5 hours (30 minutes for adult interviews; 1 hour for child interviews)	• Constructing open-ended questions. • Interviewing adults. • Children's communication and forensic linguistics. • Interviewing children, including how to approach children. • Age-appropriate observations and age-appropriate interview tips for five types of cases.

Report Writing
Time Allotted: 1 hour
	• What to include/exclude in a report.
	• Review templates for five cases:
	  • Nonparental custody case.
	  • Relocation.
	  • Paternity.
	  • Modification.
	  • Basic dissolution.
	• Identifying filing requirements under General Rule 22 and filing procedures.
	• Distributing the report.
	• Homework: writing assignment. (*The training provider will develop a basic dissolution fact pattern to be used in the training. All trainees are given the same fact pattern and required to write a report. The report will be attached ungraded/unedited to their training certificate. Counties may consider the writing sample in their decision whether to add that trainee to its registry. The training provider will change the fact pattern each year.)*

Systems and Resources Minimum Time: 5 minutes Provide local resources and systems as a handout	• Overview of DSHS systems and services. • Working with DSHS.

TOPIC AREA	SUMMARY
Child Development Minimum Time: 3 hours	• Identifying patterns of physical, psychological, and social development. • Describing the role of bonding and attachment in development. • Identifying the impact of divorce and conflict on developmental patterns. • Describing developmentally-appropriate custody, residential placement schedules, and visitation. • Describing separation, loss, and grief. • Communicating in developmentally-appropriate ways. • Identifying special needs children. • Describing impact of parental conflict on children. • Describing impact of absent parent on children. • Identifying in blended families, the impact of new relationships (parental, and step- and half-sibling) on children. • Describing reactionary behavior common in children experiencing separation due to dissolution.
Chemical Dependency and Mental Illness Minimum Time: 2 hours	• Defining and identifying basic common indicators of chemical dependency and mental illness. • Identifying impact on children of parents' specific behavior as affected by chemical dependency/mental illness. • Identifying how and when to get other professionals involved. • Identifying dangers presented to children. • Defining addiction and mental illness terminology.
Child Abuse and Neglect Time Allotted: 2 hours	• Defining and identifying the basic indicators of sexual abuse, physical abuse, emotional abuse, and neglect. • Investigation of parent's allegation of abuse or neglect. • Identifying indicators of abusive use of conflict. • Defining GAL's role regarding allegation of abuse and neglect. • Identifying mandatory reporting requirement of GAL.
Domestic Violence Minimum Time: 2 hours	• Understanding domestic violence (DV). • Identifying criminal and civil processes relating to DV. • Understanding behavioral patterns and dynamics in families where DV is present. • Identifying how parents' DV impacts children. • Identifying role of GALs in DV cases.

TOPIC AREA	SUMMARY
Personal Safety Minimum Time: 25 minutes	• Developing awareness of safety issues, including things to watch for on home visits, including methamphetamine and other issues. • Using professional practices to maximize personal safety. • Identifying defensive strategies. • Recognizing when concern for personal safety compromises the investigation. • Identifying when to report safety concerns to court.
Cultural Competency Minimum Time: 2 hours	• Identifying and avoiding GALs' personal biases. • Responding appropriately to socio-economic, ethnic, cultural, age, heritage, disability, customs, language, and religious differences. • Avoiding gender, same-sex and transgendered biases. • Separating cultural norms from harmful behavior that impacts children. • Role of GALs in assessing behavior resulting from cultural differences.
Practicum Minimum: Requirement of ten hours or its equivalent as defined by the court, unless waived by the court for good cause.	• Where Title 26 mentors are available: ⇒ Five hours shadowing a mentor for two cases. Best practices are that the prospective GALs observe a child interview, observe an adult interview, assist in information gathering and investigation, and assist in report writing, AND ⇒ Five hours observing Title 26 cases in court. Best practices are that the prospective GALs observe GAL-involved hearings. • Where no Title 26 mentors are available: ⇒ 10 hours observing Title 26 hearings in court. Best practices are that the prospective GALs observe GAL-involved hearings.

Introduction to Service
GOALS & OBJECTIVES

DESCRIPTION

Introduction to Service is intended to introduce new GALs to their roles and responsibilities in representing the best interests of the child within the five types of cases that they might see. A minimum of thirty minutes should be devoted to this topic. Training will include:

- What is a Title 26 GAL.
- Initial expectations.
- Five types of cases.
- What GALs might see.
- Responsibilities and authority of GALs.
- Principles and introductory terms.

As a result of this training, GALs will understand how their roles and responsibilities may differ depending upon the types of case. GALs will identify the scope of the responsibilities and authority of GALs, as well as become familiar with the principles and terms used in these family law cases.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Understanding and following the law as it pertains to GALs.

LEARNING OBJECTIVES

At the conclusion of this training, GALs will be able to:

- Outline the functions and responsibilities of GALs.
- Identify five types of cases in which GALs might be appointed.
- Explain GALs' scope of authority and the ways in which that authority may be defined or limited.
- Define principles and introductory terms.

Ethics and Professional Conduct
GOALS & OBJECTIVES

DESCRIPTION

Ethics and Professional Conduct is intended to introduce new GALs to the code of conduct and their ethical responsibilities as a professional while serving as a GAL. A minimum of one hour should be devoted to this topic. Training will include:

- Code of professional conduct, general rules, and GAL rules.
- Ethical standards and decision-making.
- Reasons and processes for removal.

As a result of this training, GALs will appreciate the central role of professional ethics and fairness in serving as a GAL, and will have the knowledge necessary to make prudent ethical decisions while acting in the best interests of a child. GALs will be clear on how to avoid the appearance of unfairness and how to handle requests for confidentiality of information. GALs will also learn how and why GALs may be removed from cases. GALs should also understand when it is appropriate to ask to be removed from a case.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Understanding and following the law as it pertains to GALs.
- Maintaining the highest standards of ethics and professional conduct.

LEARNING OBJECTIVES

At the conclusion of this training, GALs will be able to:

- Define code of conduct that applies to the GAL.
- Identify professional ethics of GALs.
- Apply ethical standards to situations GALs are likely to face, including responding to unethical behavior of others in the case.

The Law and Legal Process GOALS & OBJECTIVES

DESCRIPTION

The Law and Legal Process is intended to introduce prospective GALs to the law, procedures, court rules including GAL rules and general rules numbers 15, 22 and 31; roles of players in court; and expectations that will guide their work, as well as the legal path cases will take. GALs will also develop skills in testifying in court. A minimum of two hours should be devoted to this topic. Training will include:

- Overview of the courts and legal terminology.
- Overview of a case: procedural steps and players.
- Relevant statutes and codes, including: Title 26, Indian Child Welfare Act (ICWA), Violence Against Women Act, and Immigration Act.
- Define "best interests" from statute and case law.
- Checklist, differentiation, and outline of report for five types of cases:
  - Nonparental custody case, including ICWA
  - Relocation
  - Paternity
  - Modification
  - Basic dissolution.
- How to get orders revised.
- Describe family reconciliation and mediation services.
- Applicable case law and changing nature of case law.
- Preparing motions and providing notice.
- Review sample forms and reports.
- Evidentiary standards: weighing the relevance, reliability, and significance of information gathered.
- Lawyers as advocates in the adversarial process.
- Roles in court of attorney, GAL, experts, self-represented litigants, parties.
- Appearing in court: documents, how to testify in court—direct and cross-examination.

As a result of this training, GALs will be prepared to represent the best interests of the child to the court. GALs will know how to identify and clarify the scope of authority for each assigned case. They will understand the law as it applies to the five types of family law cases. GALs will be able to present evidence including phone message recordings and video tapes, testimony and recommendations to the court in the most effective manner.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Understanding and following the law as it pertains to GALs.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Knowing what to do if the scope of authority is not clear, if party/attorney/other person makes request outside that scope, or if court makes order that seems inappropriate.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.

LEARNING OBJECTIVES

At the conclusion of this training, GALs will be able to:

- Describe the path a case will take, given particular facts.
- Understand the role of the judge, lawyers, caseworkers, and other professionals involved in the case.
- Given five types of Title 26 cases, describe which statute, code, and case law apply.
- Discuss what constitutes “best interests,” giving examples of conflicts between competing interests of a child.
- Describe restrictive factors under Title 26 RCW.
- Evaluate case studies with respect to restrictive factors.
- Recommend residential placement given specific fact patterns.
- List steps taken when paternity is in question.
- List relevant court rules.
- Discuss the ways in which judges’ expectations should impact motions, reports, testimony and other communication with the court.
- Be aware that law changes and the need to keep current.
- Use pattern motion forms appropriately and when those do not exist, how to locate forms to use.
- Explain the rules for notice.
- List examples of evidence which would be particularly compelling for the court.
- Provide examples of information that would be unacceptable to the court due to evidentiary standards such as relevance or hearsay.
- Identify key components of effective testimony.
- Assess the effectiveness of testimony.
- Anticipate cross-examination questions given a particular fact pattern and/or GALs report.

Investigation
GOALS & OBJECTIVES

DESCRIPTION

Investigation is intended to assist prospective GALs in planning, documenting, and carrying out investigations that will assist the court in decision-making. A minimum of two hours should be devoted to this topic. Training will include:

- Planning an investigation.
- Maintaining records of an investigation.
- Accessing information and records.
- Maintaining confidentiality of reports as required, including the Health Insurance Portability and Accountability Act (HIPAA).
- Maintaining fairness and the appearance of fairness.
- Following leads while avoiding distractions.
- Understanding, summarizing, and incorporating findings from expert reports, including DNA evidence.
- Working with other professionals.

As a result of this training, GALs will have the procedural knowledge and skills necessary to gather and synthesize information for the court. GALs will gain appreciation for the critical yet sensitive nature of the information they seek and will have the knowledge to treat such information appropriately. GALs will become aware of distractions and biases that might detract from representing the best interests of the child, and will develop strategies for avoiding them. GALs will learn to work with other professionals.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
  - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services.
  - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or

medical needs of a child; and making referrals to appropriate specialists or treatment programs.
  - ⇒ Requesting educational testing of, or an individualized education plan, for a child.
  - ⇒ Understanding reports related to DV, abuse of a child, chemical dependency, mental illness, and/or the special needs of a child.
  - ⇒ Understanding scientific data related to paternity and/or medical needs of a child.
  - ⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.
- Communicating in a developmentally-appropriate way with the child; advocating that steps are taken to protect the child from harmful communication.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Outline the processes for obtaining the court file.
- Using a timeline format, list steps in planning an investigation, including identifying issues to be investigated, developing a timeline, prioritizing issues, gathering information and maintaining a record.
- List circumstances where observation is needed.
- Using a hypothetical case:
  - ⇒ Identify issues to be investigated in a case study to include: Native American status of the child, type of case, and questions to be answered for the court.
  - ⇒ Prioritize issues.
  - ⇒ Identify persons to be interviewed and reports/records to be reviewed.
  - ⇒ Respond appropriately to new issues as they emerge.
  - ⇒ Outline information to be included in the report.
- Describe appropriate GAL responses when an issue of child safety arises.
- Describe the communications to be initiated by GALs in order to ensure notice, cooperation of attorneys, and access to information.
- Design a log to record contacts; attempted contacts; and date, place, length, and content of contacts.
- Describe the record GALs should maintain.
- Understand the role of records in subsequent proceedings.
- Distinguish fact-finding from advocacy and decision-making.
- Utilize communication skills that minimize conflict among parties.
- Understanding how to use findings from experts and how to work with other professionals.

- Practice strategies to convey or gather information without making or disclosing conclusions prematurely.
- Identify personal biases and analyze their potential impact on cases.

Interviewing
GOALS & OBJECTIVES

DESCRIPTION

Interviewing is intended to assist prospective GALs in carrying out investigations that will assist the court in decision-making. A minimum of one and a half hours should be devoted to this topic, with 30 minutes devoted to adult interviews and one hour for child interviews. Training will include:

- Constructing open-ended questions.
- Interviewing adults.
- Children's communication and forensic linguistics.
- Interviewing children, including how to approach children.
- Making age-appropriate observations and identifying age-appropriate interview tips for five types of cases.

As a result of this training, GALs will recognize the important role of interviewing in gathering relevant information for the court. They will gain skills for conducting developmentally-appropriate interviews of both adults and children.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
  - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services.
  - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or medical needs of a child, and making referrals to appropriate specialists or treatment programs.
  - ⇒ Requesting educational testing of, or an individualized education plan, for a child.
  - ⇒ Understanding reports related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or the special needs of a child.
  - ⇒ Understanding scientific data related to paternity and/or medical needs of a child.

⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.

- Communicating in a developmentally appropriate way with the child; advocating that steps are taken to protect the child from harmful communication.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspire confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Describe interview techniques, distinguishing between appropriate strategies for children and those for adults.
- Develop open-ended questions for an investigation.
- Discuss the impact of interviews on children.
- Develop sample age-appropriate questions.
- Demonstrate effective interviewing techniques for children and adults.

Report Writing
GOALS & OBJECTIVES

DESCRIPTION

Report Writing is intended to assist prospective GALs with writing reports for the court, which is one of the core requirements of serving as a GAL. GALs will learn in class how to write these reports for the five types of cases and they will complete a written homework assignment. A minimum of one hour of in-class time will be devoted to this topic. Training will include:

- What to include/exclude in a report.
- Review templates for five cases:
  - Nonparental custody case;
  - Relocation;
  - Paternity;
  - Modification;
  - Basic dissolution.
- Identify filing requirements under General Rule 22 and filing procedures.
- Distributing the report.
- Homework—writing assignment: *All trainees will receive the same fact pattern on a basic dissolution case and be required to write a report. The report will be attached ungraded/unedited to the training certificate. Counties may consider the writing sample in their decision whether to add that trainee to its registry. The training provider will change the fact pattern each year.*

As a result of this training, GALs will be able to write, file, and distribute effective reports for each of the five types of cases to which GALs might be assigned.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Within the scope of authority defined by statute or court order, plan, carry out, document, and complete thorough, appropriate, and fair investigations in a timely fashion.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.

- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Identify what to include and exclude from reports.
- Use a report template for the five types of cases.
- Identify the filing and distribution requirements for reports – including GR 22 requirements that two reports be filed: one for the public and another that is confidential.
- Write effective reports that identify information sources and facts that support the recommendations.

Systems and Resources GOALS & OBJECTIVES

DESCRIPTION

Systems and Resources is intended to assist prospective GALs in working with various agencies, systems, and funding sources related to children such as the Department of Social and Health Services (DSHS), Division of Children and Family Services, and public schools. This material will be presented as a written resource with only five minutes allotted for discussion. Training will include:

- Overview of DSHS systems and services.
- Working with DSHS.

As a result of this training, GALs will be able to locate institutions and agencies that can provide information about or services to a child.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
  - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services.
  - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or medical needs of a child, and making referrals to appropriate specialists or treatment programs.
  - ⇒ Requesting educational testing of, or an individualized education plan, for a child.
  - ⇒ Understanding reports related to DV, abuse of a child, chemical dependency, mental illness, and/or the special needs of a child.
  - ⇒ Understanding scientific data related to paternity and/or medical needs of a child.
  - ⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.
- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.

- Communicating effectively with the court in motions, reports, recommendations, and testimony.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Identify how to find state and local services available to children, including diverse methods for accessing funds.
- Describe DSHS and how to work with DSHS.

Child Development GOALS & OBJECTIVES

DESCRIPTION

Child Development is intended to introduce prospective GALs to principles of child development and assessing the impact of family changes on children. A minimum of three hours should be devoted to this topic. Training will include:

- Identifying the patterns of physical, psychological, and social development.
- Describing the role of bonding and attachment in development.
- Identifying the impact of divorce and conflict on developmental patterns.
- Describing developmentally-appropriate custody, residential placement schedules, and visitation.
- Describing separation, loss, and grief.
- Communicating in developmentally-appropriate ways.
- Identifying special needs children.
- Describing impact of parental conflict on children.
- Describing impact of absent parent on children.
- Identifying blended families and the impact of new relationships (parental, and step- and half-sibling) on children.
- Describing reactionary behavior common in children experiencing separation due to dissolution.

As a result of this training, GALs will understand that human development follows a general, predictable pattern. They will have the knowledge to recognize behaviors or other signals that a child has special needs or that the child's development has been disrupted, and will be equipped to respond appropriately. GALs will understand that the best interests of the child are tied to developmental stages and will act with knowledge of these stages.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
  - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services.
  - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or

medical needs of a child, and making referrals to appropriate specialists or treatment programs.
  - ⇒ Requesting educational testing of, or an individualized education plan, for a child.
  - ⇒ Understanding reports related to DV, abuse of a child, chemical dependency, mental illness, and/or the special needs of a child.
  - ⇒ Understanding scientific data related to paternity and/or medical needs of a child.
  - ⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.
- Identifying physical, psychological, and social development stages of children and documenting the impact of conflict and changed family relationships on children.
- Communicating in a developmentally appropriate way with the child; advocating that steps are taken to protect the child from harmful communication.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Outline patterns of physical, emotional, psychological, and social development for a normally-developing child.
- Describe appropriate needs of normally-developing children.
- Identify appropriate custody, residential schedules, and visitation recommendations.
- Discuss the relationships among attachment, parenting, parental conflict, absence of parent, custody, and visitation.
- Describe blended families and impact on children.
- Describe common behaviors related to separation, loss, and grief.
- List common warning signs that a child has special developmental needs.
- Identify appropriate assessment resources for children who may have special needs.
- Describe parenting considerations when a child has special needs.

Chemical Dependency and Mental Illness GOALS & OBJECTIVES

DESCRIPTION

Chemical Dependency and Mental Illness is intended to introduce prospective GALs to the dynamics and impact of a parent's addiction and mental illness on a child. A minimum of two hours should be devoted to this topic. This area of training will include:

- Defining and identifying basic common indicators of chemical dependency and mental illness.
- Identifying impact on children of parents' specific behavior as affected by chemical dependency/mental illness.
- Identifying how and when to get other professionals involved.
- Identifying dangers presented to children.
- Defining addiction and mental illness terminology.

As a result of this training, GALs will recognize the impact on a child of parental behavior as affected by chemical dependency and mental illness. GALs will be prepared to report to the court regarding assessment and/or treatment, in order to ensure the best interests of the child. At the same time, GALs will individualize each case and identify specific dangers presented to the child. GALs will understand terminology used in the chemical dependency and mental health professions.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case.
- Defining and identifying indicators of chemical dependency, mental illness, child abuse, child neglect, DV; specifying how these behaviors impact children.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Describe the impact of chemical dependency on the children.
- Identify community resources for assessment, treatment, and recovery.
- Explain the risks children face when one or both parents are chemically dependent.
- Discuss appropriate actions to be taken when a parent in treatment or recovery experiences relapse.
- Describe situations in which assessment or treatment for mental illness should be considered.
- Identify local community resources for mental illness treatment.
- Describe the procedures for obtaining records related to chemical dependency and mental illness; assess the confidential or privileged nature of those documents.
- Use accurately the terminology from mental illness and chemical dependency.

Child Abuse and Neglect
GOALS & OBJECTIVES

DESCRIPTION

Child Abuse and Neglect is intended to assist GALs in identifying the indicators of abuse and neglect. In addition, this section will help GALs define their role in regard to allegations of abuse and neglect. A minimum of two hours should be devoted to this topic, and include sexual abuse, physical abuse, emotional abuse, and neglect. Content for each section will include:

- Defining and identifying the basic indicators of sexual abuse, physical abuse, emotional abuse, and neglect.
- Investigation of parent's allegation of abuse or neglect.
- Identifying indicators of abusive use of conflict.
- Defining GALs' role regarding allegation of abuse and neglect.
- Identifying mandatory reporting requirement of GALs.

As a result of this training, GALs will distinguish the indicators of sexual abuse, physical abuse, emotional abuse, and neglect. Emphasis will be made that (effective January 1, 2007) child neglect is a distinct form of child maltreatment. GALs will understand the scope of their role and how to seek expert evaluation of the situation.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Working effectively with other professionals involved in the assessment or treatment of parties to a child's case.
- Defining and identifying indicators of chemical dependency, mental illness, child abuse, child neglect, and DV; specifying how these behaviors impact children.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.

- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Define sexual abuse, physical abuse, emotional abuse, abusive use of conflict, child neglect, and abandonment.
- Describe the dynamics of families where abuse or neglect is present.
- List risk factors for violence, including family history and chemical dependency.
- Identify warning signs that would warrant further investigation by the GAL.
- Discuss the ethical and legal obligations of GALs when a child or parent alleges abuse or neglect to GALs if not previously reported.
- Outline steps to access files related to issues of violence and neglect.
- Describe confidentiality and privilege as it relates to files, assessments, reports, and records regarding family violence.
- Describe the role of experts such as police, sexual assault specialists, doctors, counselors, and caseworkers in conducting the investigation and making recommendations.
- Understand that expert reports will conflict; discuss strategies for handling this situation, including cases when the child is very young.
- Identify community resources.

Domestic Violence
GOALS & OBJECTIVES

DESCRIPTION

Domestic Violence (DV) is intended to build understanding about DV and to assist GALs in defining their roles when allegations of DV are present. The training will focus on how parents' DV impacts children. A minimum of two hours should be devoted to this topic. This area of training will include:

- Understanding DV.
- Identifying criminal and civil processes relating to DV.
- Understanding behavioral patterns and dynamics in families where DV is present.
- Identifying how parents' DV impacts children.
- Identifying role of GALs in DV cases.

The training should include concepts of manipulation and control versus anger management and failure to protect. GALs should learn why the batterer perpetrates the violence instead of why the victim allows the violence and why staying in a DV situation may be better for the children.

As a result of this training, GALs will understand the psychological and legal definitions of DV, what the criminal and civil processes are in regard to DV, and identify how parental DV impacts children. GALs will gain awareness of the ways in which family violence may impact various aspects of the case, including the parties' attitudes and behavior towards one another. GALs will have the ability to recognize risk factors and to identify the need for expert evaluation of the situation.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Working effectively with other professionals involved in the assessment or treatment of parties to a child's case.
- Defining and identifying indicators of chemical dependency, mental illness, child abuse, child neglect, and DV; specifying how these behaviors impact children.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.

- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Define DV, assault, and sexual assault.
- Distinguish child abuse from spousal abuse or DV.
- Describe the dynamics of families where DV is present.
- List risk factors for DV, including family history and chemical dependency.
- Identify warning signs that would warrant further investigation by the GAL.
- Describe the impacts and potential impacts of DV on children who witness abuse of a parent.
- Outline steps to access files related to issues of violence.
- Describe confidentiality and privilege as it relates to files, assessments, reports, and records regarding family violence.
- Describe the role of experts such as police, sexual assault specialists, doctors, counselors, and caseworkers in conducting the investigation and making recommendations.
- Identify community resources.

Personal Safety
GOALS & OBJECTIVES

DESCRIPTION

Personal Safety is intended to assist prospective GALs in carrying out fair and thorough investigations by introducing issues of personal security. A minimum of 25 minutes should be devoted to this topic. This area of training will include:

- Developing awareness of safety issues, including things to watch for on home visits, including methamphetamine and other issues.
- Using professional practices to maximize personal safety.
- Identifying defensive strategies.
- Recognizing when concern for personal safety compromises the investigation.
- Identifying when to report safety concerns to court.

As a result of this training, GALs will recognize that parties to a case are facing crises that may prompt hostile behaviors or attitudes. GALs will have the knowledge to assess potentially risky situations and will develop strategies to reduce risk in a professional manner. They will gain proficiency in a limited number of defensive strategies. GALs will also know when to contact the court to report safety concerns that may compromise the investigation.

PROGRAM GOALS

- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Identify general issues of safety arising from GALs' work.
- Discuss safety concerns in particular case studies.
- Develop general rules for maintaining personal safety while conducting a thorough investigation.
- Demonstrate defensive strategies.
- Recognizing when concern for personal safety compromises the investigation.
- Identifying when to report safety concerns to court.

Cultural Competency GOALS & OBJECTIVES

DESCRIPTION

Cultural Competency is intended to assist prospective GALs in carrying out fair and thorough investigations by introducing issues of diversity. A minimum of two hours should be devoted to this topic. This area of training will include:

- Identifying and avoiding GALs' personal biases.
- Responding appropriately to socio-economic, ethnic, cultural, age, heritage, disability, customs, language, and religious differences.
- Avoiding gender, same-sex, and transgendered biases.
- Separating cultural norms from harmful behavior that impacts children.
- Role of GALs in assessing behavior resulting from cultural differences.

As result of this training, GALs will recognize that cultural values and norms vary. They will understand that normative values determine how individuals give, receive, and interpret information. GALs will gain self-awareness with respect to cultural issues, including the impact of poverty, in his or her personal assessment of others' reliability and credibility. GALs will separate cultural norms from harmful behavior that impacts children.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Maintaining the highest standards of ethics and professional conduct.
- Planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion and within the scope of authority defined by statute or by court order.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

LEARNING OBJECTIVES

At the conclusion of this training, the prospective GALs will be able to:

- Discuss the role of socio-economic status, ethnicity, culture, age, heritage, disability, customs, language, and religion to individual perception.
- Discuss the role of socio-economic status, ethnicity, culture, age, heritage, disability, customs, language, and religion to child-rearing options and practices.
- Identify personal biases and analyze their potential impact on the case.
- Address biases relating to gender, same-sex relationships, and transgendered persons.
- Evaluate the role of culture or bias in the outcome of various case studies.
- Discuss cultural and religious issues to be considered in making placement recommendations.
- Describe the role of the Indian Child Welfare Act and the Multicultural Placement Act in placement decisions.

Practicum GOALS

DESCRIPTION

Practicum is intended to give real case experience to newly trained GALs in representing the best interests of the child. The curriculum strives to be realistic in its requirements. Prospective GALs are required to serve ten hours in the practicum. Five hours must be spent shadowing mentor GALs for two cases. Best practices for these five hours are that the prospective GALs observe a child interview, observe an adult interview, assist in information gathering and investigation, and assist in report writing. The remaining five hours must be spent observing Title 26 cases in court. Best practices are that the prospective GALs would observe GAL-involved hearings.

However, it is recognized that in some counties there are no mentors available. Therefore, GAL managers can instead require that the prospective GALs observe ten hours of Title 26 cases in court. Best practices are that the prospective GALs would observe GAL-involved hearings.

The curriculum takes into account that good cause may excuse the practicum requirements.

As a result of the mentoring relationship, GALs will grow more comfortable with the process of representing the best interests of the child and will become more effective at doing so. Additionally, educational evidence suggests that master practitioners improve their performance when required to share expertise with new GALs. It is expected that mentoring will improve opportunities for self-reflection and self-improvement in the field.

PROGRAM GOALS

- Representing consistently the best interests of the child within the five types of Title 26 cases.
- Understanding and following the law as it pertains to GALs.
- Maintaining the highest standards of ethics and professional conduct.
- Within the scope of authority defined by statute or court order, planning, carrying out, documenting, and completing thorough, appropriate, and fair investigations in a timely fashion.
- Identifying physical, psychological, and social development stages of children; document the impact of conflict and changed family relationships on children.
- Defining and identifying indicators of chemical dependency, mental illness, child abuse, child neglect, and DV; specifying how they impact children.

- Working effectively with other professionals involved in the assessment or treatment of the child and/or parties to a child's case, to include:
  - ⇒ Understanding the relevant systems and services of the Department of Social and Health Services.
  - ⇒ Identifying the need for assessments related to DV, abuse of a child, neglect of a child, chemical dependency, mental illness, and/or special developmental, educational or medical needs of a child, and making referrals to appropriate specialists or treatment programs.
  - ⇒ Requesting educational testing of, or an individualized education plan, for a child.
  - ⇒ Understanding reports related to DV, abuse of a child, chemical dependency, mental illness, and/or the special needs of a child.
  - ⇒ Understanding scientific data related to paternity and/or medical needs of a child.
  - ⇒ Acquiring records kept by others or interviewing persons with knowledge of the case.
- Communicating in a developmentally appropriate way with the child; advocating that steps are taken to protect the child from harmful communication.
- Making appropriate, well-reasoned, and defensible recommendations regarding the best interests of the child.
- Inspiring confidence in GALs by including parties in the investigation, utilizing effective communication techniques, and interacting competently within the culture and socio-economic status of the parties.
- Communicating effectively with the court in motions, reports, recommendations, and testimony.
- Individualizing each case so that decisions are made on the specific facts and circumstances rather than on generalizations or stereotypes.

APPENDIX F

DOMESTIC VIOLENCE: THE OVERLAP BETWEEN STATE LAW AND IMMIGRATION LAW[1]

As public policy and legislation have focused efforts on deterring domestic violence and ameliorating its effects and as the legal system is increasingly faced with litigants of varying ethnic and racial backgrounds and life experiences, courts will likely encounter increased numbers of immigrant survivors of domestic violence. While state court judges do not have jurisdiction to make decisions about immigration status, state court decisions can have a significant if not conclusive impact on immigration issues. Issues of culture and immigration status frequently arise within the context of family law and domestic violence cases. Judges need to understand certain aspects of immigration law because in the process of conducting routine proceedings, they may unknowingly make decisions with far-reaching immigration consequences. An appreciation of how these issues affect litigants will help courts in their efforts to assure access to justice for all individuals.

This appendix is intended to provide a cursory overview of issues presented in cases where litigants are impacted by the confluence of domestic violence and immigration law. For a more in-depth guide on the overlap between civil court issues and immigration law, go to http://www.courts.wa.gov/content/manuals/civilImmigrationBenchGuide.pdf. For a resource guide on criminal law issues and immigration, go to: http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/Immigration/index

I. HOW DOMESTIC VIOLENCE IMPACTS IMMIGRANT VICTIMS

Domestic violence is a pattern of behaviors that one intimate partner or spouse exerts over another as a means of control.[2] This includes psychological, social, and familial factors as well as physical acts.[3] Immigrant victims, like all survivors of domestic violence, experience physical violence, emotional abuse, coercion, threats and intimidation, isolation, economic abuse, and sexual abuse. Perpetrators of domestic violence against immigrants use culture and cultural taboos, children and child custody,

[1] Updated November 2014, by Grace Huang, J.D.
[2] Anne Ganley, "Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases," in *Domestic Violence Manual for Judges* Chapter 2, (Washington State Gender and Justice Commission (2015)).
[3] *Id*, Ch. 2, p 6..

and economics to enhance their control.[4] In addition, abusers often use immigration status as a tool of control.[5]

Fear of Deportation

> *He came in and kicked me repeatedly. I was bleeding and I was starting to develop bruises. Finally, he calmed down and he left me alone. The beatings were getting worse. I began to feel that my life* was *in danger. When he would beat me, I never called the police because I was afraid of being deported. I thought the police were connected to Immigration. I have heard that they ask people if they* have *papers, and if they don't, they are turned over to Immigration. Even though my husband has a green card, he has refused to apply for papers for our children and me. After he beats me, he always promises that he will fix my papers, but he never follows through. I have lived in constant fear of his abuse and his reporting me to immigration.*

Threats and fears of deportation are the often the primary concern for many non-citizen or non-English speaking survivors who are seeking help fleeing domestic violence. Abusers of battered immigrants frequently threaten them with deportation if they complain about the abuse, threaten to leave, or attempt to call the police or ask others for help. For undocumented women, fear of deportation is one of the primary reasons that few seek any help unless the violence against them has reached catastrophic proportions. Even women who do have lawful status may fear deportation if they report domestic violence, due to incorrect information provided to battered women by their batterers. Victims may fear that if they report the abuse, their abusers may be deported and they will lose valuable child support or other economic assistance they need. Unfortunately, in places where it is common for those affiliated with the legal system to inquire about individuals' immigration status, victims of crime will not seek protection or redress from the justice system.

Cultural Issues

Immigrant abuse survivors often face pressure from their "cultural communities"[6] to remain in abusive relationships for complex reasons, ranging from cultural norms about the role of women in the community, or the sacredness of the family unit, to the batterer's higher status in the particular community. Immigrant survivors of domestic violence may fear ostracism by members of their

---

[4] Raj, Anita, and Jay Silverman, "Violence Against Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence," Violence Against Women Vol. 8 No. 3, March 2002, 369.
[5] Mary Ann Dutton et al., Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications, 7 GEO. J. ON POVERTY L. & POL'Y 245, 55 (2000).
[6] In this context, "cultural community" refers to the way in which individuals identify as belonging to a certain community that is comprised of individuals having a common set of experiences.

community if they seek assistance from outside their community, which may include all of their friends or family members in the United States.[7]

Survivors from close-knit religious communities may feel that the remedies provided by the legal system conflict with their religious beliefs. For example, survivors may have beliefs that emphasize the sanctity of the family and prohibit or strongly discourage divorce. Religious leaders may instruct battered immigrants that they have a duty to make their marriages work. Battered immigrants who may not want to separate permanently from their batterers may need different types of family court orders to accommodate these needs. For example, a survivor can request a protection order that requires the batterer to abstain from abusive behavior, but does not require the batterer to stay away from the survivor or leave the family home.

Along with barriers created by their cultural norms, survivors may be afraid to reveal violence to individuals outside their community. Many cultural traditions are quite different than "mainstream" American customs and it may be difficult to find services that satisfy the needs of survivors from immigrant communities. Battered immigrants who choose to seek assistance from a domestic violence shelter may feel alienated and alone without access to culturally familiar surroundings. Their apprehension may cause them to leave or avoid seeking assistance in the future. Attorneys can work with domestic violence service providers and shelters to help battered immigrants receive the services they need. Some examples may include allowing battered immigrants to prepare their own food, providing translators to accompany battered immigrants to individual or group counseling sessions offered by the shelter, or advocating for language specific support groups.

To help remove these barriers, courts can learn more about the dynamics of domestic violence experienced by immigrants. In addition, courts can work to develop strategies for instituting culturally-appropriate policies and procedures. For example, courts can work on adopting culturally competent assumptions including:[8]

- All cultures are contradictory in that there are both widespread acceptance of domestic violence as part of society and traditions of resistance.
- Each victim is not only a member of her or his community, but also a unique individual with her or his own responses. The complexity of a person's response to domestic violence is shaped by multiple factors.

---

[7] Edna Erez & Carolyn Copps Harley. Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective,. 2003 W. Criminology Rev. 161

[8] Sujata Warrier, "*Cultural Considerations in Domestic Violence Cases*," (2001).

- Each individual comes into any encounter with cultural experiences and perspectives that might differ from those present in the system.
- All institutions should develop specific policies and procedures to systematically build cultural competence by: learning to recognize and reject preexisting beliefs, biases, and prejudices about a particular culture; focusing on understanding information being provided by individual litigants within the context at hand; and foregoing labeling persons by using fixed or generalized information.

Unfamiliarity with the American Legal System

The last time I tried to call the police, when I was still in Mexico, they didn't do anything, because they consider it a family problem. My experience with the police is that they only protect the rich. When I tried to get help from them in the past, they would not help me.

Many immigrants come from countries whose legal systems work very differently than ours. Immigrant litigants in the United States often have great difficulty understanding our legal system, for example, the role of the court in resolving what is considered a "private" matter such as domestic violence.[9]

In addition, many immigrants come from countries where the courts serve as an arm of a repressive government and do not function independently. They expect that persons who will win in court are those with the most money or the strongest connections to the government.[10] Many refugees who have fled their native countries have associated any contact with the legal system with persecution and terror.

Many battered immigrants distrust the U.S. legal system because of misinformation from abusers. In domestic violence cases, abusers may often manipulate these beliefs to get battered immigrant women to drop charges, or dismiss protection order petitions by convincing them that since the batterer is a citizen or has more money, or is a man and therefore his word is more inherently credible, he will win in court and the victim's life will become even more difficult.[11] Abusers may tell victims that they will never be believed in court or that they will be deported if they call the police or go to court. These allegations

---

[9] Mary Ann Dutton, Battered Women's Strategic Response to Violence: The Role of Context, in Future interventions with Battered Women and their Families 105 (J.L. Edelson & Zvi C. Eisikovits eds. 1996)

[10] Leslye E. Orloff et al., Battered Immigrant Women's Willingness to Call for Help and Police Response, 13 UCLA WOMEN'S L.J. 44, 71 (2003)

[11] Leslye Orloff, Deeana Jang, and Catherine F. Klein, *With No Place To Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Fam L. Q. 313, 316 (1995).

are often exacerbated by court personnel believing that non-citizens are not entitled to protections under state law against abuse. To the extent possible, court personnel should explain the U.S. legal system with immigrant litigants and answer any questions they may have regarding the value of their testimony and the legal relief that is available.[12]

Language Barriers

One time, after my husband had beaten me severely and I fled the house with my children. I didn't know where to go, but I was terrified of being near him. I went to our church, who in turn called the local domestic violence program. When I got there, there was no one there who could talk to me. I had to wait for hours until they could find someone on the telephone who could talk with me. I stayed at the domestic violence shelter for a few days, but decided to go back to my husband. I didn't have anybody I could talk to, and I felt very lonely. They said that I had to participate in their support groups, but I couldn't speak English, and I didn't have anything in common with the other women there, I didn't understand them and they didn't understand me.

Another time, my husband accused me of cheating on him. He began yelling at and beating me. Someone called the police, who came to the house and knocked on the front door. The officers came to talk to me, *but I did not understand what they were saying. My husband told them something in English, and they left. He had proven to me that he could do whatever he wanted to do, and that the police would not believe me.*

When battered immigrants do approach the legal system for help, the courts and law enforcement agencies, and even shelters, often have not implemented policies which ensure that domestic violence victims who do not speak English can communicate their complaints effectively and can learn about their rights as domestic violence victims. An inability to communicate may prevent a battered immigrant from seeking necessary legal, shelter, or emergency services. For example, the immigrant may be unable to communicate with law-enforcement officers responding to an emergency call. The batterer may attempt to communicate on behalf of the victim, and distort and twist the facts or completely minimize or deny the abuse. Furthermore, the abuser may lie and tell the police that the victim initiated the fight and she may be arrested as a result. Many courts, domestic violence shelters, crisis hotlines, and social service agencies have limited access to interpreters, further isolating the battered immigrant from the services she needs. Immigrants may also be unaware of the availability of interpreters and translated forms, and thus are not able to access available services.

---

[12] *Id.*

Though domestic violence protection order forms and instructions are translated in various states, including Washington State,[13] this is only a small part of the legal process faced by domestic violence survivors. The lack of ability to read or understand English impacts every part of the immigrant woman's encounter with the legal system: forms must be translated; hearings are meaningless unless an interpreter is present; and the woman may not understand court orders or when a violation has occurred unless adequate, competent, interpretation and translated explanation is provided. Provision of qualified interpretation and translation is critical to ensuring equal access to safety and justice in the courts.[14]

As our society becomes more aware about the problem of domestic violence, more and more non-citizen battered women and children are turning to the legal system for assistance. Although domestic violence traverses all racial, ethnic, religious, and economic lines, battered immigrant women face greater obstacles to escaping violence and getting help from the legal system. Awareness of how immigration law affects battered women can help courts intervene more effectively in all domestic violence cases.

II. DOMESTIC RELATIONS LAW AND IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE

An understanding of the immigration consequences of state court decisions may assist the court in understanding many factors influencing litigants' choices and decision-making. For example, one primary impact of a court ordering dissolution of marriage is that spouses and/or children may lose their immigration status as a result of the order. In child custody cases, the litigants may be concerned that their immigration status (or lack thereof) will have a significant bearing on how residential time is awarded.

A. Child Custody

Abusers may threaten to obtain legal custody of the children, telling immigrant victims that they will lose their children due to their lack of immigration status. In parenting plan cases involving battered immigrants, an abuser may attempt to introduce evidence about the victim's immigration status.[15] This maneuver is

---

[13] RCW 26.50.035 provides, "The administrator for the courts shall determine the significant non-English-speaking or limited English-speaking populations in the state. The administrator shall then arrange for translation of the instructions and informational brochures required by this section, which shall contain a sample of the standard petition and order for protection forms, into the languages spoken by those significant non-English-speaking populations and shall distribute a master copy . . ."

[14] Practices that deny limited English Proficient individuals meaningful access to the courts may violate federal civil rights protections. *See*, http://www.lep.gov/final_courts_ltr_081610.pdf. For interepreter resources, see http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=interpreterCommission .

[15] *See, e.g*, Kim v. Kim, 208 Cal. App. 3d 364 (1989)

intended to control the battered immigrant victim by frightening her and reinforcing the abuser's threats that he will have her deported if she does not comply with his demands. Immigration status is irrelevant in and of itself to the custody determination. If the abuser claims that this information is necessary because of the threat of flight with the children, the abuser should be required to prove that the threat of flight is real, as any litigant would have to do in any other parenting plan matter.

Abusers may also claim that because the immigrant is from a foreign culture, it is not in the best interests of children to be raised in an environment that differs from the "norm." For example, an immigrant litigant's living arrangements may appear unusual to a judge from a different ethnic or cultural background. A client may live with extended family members, or share a bedroom with another family. This may be a typical arrangement within the immigrant community, but may raise concerns for the court. The court should seek information regarding cultural differences and about whether the unfamiliar cultural practices harm the children or affect them negatively.

Parenting Plans

Findings of abuse, restrictions in residential placement or visitation due to abuse, and restraint provisions in custody orders may also affect a litigant's ability to prove the requirement of "extreme hardship" in certain types of deportation cases. For example, judicial findings that the abuser has threatened to harm the children might help establish that removing the battered parent or children from the legal protections provided by U.S. courts would cause "extreme hardship." In addition, family court findings with respect to a child's best interest being primary residential placement with the non-abusive parent might be used to demonstrate extreme hardship to either the parent or the child due to their long term separation.

Family Court findings may also affect a battered immigrant's ability to meet the "good moral character" requirement for an immigration case. If there has been a finding that a non-citizen "failed to protect" the child from abuse, the individual may face difficulty in establishing that she or he has good moral character for the purposes of the immigration matter.

B. Dissolution of Marriage

Because many applications for immigration status are based on a legal family relationship, one primary impact of a court declaring a marriage invalid, or ordering dissolution of a marriage is that spouses and/or children may jeopardize their immigration status as a result of the order. Various issues may arise for abused immigrants in matters involving dissolution of marriage. An immigrant's

legal immigration status may be completely dependent on the fact that she or he is married to a spouse with a certain legal status. Other concerns may be related to beliefs about the propriety of dissolving a marriage. Divorce may be contrary to their religious or social beliefs, or they may be concerned that they will shunned by their community if they initiate dissolution proceedings. Some may seek to obtain a legal separation instead of dissolution of marriage.

1. Validity and Viability of the Marriage

In order for a non-citizen to obtain lawful permanent residence through marriage to his or her spouse, immigration law requires that the marriage was not entered into for the purposes of evading immigration law,[16] and the marriage must be valid under the law of the state or country, and then under the Immigration and Nationality Act. In certain instances involving abused spouses, if the marriage was not valid because a prior or concurrent marriage of the abusive U.S. citizen or Permanent Resident sponsor was not terminated, but the non-citizen applicant believed the marriage was valid, an application for status as an ***intended spouse*** may still be filed.[17]

In addition, because there is a long waiting period between the time a family visa petition is accepted and the time a visa becomes available, if the marriage terminates before a visa is available and the immigrant spouse can get her or his permanent resident status, she or he is no longer eligible for the immigration status she or he applied for.

There is one major exception for those who are eligible to apply to self-petition under the Violence Against Women Act ("VAWA"). If the marriage is terminated for any reason after a VAWA self-petition is filed, the termination will not affect the application.[18] In cases where the marriage has been terminated prior to the filing of the VAWA self-petition, if the application is filed within two years of the termination and there is a showing of a "connection" between the dissolution of marriage and domestic violence, the individual may still be eligible for immigration benefits under VAWA.[19]

---

[16] INA §204(c); 8 U.S.C. §1154(c)

[17] INA §204(a)(1)(A)(iii)(II)(aa)(BB); INA§204(a)(1)(B)(ii)(II)(aa)(BB)

[18] INA§204(a)(1)(A)(vi) and INA §204(a)(1)(b)(v)(I)

[19] INA §204(a)(1)(A)(iii)(II)(aa)(CC); INA§204(a)(1)(B)(ii)(II)(aa)(CC)

2. Financial Issues

Many abused immigrants may face economic barriers due to a lack of employment authorization from the Bureau of Citizenship and Immigration Services (CIS), low-paying jobs, or an inability to obtain certain public benefits due to their immigration status.[20] Battered immigrants may lack job experience or employment skills due to isolation by the abuser. For examples, abusers often prohibit battered immigrants from learning English or from working outside the home in order to maintain control.

Economic issues can be addressed by family court orders distributing marital assets, as well as orders to pay maintenance and child support. In dividing property and awarding maintenance, it is appropriate for courts to consider domestic violence by considering the length of time the abused immigrant may require financial support for herself and/or her children; the length of time it will take for the abused immigrant to be able to work, the abused party's lost employment opportunities due to the abuser's controlling behavior, and/or other factors such as the need for counseling or other interventions resulting from the abuse.[21]

C. Civil Protection Orders

Protection orders can offer broad relief and can offer crucial protection against continued violence.[22] In addition, orders including findings of abuse provide critical evidence for battered immigrants who self-petition or file for cancellation of removal under the Violence Against Women Act.

Washington's protection order statute includes a "catch-all" provision that can be used creatively to obtain specific relief for battered immigrants. RCW 26.50.060(f). In addition, in family law matters, courts can "make provision for any necessary continuing restraining orders." RCW 26.09.050(1).

Some provisions that may provide particularly relevant relief might include:

- The respondent shall give petitioner access to, or copies of, any documents supporting petitioner's immigration application.

---

[20] *See, e.g.*, Washington Administrative Code Sec. 388-424-001, et. al, 8 U.S.C, §§1601 et. al.

[21] *See*, In re Marriage of Foran, 67 Wn. App 242, 258 (1992)

[22] Victoria Holt, et.al, "Civil Protection Orders and Risk of Subsequent Police-Reported Violence, *Journal of the American Medical Association*, Vol. 288, No. 5, 589 (August 7, 2002).

- The respondent shall not withdraw the application for permanent residency or any other visa application which has been filed with the CIS on the petitioner's behalf.
- The respondent shall not contact Immigration and Customs Enforcement (ICE), the (insert particular) Consulate, or the (insert particular) Embassy about the petitioner's immigration petition.
- The respondent shall take any and all action necessary to ensure that the petitioner's application for permanent residency is approved.
- The respondent shall turn over the following items or copies of the following items to the petitioner: petitioner's pocketbook, wallet, working permit, ID card, bank card, social security card, passport, certificate of naturalization or citizenship (if applicable), alien registration receipt card, or passport stamp to prove permanent residency (if applicable).
- The respondent shall relinquish possession and/or use of the following items: respondent's passport, certificate of naturalization or citizenship, alien registration receipt card or passport stamp to prove permanent residency, working permit, ID card, bank card, baptismal certificate, Social Security card.
- The respondent shall relinquish possession and/or use of the following items: the parties' marriage certificate, family photos, papers, documentation, or other objects relating to the marriage, copies of the respondent's divorce certificates for any previous marriages and/or information about where such divorce decrees may be obtained.
- The respondent shall relinquish possession and/or use of the following items: children's early school records, rent receipts, and income tax returns.
- The respondent shall not remove the children from the court's jurisdiction and/or the United States absent a court order and shall relinquish the children's passports to the petitioner or the court.
- The respondent shall sign a statement informing the (particular) embassy or consulate that it should not issue a visitor, or any other type of visa, to the child absent an order of the court.
- The respondent shall pay all fees associated with the petitioner's and/or children's immigration cases.
- The respondent shall sign a prepared CIS FOIA (Freedom of Information Act) form. This signed form shall be turned over to the petitioner or the petitioner's attorney.

By ordering these types of remedies, courts can prevent an abuser from continuing to use the immigration process as a means to control and manipulate the victim. To withstand constitutional scrutiny, a court must have made a specific determination that a particular course of conduct is unlawful, and provide injunctive relief that is narrowly crafted to prohibit repetition of the prohibited

conduct. E.g, ***Bering v. Share,*** 106 Wn. 2d 212, 243 (1986), *cert dismissed* , 479 U.S. 1050(1987); ***In re Marriage of Suggs***, 152 Wn. 2d 74 (2004); ***In re Marriage of Meredith,*** 148 Wn. App 887 (2009); ***Madsen v. Women's Health Center, Inc.*** 512 U.S. 753, 763 n. 2 (1994).

D. State Court Findings as Evidence of Domestic Violence for Immigration Matters

The Violence Against Women Acts allows abused spouses, and children of lawful permanent residents[23] or abused spouses, parents, and children of United States citizens[24] to file petitions for lawful permanent residence without having to rely on their abusive spouse or parent to apply for them. Spouses also may file petitions based on abuse suffered by their children. In order to successfully self-petition under VAWA, an applicant must demonstrate[25]:

1. Battering or extreme cruelty inflicted by a U.S. citizen or lawful permanent resident on a spouse or child (or parent by a U.S. Citizen child);
2. Good faith marriage and residence with the United States citizen or lawful permanent resident spouse (or residence if a child or parent); and
3. Good moral character.

The state court system can help facilitate a battered immigrant's self-petitioning process by providing evidence to meet the statutory requirements under VAWA, as well as help protect her from further abuse. For example, protection or restraining orders that order abusers to vacate a joint residence may provide the opportunity for a battered immigrant to gather the documents necessary to support a self-petition. In such a case, it may be crucial for such an order to go into immediate effect, preventing an abuser from being given the opportunity to hide, destroy, or remove importance evidence needed for her self-petition.

State court findings of abuse may also be particularly helpful for a battered immigrant in providing evidence that he or she was subjected to battering or extreme cruelty. Evidence of battering or extreme cruelty may include "any credible evidence."[26] Specifically, "[e]vidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."[27] Other relevant evidence may include: an order of

[23] INA§§ 204(a)(1)(B)(ii) and (iii).
[24] INA §§ 204(a)(1)(A)(iii), (iv), and (vii).
[25] INA §§204(a)(1)(A)(iii), (iv), (vii), and (B)(ii) and(iii)
[26] INA § 204(a)(1)(H).
[27] 8 CFR §§ 204.2(c)(2)(iv) and (e)(2)(iv).

protection against the abuser or other legal steps to end the abuse, evidence of seeking refuge in a battered women's shelter or similar place, a photograph showing visible injuries, or other documentation.

The state court can facilitate a self-petitioner's gathering of evidence to support an application by providing documentation of a record of domestic violence. Restraining and protection orders without a finding of abuse are not as useful to self-petitioners as orders with such findings, except to corroborate other evidence. Courts should permit battered immigrants to provide testimony and evidence on the record about the history of violence, injuries to the petitioner, the impact of violence on the petitioner and/or her children, use of control over the petitioner's immigration status as a means to exert power and control, threats made by the abuser, and the respondent's criminal record. In addition, it may be preferable to obtain a judicial finding that domestic violence has occurred in protection order matters or family law cases rather encouraging the parties to settle such matters without hearing.

E. Certification for Visas for Certain Victims of Crime

The Victims of Trafficking and Violence Protection Act created two categories of visas for immigrant crime victims, one for certain violent crimes (U-Visas), and one for victims of severe forms of trafficking (T-visas). Both types of visas are designed to provide immigration status for individuals who are assisting or willing to assist authorities investigating specifically delineated crimes. Of particular relevance to domestic violence cases are U-visas (crime victim visas).

In order to obtain a U-visa, applicants are required to obtain a certification from a federal, state, or local law enforcement official, prosecutor, judge, or authority investigating criminal activity designated in the statute that states that the U-visa applicant is being, has been, or is likely to be helpful to the investigation or prosecution of designated criminal activity.[28] The statute does not require that an investigation in which the immigrant victim cooperated result in a prosecution, nor does it require that a prosecution result in a conviction.

State court judges are included in the list of individuals who can provide certifications for individuals who have provided statements that serve as the basis for a criminal investigation (e.g., the basis for a warrant) or for individuals who have served as witnesses in a criminal prosecution. In addition, state court judges may consider directing a prosecutor's office or law enforcement agency to provide certification for witnesses in certain cases.

---

[28] INA §101(a)(15)(U)(i)(III) & INA §214(o)(1), added by VTVPA §1513(b) & (c)

III. IMMIGRATION CONSEQUENCES FOR DOMESTIC VIOLENCE CRIMINAL MATTERS

Often the most important issues facing non-citizen defendants charged with crimes is whether a conviction and sentence for any given offense will trigger certain provisions under the Immigration and Nationality Act that will result in his or her removal (deportation) from the United States. All non-citizens, including survivors of domestic violence, may risk removal, or be rendered ineligible to adjust status to permanent resident or to obtain citizenship if they are convicted of a criminal offense. Often non-citizen defendants do not realize just how important this issue is until it is too late.

As noted in the Immigration Resource Guide, found at http://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/Immigration/index, under current provisions of immigration law, the consequences for obtaining criminal convictions can be severe. For example, non-citizens who plead guilty to a seemingly low-level misdemeanor offense (e.g. theft in the third degree, simple assault) can face severe consequences.

Once convicted, non-citizens may face such consequences as automatic deportation, permanent bars to returning to the United States and possible indefinite detention by the Immigration and Customs Enforcement (ICE)—regardless of how long they have lived in the United States and what family ties they may have, or whether they are here legally. Moreover, the vast majority of non-citizen defendants (more than 85%) will be unrepresented (pro se) in their immigration proceedings before the Immigration Court.

Furthermore, even if a non-citizen is not immediately facing deportation proceedings, immigration applications generally ask if the beneficiary has ever been arrested. Even where the charges are dropped, the beneficiary will usually have to disclose the details of the arrest and disposition. This may affect his or her eligibility for discretionary immigration relief in the future.

In light of the severe consequences facing non-citizen defendants with criminal convictions and their families, it is important that courts take the time to ensure that defendants truly are aware that, if they are not U.S. citizens, their guilty pleas, especially in domestic violence cases, may ultimately result in deportation. It is important that a non-citizen defendant have the opportunity to meaningfully address the immigration consequences BEFORE deciding on which course of action to pursue in her or his criminal proceedings.

IV. CONCLUSION

The effectiveness of court interventions can be improved with an understanding of the cultural and immigration legal barriers that face non-citizen litigants in both the civil and criminal court.

APPENDIX G

The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence

Revised and updated in 2014, by Sara Ainsworth, J.D.

- October 2014 -

This chapter discusses how the Hague Convention on International Child Abduction, and its enabling statute ICARA, have been applied in courts in Washington and around the country.

The chapter features an overview of the current law and addresses complex issues courts increasingly face when an abducting parent is also a victim of domestic violence seeking protection from American courts. The chapter includes citations to unpublished Washington cases to demonstrate how Washington courts have considered some of these issues.

Special thanks to the members of the Hague Convention Chapter Advisory Committee, Justice Barbara Madsen for her immediate support of the project, Seattle University School of Law's Access to Justice Institute, and the student volunteers working on the Hague Project.

Table of Contents

INTERNATIONAL CHILD ABDUCTION AND DOMESTIC VIOLENCE

A. Overview
1. Hague Convention and ICARA: General Principles
2. Child Custody in the United States

B. Applying the Convention
1. Triggering Scenario
2. Domestic Violence and a Child's Return

C. Jurisdiction
1. International Treaties and the Supremacy Clause

D. Proceedings Under the Hague Convention
1. Commencing an Action
2. Preemptive Stay / Dismissal
3. Removal to Federal Court
4. Writs of Habeas Corpus
5. Expedited Nature of Proceedings

E. Petitioner's Prima Facie Case
1. Wrongful Removal
2. Habitual Residence
3. Custody Rights and Rights of Access

F. Exceptions Under the Hague Convention
1. Petitioner Consent or Acquiescence
2. Child Attains an Age of Maturity
3. Passage of One Year / Child Settled
4. Petitioner Not Exercising Custodial Rights
5. Grave Risk
6. Return Would Violate Human Rights

G. Recognition and Enforcement
1. Full Faith and Credit
2. Res Judicata and Collateral Estoppel

H. Fees and Costs

APPENDIX A – HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

APPENDIX B - ICARA

INTERNATIONAL CHILD ABDUCTION AND DOMESTIC VIOLENCE

A. Overview

1. Hague Convention and ICARA: General Principles

Hague Convention. The Hague Convention on Civil Aspects of International Child Abduction[1] provides a uniform law signatories may adopt to compel the return of a child wrongfully removed from his or her habitual residence.[2] The Convention applies to courts within the jurisdiction of a contracting state to which a child has been wrongfully removed. Under the Convention, courts consider only the claim that the child was improperly removed, and not the merits of an underlying custody claim.[3]

ICARA. The legislation implementing the Convention in the United States is the International Child Abduction Remedies Act (ICARA), enacted by Congress in 1988.[4] 42 U.S.C. §§ 11601-11610.

Legislative History. According to the commentary accompanying the Convention's drafting, the Convention is intended to prevent one parent from gaining an unfair advantage in a custody dispute by taking a child to another country in order to invoke that other country's jurisdiction.[5]

2. Child Custody Jurisdiction in the United States

Custody disputes in U.S. courts may concern orders not implicated in the Hague Convention. In such cases, the court must look to domestic law to determine whether they have jurisdiction and the extent of their authority.[6] Jurisdiction in United States custody cases is determined by federal and state laws, including the Parental Kidnapping Prevention

---

[1] Hague Convention on the Civil Aspects of International Child Abduction, Senate Treaty Doc. 11, 99th Cong., 1st Sess. 9 (1980) reprinted in 19 I.L.M. 1501 (1981) (hereinafter Convention). See full text in Appendix A.
[2] Convention, Article 3a.
[3] Convention, Article 19; *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004); *Abbott v. Abbott*, 130 S. Ct 1983, 560 U.S. 1, 176 L.Ed. 2d 789 (2010).
[4] International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (hereinafter ICARA). See full text in Appendix B.
[5] Elisa Perez-Vera, Explanatory Report § 11, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982); cited in: *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004). Note: The Explanatory Report was never adopted in the Hague Convention.
[6] For instance, The Convention may not be in effect between the United States and the other nation involved in the dispute; even if proceedings involve nations for which the Convention is in force, domestic law may be relevant. See Jurisdiction in Section C.

Act (PKPA) and, in those states which have adopted it, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[7]

Parental Kidnapping Prevention Act. Congress passed the Parental Kidnapping Prevention Act to require states to give full faith and credit to custody determinations made by other states. 28 U.S.C. § 1738A(a). The statute also defers questions regarding prior out-of-state decrees to the courts of the decree-granting state unless the initial state no longer has jurisdiction.[8]

Uniform Child Custody Jurisdiction and Enforcement Act. Washington's UCCJEA requires Washington courts to recognize and enforce foreign child custody determinations made in substantial conformity with Washington's own standards.[9] RCW 26.27.051. Washington courts are to decline jurisdiction in child custody matters where another state or foreign country has previously exercised jurisdiction, unless certain exceptions apply.[10] RCW 26.27.201. In addition, Washington courts may enforce an order for the return of a child under the Hague Convention as if the order were a child custody determination. RCW 26.27.411. Washington's UCCJEA considers temporary emergency jurisdiction in RCW 26.27.231.

---

[7] A Washington Appellate court held that the PKPA preempts the UCCJA (recently replaced by the UCCJEA) when the statutes conflict. *In re Custody of Thorenson*, 46 Wn. App. 493, 497 (Wn. App. 1987).
[8] 28 U.S.C. § 1738A(a)-(h).
[9] For the purposes of Convention proceedings, Washington courts, in two unpublished opinions, have found custody determinations not to be in substantial conformity with Washington's standards because the respondent did not receive notice of a forthcoming custody determination. See *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003); *In re Parentage of C.A.M.A.*, 103 Wn. App. 1032, WL 1726964 (Wn. App. 2000)
[10] RCW 26.27.051 provides that Washington courts are not required to apply foreign child custody determinations if the child custody law of "a foreign country violates fundamental principles of human rights." The circumstances under which the exception may be used in international cases are difficult to define and not considered by an appellate court in the U.S.; the official Comment to the drafting of the UCCJEA, which was subsequently adopted in Washington state, indicates that the basis for the exception is the same concept found in Article 20 of the Convention (considered in the discussion of the defenses, in Section F) which permits a return order to be denied if it would not be permitted by fundamental principles of the requested state relating to human rights and fundamental freedoms. Marianne Blair. *International Application of the UCCJEA: Scrutinizing the Escape Clause*. 38 Fam. L. Q. 547, 554-66 (2004) (citing UCCJEA § 105 cmt., 9 Part1A U.L.A. at 662.).

B. Applying the Convention

1. Triggering Scenario

The primary purpose of the Convention is to deter international child abductions and to provide a prompt remedy for the return of an abducted child by ensuring custody rights under one Contracting State are respected in other Contracting States.[11] Thus, for example, if a parent removes a child from the country of the child's habitual residence into a separate country, acting in breach of the other parent's rights of custody, the left-behind parent may commence an action under the Convention by filing a petition for relief in the jurisdiction to which the child was wrongfully removed or retained (the removed-to state).[12] [13] The petitioning parent must establish that the child was wrongfully removed or retained[14] from the country of the child's habitual residence (the removed-from state), in breach of the petitioning parent's custody rights.[15]

The Convention also provides a series of affirmative defenses, exceptions, which, if established by the respondent, may preclude the child's return. If the petitioning parent demonstrates the elements of the prima facie case, and the abducting parent fails to establish excepting circumstances, the Convention requires the prompt return of the child to the country of his or her habitual residence.

2. Domestic Violence and a Child's Return

In some cases, courts have found it inappropriate to return the child based on the threat of abuse to the child or the caregiver. The presence of domestic violence may affect determining the place of a child's habitual residence and, under Convention Article 13(b), determining the gravity of risks a child faces if a return is compelled.[16] For further information, see subsequent sections detailing habitual residence and grave risk.

---

[11] Convention, Art. 1.
[12] 42 U.S.C. § 11603(b).
[13] The Hague Convention also allows the Department of State, appointed as a "Central Authority," to perform the remedy of return through administrative means. 42 U.S.C. § 11606. See Section D.1.
[14] Specifically, the Convention defines wrongful removal or retention as a "breach of rights of custody…under the law of the State in which the child was habitually resident" and "at the time of removal or retention those rights were actually exercised, either jointly or alone…" The Convention, Art. 3(a)-(b).
[15] The petitioner's prima facie case is discussed in detail in Chapter Section E.
[16] *Taylor v. Taylor* (11th Cir. 2012).

C. Jurisdiction

A Hague Convention proceeding is a civil action brought in the country to which a child[17] (under the age of 16) was wrongfully removed or retained. The Convention applies only between Contracting States[18] and only when the wrongful abduction occurs after the Convention is in force between those States.[19] In cases where the Convention is not in effect between the United States and the other nation involved in the dispute, U.S. courts must look to domestic law to determine jurisdiction and the extent of their authority.

ICARA provides both state and federal district courts with original and concurrent jurisdiction over a Convention proceeding.[20] To obtain jurisdiction, courts must find a removal was wrongful, which requires determining whether or not the child was taken from his or her habitual residence in violation of custody orders.[21] Courts within the jurisdiction of the state to which a child is wrongfully removed are to consider only the removal claim, not the merits of an underlying custody claim.[22]

1. International Treaties and the Supremacy Clause

The U.S. Constitution provides that international treaties, along with the Constitution and federal statute, are the Supreme Law of the Land.[23] If conflict exists between an international treaty and federal statute, the most recent provision applies.[24]

---

[17] The Convention ceases to apply when the child attains the age of 16. Convention, Art. 4. Even if the child is under the age of 16 at the time of the wrongful removal or retention, if the child has reached 16 when the return is requested, the Convention does not require the child's return.

[18] An up-to-date list of contracting states to the Convention is maintained at http://www.hcch.net/index_en.php?act=conventions.status&cid=24
Article 38 of the Convention distinguishes between states which have acceded to the Convention and Contracting States. The United States, as a Contracting State, is not required to accept the accession of nations party to the Convention which were not party to the Hague Conference and thus Contracting States; each Contracting State must accept the accession of each nation individually.

[19] Convention, Art. 35.

[20] 42 U.S.C. § 11603.

[21] If the child was not removed from his or her habitual residence, the Convention does not apply. As part of determining a child's habitual residence, domestic violence may factor into a court's interpretation of habitual residence; see the section discussing habitual residence.

[22] Convention, Art. 19; *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004); *Abbott v. Abbott*, 130 S. Ct 1983, 560 U.S. 1, 176 L.Ed. 2d 789 (2010).

[23] The U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2.

[24] If conflict between a federal law and a treaty is unavoidable, the most recent expression of the "sovereign" controls. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 600, 9 S.Ct. 623 (1889).

Federal courts must have the power to vacate state custody determinations and other state court orders that contravene or frustrate the purposes of the Hague Convention.[25]

D. Proceedings under the Convention

1. Commencing an Action

By Petition. A judicial proceeding under the Convention is commenced in the United States by the filing of a petition in state or federal court.[26] A petitioner's submission to the court has the effect of conferring in personam jurisdiction and results in a bilateral hearing.

Central Authority. The Convention also provides for the designated Central Authority[27] to enforce the remedy of return through administrative means, whereby the left-behind parent submits an application for the child's return through the Central Authority of either the child's habitual residence or in the state where the child is found.[28] For all practical purposes, the Central Authority's role is largely limited to that of a facilitator, and, when dispute exists between parties, has no power to order a child's return.[29]

2. Preemptive Stay/Dismissal

Where the court or administrative authority in the requested state has reason to believe the child has been taken out of the removed-to state, it may stay the proceedings or dismiss the application for the return of the child.[30]

3. Removal to Federal Court

There is no provision in ICARA that prohibits removal of state court Convention proceedings to federal court. Thus, arguably, ICARA allows removal to federal court.[31]

---

[25] *Mozes v. Mozes*, 239 F.3d 1067, 1085 (9th Cir. 2001).
[26] 42 U.S.C. § 11603(a)-(b).
[27] The United States Department of State is appointed as the Central Authority for the purposes of the Convention in the United States. Exec. Order No. 12648, 53 Fed. Reg. 30637 (1988). Central Authorities coordinate and cooperate with various agencies of the child's habitual residence and the requested state in order to secure the prompt return of a child. Convention, Art. 7.
[28] 42 U.S.C. § 11606
[29] A Central Authority may help secure the voluntary return of the child or bring about an amicable resolution of the issue. Convention, Art. 7(c); Art. 10; see also *Wojcik v. Wojcik*, 959 F.Supp. 413, 416 (E.D. Mich. 1997) (noting the Central Authority may take measures to obtain the *voluntary* return of the child) (emphasis added).
[30] Convention, Art. 12, cl. 3.
[31] A district court in New York granted a father's request for removal reasoning that, pursuant to the Federal Removal statute, 28 U.S.C. § 1441(a), and based on ICARA's granting state and federal courts

4. Writs of Habeas Corpus

Although the writ of habeas corpus is not mentioned in the language of the Convention or ICARA, it may arguably be used by a petitioner in a Convention proceeding to test the legality of an alleged wrongful removal or retention.[32] If the court finds a removal or detention wrongful, it may compel the respondent before the court.[33]

5. Expedited Nature of Proceedings

The Convention mandates the prompt disposition of the case. The Convention stipulates that if the judicial or administrative authority has not reached a decision within six weeks from the date of the commencement of the proceedings, the petitioner or the Central Authority of the requested state has the right to seek an explanation of the reasons for delay.[34] The Convention's expedited nature has not been construed as a license to conduct hearings ex parte.[35]

E. Petitioner's Prima Facie Case

1. Wrongful Removal

To invoke the Hague Convention's remedy of return, the petitioning parent must establish, by a preponderance of the evidence,[36] that the child's abduction was wrongful. Removal or retention of a child is wrongful where the child is taken from the state in which the child is habitually resident, violating the petitioner's custody rights. Article 3 of the Convention describes a removal or retention to be wrongful where:

1) It is in breach of rights of custody attributed to a person, an institution, or any other body under the law of the state in which the child was habitually resident immediately before the removal or retention;

and

---

concurrent original jurisdiction, the matter could have originally been filed in federal court. *In Matter of Mahmoud*, 1997 WL 43524 (E.D.N.Y. 1997).

[32] *See Zajaczkowski v. Zajaczkowska*, 932 F.Supp.128, 130-31 (D.Md.1996).

[33] *Zajaczkowski*, 932 F.Supp. at 131.

[34] Convention, Art. 11.

[35] *See Wanninger v. Wanninger*, 850 F.Supp. 78 (D.Mass 1994) (court denied a request to issue an ex parte order in place of a writ of habeas corpus, instead issuing an order compelling attendance).

[36] 42 U.S.C. § 11603(e)(1)(A).

2) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[37]

2. Habitual Residence

As part of determining whether a removal or retention is wrongful, courts must determine the child's habitual residence. Neither the Convention nor ICARA define habitual residence. Courts interpret the phrase according to its ordinary meaning and analyze habitual residence as a mixed question of fact and law, based on the circumstances of the particular case.[38] Courts must carefully consider the unique circumstances of each case when determining a child's habitual residence, particularly in situations involving military families.[39]

a. Determining Habitual Residence

Most courts hold that a person can have only one habitual residence at a time.[40] If a child is born where parents have their habitual residence, the child normally should be regarded as a habitual resident of that country.[41] However, the place of birth is not automatically the child's habitual residence,[42] because there *must be a settled purpose* to create a habitual residence.[43] The absence of a more defined baseline requires close attention to the subjective intent of the parents when evaluating *settled purpose*.[44] While the intent of the child may also be considered, parental intent acts as a surrogate for children who are not yet

---

[37] Convention, Art. 3(a)-(b).
[38] *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1048 (E.D.Wash 2001); *Feder v. Evans*, 63 F.3d 217, 222 (3rd Cir. 1995); *Norinder v. Fuentes*, 657 F.3d 526 (7th Cir. 2011); *Poliero v. Centenaro* (2nd Cir. 2010); *Barzilay v. Barzilay* 600 F.3d 912 (8th Cir. 2010); *Duran v. Beaumont*, 534 F.3d 142, (2nd Cir. 2008); *Vale v. Avila*, 538 F.3d 581, (7th Cir. 2008). *But see, Robert v. Tesson,* 507 F.3d 981(6th Cir. 2007) (expressly rejecting the reasoning of the Ninth Circuit in *Mozes v. Mozes* that the subjective intent of the parties is dispositive (or relevant) in a determination of a child's habitual residence).
[39] *Holder* 392 F.3d at 1015.
[40] *Mozes* 239 F.3d at 1076 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1069); *Freier v. Freier*, 969 F.Supp 436, 440 (E.D. Mich. 1996)). A cited exception may exist upon the rare occurrence of a child consistently splitting time between two locations so as to have an alternating habitual residence. *Mozes* 239 F.3d at 1076 (citing *Johnson v. Johnson,* 26 Va.App. 135, 493 S.E.2d 668, 669 (1997)).
[41] *Holder* 392 F.3d at 1020.
[42] *Holder*, 392 F.3d at 1020 (9th Circuit 2004) (citing *Delvoye v. Lee*, 329 F. 3d 330, 334 (3rd Cir. 2003)); *Robert v. Tesson* 507 F.3d 981 (6th Cir. 2007).
[43] Emphasis added. Courts require a settled purpose; see *Holder*, 392 F.3d, 1020; *Mozes* 239 F.3d at 1074. But see, *Robert,* 507 F.3d at 998.
[44] *Holder* 392 F.3d at 1016 (citing *Mozes*, 239 F.3d at 1076-78).

capable of making an autonomous decision.[45] As a general rule, military families do not settle where they are assigned overseas. A Ninth Circuit court held that the focus when military families relocate should center on the details of each case.[46]

Permanent Relocation. If a petitioner permanently moves to the same country as the abductor, the court cannot grant relief under the Hague Convention and the petition becomes moot.[47] Domicile has been considered by the Ninth Circuit as an appropriate measure to determine whether one has moved permanently to a new jurisdiction.[48]

b. Changing Habitual Residence

Habitual residence may be changed when the family has manifested a settled intention to abandon a prior habitual residence, even if one parent had qualms about the move.[49] However, where a court finds verbal and physical abuse of a spouse, the conduct of the victimized spouse asserted to manifest consent must be carefully scrutinized because there is a chance that the victim's residence was coerced.[50] The Ninth Circuit has held that the intent to change habitual residence must be manifest by: an actual change in geography, the passage of an appreciable period of time which is sufficient for acclimatization.[51] When parents no longer agree on where the children's habitual residence has been fixed, courts must look beyond the representations of the parties and consider all available evidence.[52]

Even where it is determined that parents do not share a settled intention to adopt a new habitual residence, courts consider whether the child has grown accustomed, or "acclimatized,"[53] to life in a new country. In determining whether a child has

---

[45] *Holder,* 392 F.3d at 1017; *Mozes*, 239 F.3d at 1076; *Norinder v. Fuentes*, 657 F.3d 526 (7th Cir. 2011); *Duran v. Beaumont*, 534 F.3d 142, (2nd Cir. 2008); *Vale v. Avila*, 538 F.3d 581, (7th Cir. 2008).
[46] *Holder*, 392 F.3d at 1016 (despite sister circuits finding a settled intent to acquire a new habitual residence based in part on the shipment of family possessions to a new location coupled with failure to maintain a residence in the former location, the court held that the parties lacked a settled intent to abandon the U.S. as the children's habitual residence and shift it to Germany, where the father petitioner was stationed).
[47] *Gaudin v. Remis*, 282 F.3d 1178, 1183 (9th Circuit 2002).
[48] *Gaudin v. Remis*, 379 F.3d 631, 637 (9th Circuit 2004).
[49] *Mozes*, 239 F.3d at 1076.
[50] *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1056 (E.D.Wash 2001).
[51] *Mozes*, 239 F.3d at 1078.
[52] *Holder*, 392 F.3d at 1017 (citing *Mozes*, 239 F.3d at 1076).
[53] *Holder*, 392 F.3d at 1019; *Mozes*, 239 F.3d at 1079.

acclimatized to a new environment, courts should be slow to infer from a child's new contacts that an earlier habitual residence has been abandoned.[54] The child must become settled insofar as the new residence supplants the old as the locus of the children's family and social development.[55] While physical presence is itself insufficient, acclimatization should not be confused with requiring acculturation.[56] Courts have also recognized it to be practically impossible for a very young child to acclimatize independent of the immediate home environment of the parents.[57]

Consent to Change of Limited Duration. Where a child's translocation from an established habitual residence is intended for a limited duration, courts generally refuse to find a change in the child's habitual residence.[58] In cases where the petitioning parent consented to a stay abroad for an indefinite period of time, great deference is given to the fact-findings of the district court.[59]

c. Habitual Residence and the Presence of Domestic Violence

Some courts have considered the presence of domestic violence as a factor in determining the place of a child's habitual residence, particularly in the way domestic violence affects the interpretation of "settled intent." A district court in Washington held that petitioning father's abuse of the respondent mother precluded the family from making Greece the country of the child's habitual residence, concluding that the parties lacked any mutual intent to change the child's habitual residence from the United States to Greece.[60] The court further found the respondent's behavior adversely impacted any potential acclimatization to Greece.[61] A district court in Utah ruled that habitual residence necessarily entails an element of

---

[54] *Holder*, 392 F.3d at 1019; *Mozes*, 239 F.3d at 1079.
[55] *Mozes*, 239 F.3d at 1080; *see also Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D.Wash 2001) (although children attended school and began learning language, facts not sufficient to find change in habitual residence; children rarely socialized outside the family and remained with respondent virtually all day every day for 27 months until subsequent departure from Greece).
[56] *Holder*, 392 F.3d at 1019.
[57] *Holder*, 392 F.3d at 1020.
[58] *Mozes*, 239 F.3d at 1077; *see also Holder v. Holder*, 392 F.3d 1009, 1017 (9th Cir. 2004) (despite commitment to four-year tour of duty in Germany, move was conditional and family did not definitively leave old residence and reestablish residence in new location).
[59] *Mozes*, 239 F.3d at 1078; see also *Levesque v. Levesque*, 816 F.Supp. 662, 667 (D. Kan. 1993) (holding Germany became the child's habitual residence based on mutual intent to remain there for an "indefinite" period of time).
[60] *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001).
[61] *Tsarbopoulos*, 176 F.Supp.2d at 1055.

voluntariness in "settled purpose."[62] The court found that the respondent and her child were detained in Germany by means of verbal, emotional and physical abuse and that such coercion "removed any element of choice and settled purpose" which may be been present in the family's decision to visit Germany.[63]

Other courts, however, have construed habitual residence more narrowly, and in at least one case from the Eighth Circuit, rejected the argument that the petitioner's abuse of the respondent, in itself, should factor into a court's assessment of intent for the purposes of habitual residence.[64]

3. Custody Rights and Rights of Access

Custody Rights. Custody rights are defined as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[65]

Courts in the U.S. have interpreted custody rights broadly. In *Abbott v. Abbott,* 130 S. Ct 1983, 560 U.S. 1, 176 L.Ed. 2d 789 (2010), the U.S. Supreme Court held that the *ne exeat* right – the right to consent before a child may be removed from the country that granted the order – is a custody right within the meaning of the Convention.[66]

The *exercise* of custody rights has also been broadly construed. In the absence of a ruling from a court in the child's habitual residence, a court may find the statutory language requiring "exercise" whenever a parent with custody rights keeps, or seeks to keep, any sort of regular contact with the child.[67]

In an unpublished opinion, a Washington appellate court held that a guardian order confers rights of custody for the purposes of the Convention.[68]

---

[62] *In re Ponath*, 829 F.Supp. 363 (D. Utah 1993).
[63] *In re Ponath*, 829 F.Supp. at 367.
[64] *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995) (the court rejected the respondent's argument that she because she was coerced, her residence was not voluntary, and concluded that courts should focus on the child in determining habitual residence, not the parent).
[65] Convention, Art. 5.
[66] *Abbott v. Abbott,*130 S. Ct 1983, 560 U.S. 1, 11-12, 176 L.Ed. 2d 789 (2010).
[67] *Friedrich v. Friederich*, 78 F.3d 1060, 1065 (6th Cir. 1996).
[68] *In re Parentage of C.A.M.A.*, 103 Wn. App. 1032, WL 1726964 (Wn. App. 2000) (the court ruled, however, that although Germany was the child's habitual residence, a German custodial decree awarding custody to a German youth office, did not confer rights to the exclusion of the parents; thus, the parent's retention of the child in America was not wrongful).

Rights of Access. Courts distinguish between rights of custody and rights of access.[69] While a court may require the removing parent to take certain steps to ensure a parent's right of access (such as visitation rights), there is no return remedy when a parent removes a child in violation of a right of access.[70] However, a New York state court, in *David S. v. Zamira*,[71] upheld a Canadian court's finding that the violation of visitation rights may constitute a wrongful removal for the purposes of the Convention.[72] International courts have also held visitation rights, insofar as they confer rights to influence the child's actual residence, satisfy the Convention's definition of custody rights.[73]

In an unpublished opinion, a Washington appellate court held that visitation rights do not trigger the Convention's return remedy, and found the *Zamira* case distinguishable, noting a restriction clause in the parties' separation agreement.[74] By contrast, the Washington court ruled, the custody order at issue in the Washington case contained no provision restricting the respondent's residence.[75]

F. Exceptions to Ordering a Return under the Hague Convention

Two factors limit application of the Convention's defenses to a child's return. First, exceptions under the Convention are to be narrowly construed.[76] Second, even if the conditions for one of the exceptions are met, the Convention gives courts discretion to return the child to the country of habitual residence if return furthers the aim of the Convention.[77]

---

[69] The distinction is based on the notion of rights of custody and rights of access as identified in the Convention, Art. 5. The Convention further stipulates that "only a parent with rights of custody may petition a court for an order of return." Convention, Art. 12.
[70] *Abbott v. Abbott,* 130 S. Ct 1983, 560 U.S. 1, 13, 176 L.Ed. 2d 789 (2010).
[71] *In the Matter of David S. v. Zamira*, 151 Misc.2d 630, 574 N.Y.S.2d 429 (1991).
[72] *In the Matter of David S. v. Zamira*, 151 Misc.2d 630, 632-33, 574 N.Y.S.2d 429 (1991).
[73] *C. v. C.*, 2 All E.R. 465 (Eng. C.A. 1989). The court's larger conclusion has been followed by courts elsewhere, which held that if the custodial parent needs permission from the court or non-custodial parent before removing the child from the country, a removal without permission is wrongful. See *Thomson v. Thomson*, S.C.R. 551 (Can. 1994); *B. v. B.*, Fam. 32 (Eng. C.A. 1992). For a law review article considering the subject, see Merle H. Weiner. *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*. 33 Colum. Hum. Rts. L. Rev. 275 (2002).
[74] *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).
[75] *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).
[76] 42 U.S.C. § 11601(a)(4); Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (1986); *accord Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).
[77] Convention, Art. 18; Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed. Reg. 10494, 10509 (1986); *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); *De Silva v. Pitts*, 481 F.3d 1279, (10th Cir. 2007.

1. Petitioner Consent or Acquiescence

The judicial authority of the requested State is not bound to order the return of the child if the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention.[78]

ICARA requires the respondent to demonstrate, by a preponderance of the evidence,[79] that the petitioner consented to or subsequently acquiesced in the removal or retention.

Some courts, including one in the Ninth Circuit, distinguish between consent prior to removal and subsequent acquiescence, either of which may extinguish the right of return.[80]

To establish acquiescence or consent, courts have required acts or statements with requisite formality, such as testimony in a judicial proceeding, a convincing written renunciation or rights, or a consistent attitude over a significant period of time.[81] The absence of any meaningful effort to obtain return of the child has been found by some courts to be sufficient to establish the exception.[82]

A petitioner's repeated actions to locate the child, however, are inconsistent with any claim of acquiescence.[83] A respondent's act of concealing removal is inconsistent with any claim of consent.[84] Additionally, any allegation of prior consent is undermined by filing a petition pursuant to the Convention.[85] A petitioner's failure to exercise obligations under a custody agreement does not constitute consent where the agreement giving custody was rescinded before removal and the petitioner's subsequent action fails to show consent to removal.[86]

---

[78] Convention, Art. 13(a); *Walker v. Walker* (7th Cir. 2012).
[79] 42 USC § 11603(e)(2)(B).
[80] *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir. 2001) (appellate court found that the petitioning mother consented to removal and trial court did not err by not addressing the petitioner's argument that she did not subsequently acquiesce or that she revoked her consent after removal occurred). The distinction is also made in *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996) and *Levesque v. Levesque*, 816 F. Supp. 662, (D. Kan. 1993). The *Gonzales-Caballero* Court rejected the conflation of consent and subsequent acquiescence implied in *Currier v. Currier*, 845 F.Supp. 916 (D.N.H. 1994).
[81] *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (6th Cir. 1996); *Simcox v. Simcox* 511 F.3d 594 (6th Cir. 2007).
[82] *In re Ponath*, 829 F.Supp. 363, 368 (D. Utah 1993).
[83] *Furnes v. Reeves*, 362 F.3d 702, 724 (11th Cir. 2004); *accord Wanninger v. Wanninger,* 850 F.Supp. 78 (D. Mass. 1994).
[84] See *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).
[85] See *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000)
[86] *Currier v. Currier*, 845 F.Supp. 916, 922 (D.N.H. 1994); see also *Levesque v. Levesque*, 816 F.Supp. 662, 667 (D. Kan. 1993) (court failed to find acquiescence where petitioning parent revoked and rescinded

2. Child Attains an Age of Maturity

The judicial authority of the requested State may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.[87]

ICARA requires the respondent to prove by a preponderance of the evidence[88] the child has attained an age of maturity.

An opinion from the Ninth Circuit instructing a district court on remand noted the importance of a court ensuring a child's statements reflect his or her "own, considered views."[89] Courts are given broad discretion in determining the sufficiency of the child's age and maturity and the extent to which a child's preference is viewed conclusively.[90] Some courts, however, have narrowly construed the defense.[91] In a Ninth Circuit holding, the defense was not sustained when the child had not yet completed kindergarten.[92]

In an unpublished opinion, a Washington appellate court found that the record of evidence was insufficient to overturn a trial court's finding that an eleven-year-old was of sufficient age and maturity.[93]

---

a custody agreement prior to respondent's signature, and petitioner's subsequent action failed to show acquiescence).

[87] Convention, Art. 13. Note also that the Convention ceases to apply when the child attains the age of 16 years. Convention, Art. 4.

[88] 42 U.S.C. § 11603(e)(2)(B).

[89] *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005).

[90] *Blondin v. Dubois*, 238 F.3d 153, 166 (2nd Cir. 2001) (an eight-year old's views were properly considered as part of the analysis under the grave-risk exception; the court rejected drawing arbitrary lines due to age and that each child's circumstances should be considered individually).

[91] See *England v. England* 234 F.3d 268, 272 (5th Cir. 2000) (court held, given facts of the case, a 13-year was not sufficiently mature); *Tahan v. Duquette*, 259 N.J. Super. 328, 613 A.2d 486 (N.J. 1992) (court held that the standard simply does not apply to a nine year old).

[92] *Holder v. Holder*, 392 F. 3d 1009, 1017 (9th Cir. 2004).

[93] *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003).

3. Passage of One Year/Child Settled

A child who has been wrongfully removed or retained is presumed to be a habitual resident of the state from which the child is removed if, at the commencement of proceedings, a period of less than one year has elapsed from the date of the wrongful removal or retention. Even where the proceedings are commenced after the expiration of the period of one year, the court shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment.[94] Equitable tolling does not apply to the one-year period.[95]

ICARA requires the respondent to demonstrate both of these elements (petition filed later than one year after removal, and child is well settled), by a preponderance of the evidence.[96] Even if the respondent meets this burden, the court retains the discretion to order the return of the child if it would effectuate the purpose of the Convention.[97] Some courts have exercised the discretion to grant removal despite finding that the well-settled exception applies.[98]

When considering whether a child is well-settled, courts have cited, among other things, the age of the child, the duration of the child's residence in the new country, the duration of attendance at a new school, the child's establishment of a social life, close connections to family members, activities that the child is engaged in, such as sports, and whether the parent has maintained stable employment or a stable source of support for the child.[99] In an unpublished opinion, a Washington appellate court held that the exception applied, finding that a year had passed, the child's whereabouts were not concealed from the petitioner, and the child was well-settled.[100]

---

[94] Convention, Art. 12.
[95] *Lozano v. Montoya Alvarez,* 571 U.S.___, 134 S. Ct. 1224, 1232 (2014).
[96] 42 U.S.C. § 11603(e)(2)(B).
[97] Convention, Art. 18.
[98] *See, In re Marriage of Jeffers,* 992 P.2d 68 (Colo.App. 1999).
[99] *Wojcik v. Wojcik*, 959 F.Supp. 413, 420 (E. D. Mich. 1997). *Muhlenkamp v. Blizzard,* 521 F. Supp. 2d 1140 (E.D.Wash. 2007) (three year-old child was well-settled where there were significant family ties, established friendships, and participation in cultural events); *Etienne v. Zuniga,* 2010 WL 4918791 (W.D. Wash. 2010) (Eight-year-old child was well-settled because she had consistently attend the same school and church, participated in church activities and swimming, had friends and family networks, and parent's occasional unemployment and housing instability had not deprived child of basic needs). Where the defense was not established, one court concluded a three-year-old and one-year-old were too young to forge friendships and were not yet involved in school, community, or social activities. *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 433 (N.Y.Fam.Ct.1991).
[100] *Terron v. Ruff*, 116 Wn. App. 1019, 2003 WL 1521967 (Wn. App. 2003) (the court held that no evidence established the child was not well-settled, as he adjusted to life and school in Washington and spends time with the family of his mother, the respondent.)

4. Petitioner Not Exercising Custodial Rights

The judicial authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention.[101]

ICARA requires the respondent to prove by a preponderance of the evidence[102] that the petitioner was not actually exercising custodial rights at the time of removal or retention.

Exercising custodial rights has been broadly construed. Under the Convention, if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to exercise those custody rights short of acts that constitute clear and unequivocal abandonment of the child. Once a court determines that the parent exercised custody rights in any manner the court should avoid the question of whether those rights were exercised well or badly.[103]

5. Grave Risk

The judicial authority of the requested State is not bound to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[104]

ICARA requires the respondent to demonstrate, by clear and convincing evidence,[105] that the return of the child would expose the child to a grave risk. Considerable inconsistency exists between the way state, district, and federal appellate courts have interpreted the grave risk defense.

The defense is narrowly construed. Courts have indicated that the defense was not intended to be used as a vehicle to litigate the child's best interests or place the child where he or she would be happiest.[106] Rather, it is a question of whether, if returned, the child will suffer

---

[101] Convention, Art. 13(a); *Walker v. Walker* (7th Cir. 2012).
[102] 42 USC § 11603(e)(2)(B).
[103] *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996).
[104] Convention, Art. 13(b).
[105] 42 USC § 11603(e)(2)(A).
[106] Hague Convention on International Child Abduction, Text and Legal Analysis, 51 Fed.Reg. 10494, 10510 (1986); *Gaudin v. Remis*, 415 3d. 1028 (9th Cir. 2005); *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (ruling the exception is not license to speculate on where the child would be happiest).

serious abuse.[107] While the defense is often cited in situations where the respondent alleges abuse by the petitioner, some courts may not consider the defense if a separate defense is raised and established.[108] A number of courts have refused to apply the defense, even if evidence demonstrates the return would risk physical harm to the petitioner, concluding the harm must be directed at the child.[109]

In remanding a case to the district court, the Ninth Circuit opined that the grave risk inquiry should be concerned only with the degree of harm which could occur in the immediate future.[110]

a. Domestic Violence and the Risk of Return

Some courts have held that the existence of domestic violence would constitute a sufficiently grave risk of physical or psychological harm if the child was returned.[111] Courts routinely consider evidence of past physical and/or psychological abuse to the child, and to some extent, the parent, as well as the likelihood of harm to the child upon return. However, in finding the defense established, determinations have not been made from uniform fact patterns.[112] A district court in Washington State, finding the

---

[107] *Gaudin v. Remis*, 415 3d. 1028, 1034 (9th Cir. 2005) (citing *Blondin v. Dubois*, 238 F.3d 153, 163 (2nd Cir 2001); *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).

[108] See *Wojcik v. Wojcik*, 959 F.Supp. 413, 421 (E.D. Mich. 1997).

[109] A district court in Puerto Rico held that there was no grave risk because abuse was not directed at the child and did not have the intensity of the petitioner in *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (see footnote 113). *Aldinger v. Segler*, 263 F. Supp.2d 284. A district court in Illinois held that while the return would pose physical risk to the petitioning mother, physical and psychological risks to the child were not conclusively established. *Tabacchi v. Harrison*, 2000 WL 190576 (N.D. Ill 2000).

[110] *Gaudin v. Remis*, 415 3d. 1028, 1036 (9th Cir. 2005) (the court further noted that in the absence of physical abuse or extreme maltreatment, even a living situation capable of causing grave psychological harm over the full course of a child's development is not necessarily likely to do so during the period necessary to obtain a custody determination).

[111] The U.S. Supreme Court recognized that domestic violence could constitute grave risk in *Abbott v. Abbott,* 130 S. Ct 1983, 560 U.S. 1, 176 L.Ed. 2d 789 (2010) (application of the grave risk exception was not before the Court, but the Court opined that return remedy may be inappropriate, if, on remand, mother could establish that her own safety would be at grave risk if the children were returned, and that this may be sufficient to demonstrate that the children would be exposed to "psychological harm" or an "intolerable situation" within the meaning of the Hague Convention).

[112] Courts finding the defense established include: *Ermini v. Vittori*, 758 F.3d 153 (2d Cir. 2014) (children would not be returned to Italy because of grave risk to children resulting from father's domestic violence towards mother and children; court also considered autism treatment available to one child in the U.S. that was not available in Italy); *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544 (E.D. Pa. 2010) (court refused to return children because they were at grave risk of harm due to father's extensive violence, threats, and verbal abuse of the mother); *Blondin v. Dubois*, 238 F.3d 153 (2nd Cir. 2001) (if returned, children would face a recurrence of traumatic stress disorder considering petitioning father's past physical abuse of spouse was also directed at the child; court also found that France unable to provide necessary protection); *Walsh v. Walsh*, 221 F.3d 204 (1st Circuit 2000) (even though Ireland would issue appropriate protective orders,

defense established, held that spousal abuse is a factor to consider in determining whether grave risk applies because of the potential that the abuser will also abuse the child.[113]

Additionally, even where a child is found to face a grave risk if returned, courts require a comprehensive analysis of alternative care arrangements and legal safeguards that would facilitate safe repatriation, as well as the abilities of the authorities in the child's habitual residence to enforce any such arrangement.[114] The Ninth Circuit has suggested the question to be resolved, in examining the totality of circumstances, is whether any reasonable remedy can be forged that will permit the children to be returned to their home jurisdiction while avoiding the grave risk of harm that would otherwise result from living with the petitioner.[115]

Also, international courts considering the petitioner's abuse of the mother have held that the child's return would present a grave risk to the child, and subsequently denied requesting petitions.[116]

b. Social Context: Domestic Violence and the Convention

1) Focus on Left-Behind Parent

The Convention drafters focused on the rights of the left-behind parent, based on a view that the abducting

---

the appellate court noted the father's history of violating court orders and repeated abuse of the respondent found a return would pose a grave risk to the children; the court also noted that the district court inappropriately discounted the psychological harm to children in spousal abuse); *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456 (D. Md. 1999) (petitioning father had considerable history of physical and psychological abuse of child); *see also Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007); *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).

[113] *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057 (E.D. Wash. 2001) (sufficient evidence suggested petitioning father's past abuse of children would pose grave risk of physical and psychological harm; court found resources in Greece insufficient to ensure child safety).

[114] Analysis of the available protections in the child's habitual residence is considered in cases considering grave risk. However, the extent of the required analysis is not uniform; courts engaging in or requiring a more thorough analysis include: *Gaudin v. Remis*, 415 3d. 1028,1035 (9th Cir. 2005); *Blondin v. Dubois*, 238 F.3d 153 (2nd Cir. 2001); *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D. Wash. 2001); *Turner v. Frowein*, 253 Conn. 312, 752 A.2d 955 (Conn. 2000); *Tahan v. Duquette*, 259 N.J. Super. 328, 613 A.2d 486 (N.J. 1992).

[115] *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005) (citing *Blondin v. Dubois*, 189 F.3d 240, 249 (2nd Cir. 1999).

[116] See *Pollastro v. Pollastro*, [1999] D.L.R. 848 (Ontario, Canada 1999) (an Ontario appellate court held that the child's interests are inextricably tied to the mother's psychological and physical security; moreover, the court cited a series of risks resulting from the child's exposure to domestic violence).

parent is generally the non-custodial father.[117] This construction has produced an inaccurate picture of child abduction by ignoring the situations where either abduction does not harm the child or the harm experienced from abduction is significantly less than that which would result if the abduction had not taken place.[118]

2) Level of Domestic Violence in International Abductions

While existing studies suggest the presence of domestic violence in cases of international abduction, few studies have provided detailed information regarding the full extent to which international abductors are actually victims escaping domestic violence.

Recent research indicates that approximately one third of all published and unpublished Convention cases (identified using online legal databases) include a reference to family violence, and 70% of those include details of adult domestic violence.[119] According to a frequently cited study conducted in the United States, in cases of abduction, the majority (54%) involved parent-to-parent domestic violence.[120] 30% of the left-behind parents admitted to either being violent toward other family members or had been accused of it.[121] A separate domestic study revealed that mothers who abducted were more likely to take the children when they or the children were victims of abuse, and fathers who abducted were more likely to take the children when they were the abusers.[122]

3) Impact of Domestic Violence on a Child

---

[117] Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence.* 69 Fordham L. Rev. 593. (2000); see also Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*. Violence Against Women. Vol. 11 No. 1. 115-138. (2005).
[118] Weiner, 69 Fordham L. Rev. at 617-18.
[119] Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*. Violence Against Women. Vol. 11 No. 1. 115-138, 120 (2005).
[120] *Id.* at 121(citing G.L. Grief & R.L. Hegar, *When Parents Kidnap: The Families Behind the Headlines*. New York: Free Press (1993).
[121] *Id.* (citing *Grief and Hegar* at 268-269).
[122] J.R. Johnston, I. Sagutun-Edwards, M. E. Bloomquist, and L.K. Girdner, *Prevention of Family Abduction Through Early Identification of Risk Factors*. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Washington, D.C. (2000).

When a child is a victim of an assault or battery by a family member, the child abuse is obvious. However, recent research and social science suggests that a child's exposure to domestic violence may also have short and long-term consequences which may constitute a grave risk to the child's development. In particular, two areas of emerging social science research point to the risks a child faces in circumstances where domestic violence occurs: the increased risk of physical harm and the impact of exposure on the child's development. At least one American court has recognized the exposure to domestic violence as a sufficient risk to preclude the child's return under the Convention.[123]

While exposure to domestic violence can negatively impact children, arguments are made that domestic violence can be addressed in the country of the child's habitual residence. However, many countries signatory to the Convention have inadequate domestic violence laws or ineffective law enforcement.[124]

a) Grave Risk to the Child: Risk of Physical Harm

Evidence suggests that children who are exposed to adult domestic violence are at a greater risk of physical harm than children who are not. Reviews of the co-occurrence of documented child maltreatment in families where adult domestic violence is also occurring have found a 41% median co-occurrence of child maltreatment and adult domestic violence in families.[125] The majority of studies found a co-occurrence of 30% to 60%.[126]

b) Grave Risk to the Child: Impact on Development

---

[123] *See Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).
[124] Weiner, 69 Fordham L. Rev at 624 (citing Bureau of Democracy, Human Rights, and Labor, U.S. Department of State. *Country Reports on Human Rights*. (1999)). Victims may not be able to ensure safety because the victim has no place to go in the interim, does not speak the local language, may not have access to transportation or social service resources, may have no support, or may believe accessing legal redress will increase the immediate danger to herself and to her child. *Id*.
[125] A. E. Appel & G.W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*. Journal of Family Psychology. 12. 578-599 (1998).
[126] Jeffrey L. Edleson. *The Overlap Between Child Maltreatment and Woman Battering*. Violence Against Women. Vol. 5. 134-54 (1999).

Nearly 100 published studies report associations between exposure to domestic violence and current child problems or later adult problems even where the child is not directly abused.[127] For instance, several studies report that children exposed to adult domestic violence exhibit more aggressive and antisocial behaviors as well as fearful and inhibited behaviors.[128] Exposed children showed lower social competence[129] and were found to show higher than average anxiety, depression, trauma symptoms, and temperament problems than children not exposed.[130] These impacts have been shown to vary depending on the degree of violence, exposure, the presence of additional risk factors, such as substance abuse by caregivers, and protective factors, such as a protective parent or other adult.

6. Return Would Violate Human Rights

The return of the child may be refused if not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.[131]

ICARA requires the respondent to demonstrate, by clear and convincing evidence,[132] that the return of the child would violate fundamental principles of human rights.

No courts in the United States have used this defense as a justification for denying a return under the Convention. Internationally, however, a

---

[127] See Jeffrey L. Edleson. *Children's Witnessing of Adult Domestic Violence*. Journal of Interpersonal Violence. 14. 839-870 (1999); J. W. Fantuzo, J.W. & W.K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*. The Future of Children, 9. 21-32 (1999); G. Margolin, *Effects of Witnessing Violence on Children*. In P.K. Trickett and C.J. Schellenbach (Eds.), Violence Against Children in the Family and the Community. American Psychological Association, Washington, D.C. 57-101 (1998).
[128] Sudha Shetty & Jeffrey L. Edleson. *Adult Domestic Violence in Cases of International Parental Child Abduction*. Violence Against Women, Vol. 11 No.1, 115-138, 126 (2005) (citing Fantuzzo, J.W., Depaola, L.M., Lambert, L., Martino, T., Anderson, G., and Sutton, S. *Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children*. Journal of Consulting and Clinical Psychology, 59 (1991). 258-265; Hughes, H.M. *Psychological and Behavioral Correlates of Family Violence in Child Witness and Victims.* American Journal of Orthospsychiatry, 58 (1988) 77-90.
[129] *Id.* at 126 (citing J.L. Adamson and R.A. Thompson, *Coping With Interparental Verbal Conflict by Children Exposed to Spouse Abuse and Children from Nonviolent Homes*. Journal of Family Violence, 13 213-232 (1998).
[130] *Id*.
[131] Convention, Art. 20.
[132] 42 USC § 11603(e)(2)(A).

Spanish court refused a return on the basis of violating human rights and freedoms where it determined a fleeing mother would be deprived of due process in the courts of the child's habitual residence.[133] Also, two Australian courts have endorsed the defense in dicta.[134]

An analysis performed by the United States State Department claims that Article 20 was meant to be "restrictively interpreted and applied . . . on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[135] Courts which have ruled against application of the Article 20 defense have cited the State Department's analysis to support a strict reading of Article 20.[136]

Advocates have discouraged a strict interpretation of Article 20, arguing that the State Department's analysis extends the text of Article 20 and in fact, conflicts with the drafter's intent to include violations of parent's rights as well.[137] They argue that the phrase, "fundamental principles relating to the protection of human rights and fundamental freedoms," is ambiguous because the "fundamental principles" are undefined by Article 20.[138] However, these principles of the requested state can be established through an observation of other domestic and international laws, treaties, and constitutions concerning human rights and domestic violence.[139] As provided by the phrase "would not be permitted" a court can refuse return where there is a violation of any basic human right protected by these legal instruments.[140]

G. Recognition and Enforcement

1. Full Faith and Credit

Courts must accord full faith and credit to the judgment of any other U.S. court with jurisdiction that orders or denies the return of a child pursuant to the Convention.[141]

---

[133] *In Re S*., Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a.
[134] Dep't Families Youth & Cmty. *Care v. Bennett* 26 Fam. L. R. 71 (Fam. Ct. Austrl. 2000); *State Cent. Auth. v. Ardito* (Fam. Ct. Austrl. 1997) (No. ML 1481/97)
[135] Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed.Reg. 10,494, 10,510 (1986).
[136] *Hazbun Escaf v. Rodriquez*, 200 F.Supp.2d 603 (E.D.Va.2002); *Aldinger v. Segler*, 263 F.Supp.2d 284, 290 (D.P.R. 2003).
[137] Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 707-9 (2005).
[138] *Id.* at 711-14.
[139] Merle H. Weiner, *Using Article* 20, 38 Fam. L.Q. 583, 590 (2005).
[140] Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. Rev. 701, 711-12 (2005).
[141] 42 USC § 11603(g). Although ICARA calls for "full faith and credit" to the judgments of "any other such court…in an action brought under this chapter," judgments rendered by a foreign court are not entitled to full faith and credit as a general matter. American courts will nevertheless accord "considerable

Common Law Doctrine of International Comity.[142] ICARA appears to limit full faith and credit to judgments of courts within the United States;[143] however, nothing in ICARA or its legislative history indicates that Congress intended to bar United States courts from giving foreign judgments deference under principles of international comity.[144] Moreover, ICARA specifically recognizes the need for uniform international interpretation of the Convention.[145]

2. Res Judicata and Collateral Estoppel

The Ninth Circuit Court of Appeals has held that ordinary principles of claim and issue preclusion do not apply to claims under ICARA and the Convention.[146] Federal courts adjudicating Hague Convention petitions must accord full faith and credit only to the judgments of those state or federal courts that actually adjudicated a Hague Convention claim.[147] For instance, the Ninth Circuit rejected a petitioner's argument that a Convention proceeding should be precluded by a custody determination in the removed-to country, which preceded the Hague petition.[148]

H. Fees and Costs

The Convention and its enabling legislation require a court to order the respondent to pay the petitioner's necessary expenses if the court orders the return of the child[149] unless such an award would be "clearly inappropriate."[150]

---

deference to foreign adjudications as a matter of comity. *Velez v. Mitsak*, 89.S.W.3d 73, 82-83 (Tex.App. 2002).

[142] International comity is described as neither a "matter of absolute obligation...nor of mere courtesy and good will"… but as "the recognition which one nation allows within its territory to the legislative executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). See also *Restatement (Third) of the Foreign Relations Law of the United States* § 481 (1987).

[143] 42 USC § 11603(g).

[144] *Diorinous v. Mezitis*, 237 F.3d 133, 142 (2nd Circuit 2001). However, a long-recognized exception is that comity will not be afforded when it would be contrary to the public policy of the forum. This was a position taken in *Malik v. Malik*, 638 A.2d 1184 (Md. Ct. Spec. App. 1994), which involved a custody proceeding. Relying upon the decision in *Malik*, a Washington state appellate court concluded that even if a foreign court had jurisdiction to enter a custody decree, the Washington court could deny enforcement if it determined the foreign proceedings were conducted in a manner that offended Washington law and public policy. *Noordin v. Abdulla*, 947 P.2d 745, 759-62 (Wn App. 1997).

[145] 42 USC § 11601(b)(3)(B).

[146] *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002); *Gaudin v. Remis,* 415 F. 3d 1028 (9th Cir. 2005).

[147] *Holder* at 864 (applying 42 U.S.C. § 11603(g)).

[148] *Holder v. Holder* at 863-64 (9th Cir. 2002).

[149] The Convention, Article 26; 42 U.S.C. § 11067

[150] 42 U.S.C. § 11607(b)(3).

Reimbursable expenses must be reasonably necessary, not clearly inappropriate, and have been incurred during the course of the proceedings in the action.[151]

No provision in the Convention or ICARA awards fees to a prevailing respondent.

[151] 42 U.S.C. § 11607(b)(3); *Lebiedzinski v. Crane*, 2005 WL 906368 (D. Alaska).

APPENDIX A

Convention on the Civil Aspects of International Child Abduction

(Concluded October 25, 1980)

The States signatory to the present Convention,
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

Chapter I – SCOPE OF THE CONVENTION

Article 1
The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2
Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3
The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5
For the purposes of this Convention –

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Chapter II – CENTRAL AUTHORITIES

Article 6
A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7
Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;
b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
d) to exchange, where desirable, information relating to the social background of the child;
e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Chapter III – RETURN OF CHILDREN

Article 8
Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
b) where available, the date of birth of the child;
c) the grounds on which the applicant's claim for return of the child is based;
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
The application may be accompanied or supplemented by –
e) an authenticated copy of any relevant decision or agreement;
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State

of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
g) any other relevant document.

Article 9
If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10
The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11
The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12
Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14
In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15
The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16
After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17
The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18
The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19
A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20
The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Chapter IV – RIGHTS OF ACCESS

Article 21
An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise

of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Chapter V – GENERAL PROVISIONS

Article 22
No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23
No legalization or similar formality may be required in the context of this Convention.

Article 24
Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25
Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26
Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27
When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28
A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29
This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30
Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31
In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32
In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33
A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34
This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35
This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36
Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

Chapter VI – FINAL CLAUSES

Article 37
The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38
Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39
Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40
If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41
Where a Contracting State has a system of government under which executive, judicial and legislative

powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42
Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43
The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44
The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45
The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
(2) the accessions referred to in Article 38;
(3) the date on which the Convention enters into force in accordance with Article 43;
(4) the extensions referred to in Article 39;
(5) the declarations referred to in Articles 38 and 40;
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

APPENDIX B

International Child Abduction Remedies (ICARA)

Sec. 11601. Findings and Declarations

(a) Findings
The Congress makes the following findings:
(1) The international abduction or wrongful retention of children is harmful to their well-being.
(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations
The Congress makes the following declarations:
(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
(3) In enacting this chapter the Congress recognizes -
(A) the international character of the Convention; and
(B) the need for uniform international interpretation of the Convention.
(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

References in Text
This chapter, referred to in subsec. (b), was in the original 'this Act' meaning Pub. L. 100-300, Apr. 29, 1988, 102 Stat. 437, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

Short Title
Section 1 of Pub. L. 100-300 provided that: 'This Act (enacting this chapter and amending section 663 of this title) may be cited as the 'International Child Abduction Remedies Act'.'

Sec. 11602. Definitions

For the purposes of this chapter -

(1) the term 'applicant' means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term 'Convention' means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term 'Parent Locator Service' means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term 'petitioner' means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term 'person' includes any individual, institution, or other legal entity or body;

(6) the term 'respondent' means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term 'rights of access' means visitation rights;

(8) the term 'State' means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term 'United States Central Authority' means the agency of the Federal Government designated by the President under section 11606(a) of this title.

Sec. 11603. Judicial Remedies

(a) Jurisdiction of courts
The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions
Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice
Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case
The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof
(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence -
(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.
(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing -
(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention
For purposes of any action brought under this chapter -
(1) the term 'authorities', as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;
(2) the terms 'wrongful removal or retention' and 'wrongfully removed or retained', as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and
(3) the term 'commencement of proceedings', as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit
Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive
The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

Sec. 11604. Provisional Remedies

(a) Authority of courts
In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority
No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Sec. 11605. Admissibility of Documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Sec. 11606. United States Central Authority

(a) Designation
The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions
The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority
The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service
The United States Central Authority may, to the extent authorized by the Social Security Act (42 U.S.C. 301 et seq.), obtain information from the Parent Locator Service.

Sec. 11607. Costs and Fees

(a) Administrative costs
No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions
(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).
(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.
(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

Sec. 11608. Collection, Maintenance, and Dissemination of Information

(a) In general
In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States
Central Authority -
(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and
(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information
Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities
Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or

records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which -
(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or
(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States
Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service
To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping
The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

Sec. 11609. Interagency Coordinating Group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

Sec. 11610. Authorization of Appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

42 USC §§ 11601-11610

APPENDIX H

ABUSIVE LITIGATION AND DOMESTIC VIOLENCE SURVIVORS

by Legal Voice Violence Against Women Workgroup[1]

These materials are intended to assist in recognizing and addressing abusive litigation against domestic violence survivors. The term "abusive litigation" includes the misuse of court proceedings by abusers to control, harass, intimidate, coerce, and/or impoverish survivors. Although the practice is common, it does not have a generally recognized name. It has also been described as legal bullying, stalking through the courts, paper abuse, and similar terms.

Court proceedings can provide a means for an abuser to exert and reestablish power and control over a domestic violence survivor long after a relationship has ended. The legal system that a survivor believed would provide protection becomes another weapon that an abuser can use to cause psychological, emotional, and financial devastation.

Abusive litigation against domestic violence survivors arises in a variety of contexts. Family law cases such as dissolutions, parenting plan actions or modifications, and protection order proceedings are particularly common forums for abusive litigation. It is also not uncommon for abusers to file civil lawsuits against survivors, such as defamation, tort, or breach of contract claims. Even if a lawsuit is meritless, forcing a survivor to spend time, money, and emotional resources responding to the action provides a means for the abuser to assert power and control over the survivor.

It is important for courts to recognize when litigation is being misused as a tool of abuse and to take appropriate steps to curb such actions.

I. Recognizing Abusive Litigation and Its Impact on Survivors

A. Common Abusive Litigation Tactics

Abusers may use a wide range of tactics against domestic violence survivors in the legal system. Domestic violence survivors and advocates report that common tactics used by abusers include:

1. Protection Order Cases

[1] The Legal Voice Violence Against Women Workgroup conducted numerous interviews with survivors of domestic violence, advocates, attorneys, and judicial officers in drafting these materials. Workgroup members who contributed to these materials include Antoinette Bonsignore, Erica Franklin, Michelle Camps Heinz, Bess McKinney, Mary Przekop, Evangeline Stratton, and David Ward.

- Portraying themselves as the victim by seeking their own protection orders against the survivor and/or the survivor's friends and family.

2. Family Law Cases

- Seeking sole or primary custody of a child as punishment or retaliation for leaving, seeking a protection order, or seeking court-ordered financial support.

- Filing repeated motions to modify the terms of parenting plans, child support orders, or protection orders.

- Bringing contempt motions against a survivor without cause.

- Portraying the survivor as an unfit and incompetent parent, including making requests for mental health evaluations in an attempt to undermine the survivor.

- Reneging on agreements developed through mediation or settlement negotiations.

- Perpetuating the myth that women will fabricate domestic violence allegations and pursue a protection order simply for use as leverage in divorce and child custody proceedings.[2]

3. General Litigation Tactics

- Filing frivolous motions, appeals, motions for revisions, and motions for reconsideration of court orders.

- Attempting to re-litigate issues that have already been decided by the court.

- Bringing similar or parallel litigation in a different court or county after receiving unfavorable rulings.

- Abusing the discovery process by seeking embarrassing or irrelevant information about the survivor and by demanding excessive discovery.

---

[2] Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court* Practices, 3 Domestic Violence Report 67, 67 (1998).

- Delaying or protracting court proceedings as long as possible, such as by repeatedly seeking continuances or frequently changing attorneys, in order to prolong the abuser's control over the survivor and deplete the survivor's financial and emotional resources.

- Deliberately refusing to comply with court orders, forcing the survivor to spend money, time, and energy to enforce the orders.

4. Threats and False Reports

- If the survivor is an immigrant, threatening to make reports to immigration authorities to have the survivor deported and possibly to separate the survivors from their children.

- Making false reports to Child Protective Services (CPS).

- Falsely reporting to the police and/or courts that the survivor is abusing drugs or alcohol or withholding court-ordered access to children.

5. Retaliatory Lawsuits

- Suing a survivor for defamation if the survivor reports the abuse, or suing the survivor for other tort or breach of contract claims.

- Suing or threatening to sue anyone who helps the survivor, including friends, family, advocates, lawyers, and law enforcement officials.

6. Actions Against Judicial Officers and Attorneys

- Attempting to have a judge disqualified from a case, filing judicial conduct complaints, and/or suing a judicial official after receiving an unfavorable ruling.

- Filing bar complaints or lawsuits against the survivor's attorney, in order to intimidate the attorney from continuing representation.

- Repeatedly contacting survivor's attorney in order to harass the attorney or to increase the survivor's legal fees

B. Impact of Abusive Litigation on Survivors

Abusive litigation has serious impacts on survivors of domestic violence. Survivors and advocates report that effects of abusive litigation may include:

1. Loss of Trust in the Legal System

Survivors who face abusive litigation come to view the legal system as a forum for abuse and lose trust in the legal system. These experiences may deter survivors from leaving abusive relationships or from seeking legal remedies or police assistance because doing so may expose them to protracted litigation or the loss of custody of their children.

2. Forced Contact With Abusers

Court proceedings allow abusers to compel survivors to have contact with them after a relationship has ended, particularly in cases where a couple has children together. Litigation enables abusers to maintain control over survivors, especially when the survivor is self-represented and must confront the abuser in court alone every time a matter is heard. This can be particularly problematic when the abusive partner is self-represented and can directly question the survivor in court.

3. Coercion to Make Concessions in Order to End Litigation

The threat of abusive litigation can be used to compel survivors to make concessions in order to end the litigation. This is particularly a danger in child custody and child support proceedings. Abusive litigation may lead to a survivor "relinquishing custody of the children, giving up demands for child support, giving in to less desirable resolutions in order to end the fight, or even returning to the batterer out of fear or necessity."[3]

4. Financial Impacts

Abusive litigation often causes survivors financial devastation. Deliberately running up legal expenses is one of the most common strategies of abusers, in the hopes of leaving the survivor without representation and causing emotional distress and anxiety.

Survivors also suffer financial impacts if they are forced to miss work or pay for child care in order to appear in court. Some survivors report that they are

[3] Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. Soc. Just. 1053, 1084 (2011).

unable to keep jobs because they must constantly appear in court or respond to legal filings.

Abusers may also try to use the resulting financial devastation against the survivor in custody disputes to suggest the survivor is now incapable of providing a stable and secure home because of a lack of financial resources.

5. Emotional and Psychological Impacts

Court proceedings are emotionally and psychologically difficult for many litigants. However, domestic violence survivors are particularly vulnerable when an abuser uses the litigation process as a tool of harassment and control.

Survivors report living in fear that they will be served with legal papers and forced to appear in court to defend themselves or to keep their children. They must keep meticulous records of all matters related to their children to be ready for the next time they face a motion for contempt or a parenting plan modification. They know that any action they take—starting a new relationship, being late to a custody exchange, making decisions about a child's education or medical care—may cause the abuser to file a new legal proceeding or motion against them.

6. Isolation from Support Networks and Attorneys

Abusers sometimes threaten to sue a survivor's friends, family members, advocates, or others who provide support to the survivor. Such threats can be an effective way to isolate a survivor from support networks.

Abusive litigation may also cause a survivor to lose legal representation. Many attorneys cannot continue to represent a survivor when faced with constant motions and court appearances, particularly if the survivor is unable to pay. In addition, threats by an abuser to sue or to file a bar complaint against the survivor's attorney may result in the attorney withdrawing from the case.

C. Why Do Abusers Use Abusive Litigation?

Litigation is a way that abusers can attempt to reestablish and retain control over a survivor, particularly when other forms of contact with the survivor have been restricted. The need to reassert control after the survivor physically separates from the batterer manifests itself in litigation tactics that are designed to overwhelm the survivor's life.

Abusive litigation is often prompted by a survivor's decision to leave or separate. Trigger points may include filing for divorce or for a protection order, reporting physical abuse, or calling police for assistance.

D. Prevalence of Abusive Litigation Against Survivors

There is not yet statistical data regarding the prevalence of abusive litigation against domestic violence survivors. However, narrative studies describing abusive litigation tactics have noted its prevalence, as reported by domestic violence survivor advocates around the country.[4]

1. Battered Mothers' Testimony Projects

The Battered Mothers' Testimony Project (BMTP) at the Wellesley Centers for Women[5] and the Arizona Coalition Against Domestic Violence Battered Mothers' Testimony Project[6] have documented abusive litigation from narrative research derived from domestic violence survivors.

The Wellesley BMTP involved interviews with 40 domestic violence survivors. The report concluded:

> [T]here are batterers who use the family court system as a tool for ongoing harassment, retaliation, and intimidation of battered mothers. This misuse of the court process often goes unpunished, resulting in financial as well as emotional harm to women and children. The specific litigation abuse tactics include filing multiple harassing, baseless, or retaliatory motions in court. . . . Nearly half of the survivors reported to us that their ex-partners made false allegations against them, such as accusing them of abusing, neglecting, or kidnapping the children, of denying the fathers visits with the children, of being a flight risk, and of using drugs. . . . Finally, more than half of the survivors stated that their ex-partners were using parallel actions in courts of different jurisdictions to manipulate the courts to their advantage.[7]

The Arizona BMTP involved interviews with 57 domestic violence survivors and found:

---

[4] Susan L. Miller and Nicole L. Smolter, "*Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011).
[5]Battered Mothers' Testimony Project at the Wellesley Centers for Women, *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* (Nov. 2002).
[6]Arizona Coalition Against Domestic Violence, *Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003).
[7] Kim Y. Slote et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women 1367, 1387-88 (2005).

- By and large, the systems of control the perpetrator established pre-divorce, including physical and sexual violence and child abuse, were maintained post-separation with the added ability to use the court system to abuse the victims.

- 84% of the study participants "reported that their ex-partners continued to use money to control them, primarily through the creation of high legal expenses." In addition, participants reported that "the abuser used the legal system itself as a means of harassment and continued abuse."[8]

- In the words of one survivor: "The most horrible sufferings have been not only physical, they have been emotional, psychological and financial! He never stops harassing me—the courts are his legal playgrounds! He uses the courts to inflict suffering—he constantly and I do mean constantly has me in court—his lawyer helps him to wear us out. . . . The end is never coming—it never ends!"[9]

2. Reports from Washington Attorneys and Advocates

Attorneys and advocates in Washington who work with domestic violence survivors also report a high prevalence of abusive litigation against survivors. Reports include:

- An attorney who represents survivors indicated that nearly every case she takes involves abusive litigation, particularly in cases where the survivor had been self-represented. The attorney describes abusive litigation as a "constant barrage" that overtakes the survivor's life.

- Other attorneys report that abusers commonly "bury the survivor in documents by filing lots of motions," requiring frequent court appearances. "Survivors end up missing a lot of work and often end up losing their jobs."

- Another attorney stated that she has seen countless instances of abusive litigation against survivors in family law matters. Common tactics include seeking sole custody of children and prolonging litigation. She reports that such litigation "takes an enormous toll" and often results in survivors "relenting and giving in, just to make it stop."

[8]Arizona BMTP at 39.
[9]*Id*. at 88.

II. The Court's Inherent Authority to Control Abusive Litigants

Courts have considerable authority to respond to abusive litigation tactics, while upholding litigants' constitutional rights to access to the courts. Much of this authority is based on the court's inherent authority to control the conduct of litigants.

A. Courts Have Inherent Authority to Curb Abusive Litigation

Courts have inherent authority to facilitate the orderly administration of justice. RCW 2.28.010(3) provides that "[e]very court of justice has power… [t]o provide for the orderly conduct of proceedings before it or its officers."

This authority provides broad power for courts to address abusive litigation tactics. *Yurtis v. Phipps*, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) ("In Washington, every court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings. Accordingly, a court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process.").

This authority is also consistent with CR 1, which provides that Washington's Civil Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

B. Exercising this Inherent Authority is Essential to Delivering Justice for Domestic Violence Survivors

In the absence of judicial intervention, domestic violence survivors facing abusive litigation tactics may be denied meaningful access to justice. *In re Marriage of Brown*, 147 Wn. App. 1020 (2008) (unpublished).[10]

By monopolizing limited resources, abusive litigants may also seriously impact the judicial system at large. *Yurtis*, 143 Wn. App. at 693 (recognizing "the potential for abuse of this revered system by those who would flood the courts with repetitious, frivolous claims which already have been adjudicated at least once"); *In re Sindram*, 498 U.S. 177, 179-180 111 S. Ct. 596, 597 (1991) ("The goal of fairly dispensing justice…is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests.").

To safeguard the integrity of the judicial system, courts have an obligation to restrain abusive litigants. *In re Marriage of Giordano*, 57 Wn. App. 74, 77-78, 787

[10] Several unpublished cases are cited in this chapter because there are few published cases regarding abusive litigation against domestic violence survivors. The reader is cautioned that unpublished decisions by Washington appellate courts are not precedential and may not be cited to the courts of Washington. GR 14.1.

P.2d 51 (1990) ("If access is to be guaranteed to all, it must be limited as to those who abuse it"); *cf. In re McDonald*, 489 U.S. 180, 184, 109 S. Ct. 993 (1989) ("A part of the Court's responsibility is to see that [judicial] resources are allocated in a way that promotes the interests of justice.").

C. Abusive Litigation May Be Restrained Without Compromising the Constitutional Rights of Litigants

There is no absolute and unlimited constitutional right of access to courts. *Giordano*, 57 Wn. App. at 77 (quoting *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554 (3d Cir. 1985)); *accord In re Marriage of Lilly*, 75 Wn. App. 715, 719, 880 P.2d 40 (1994).

Due process requires "only that the individual be afforded a reasonable right of access, or a meaningful opportunity to be heard, absent an overriding state interest." *Yurtis*, 143 Wn. App. at 694; *see also Giordano*, 57 Wn. App. at 77. The requirement that litigation proceed in good faith and comply with court rules "has always been implicit in the right of access to the courts." *Giordano*, 57 Wn. App. at 77. Thus, within certain parameters, courts may limit access to the court system to abusive litigants while maintaining constitutional guarantees.

While the trial court may regulate access to the courts, it must ensure that "the party can still access the court to present a new and independent matter." *Bay v. Jensen*, 147 Wn. App. 641, 657, 196 P.3d 753, 761 (2008). Similarly, an order restricting access to the courts must not be absolute and, instead, should provide a "safety valve for emergencies." *See Giordano*, 57 Wn. App. at 78; *Bay*, 147 Wn. App. at 762.

D. Courts Have Broad Authority to Fashion Injunctive Relief to Curtail Abusive Litigation.

Courts may issue far-reaching injunctive relief upon a specific and detailed showing of a pattern of abusive and frivolous litigation. *Whatcom County v. Kane*, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981); *see also Burdick v. Burdick*, 148 Wash. 115 (1928) (upholding order enjoining an action brought purely for vexatious purposes); *Yurtis*, 143 Wn. App. at 696 (barring litigant from "filing any appeals or further claims" against opposing party); *Giordano*, 57 Wn. App. at 78 (upholding trial court's imposition of moratorium on motions).

In fashioning injunctive relief, the trial court should avoid issuing a more comprehensive injunction than is necessary to remedy proven abuses. *Whatcom County*, 31 Wn. App. at 253. If appropriate, the court should consider less drastic remedies. *Id.*

Pursuant to CR 65(d), courts deploying injunctive relief to address abusive litigation must state the reasons for doing so. *Id.* (requiring a specific and detailed showing of a pattern of abusive and frivolous litigation); *Yurtis*, 143 Wn. App. at 693 (noting that proof of mere litigiousness is insufficient); CR 65(d). Finally, as noted above, an order restricting access to the courts must provide a "safety valve for emergencies" and may not bar "access to the court to present a new and independent matter." *Bay*, 147 Wn. App. at 657-62.

A state court may not enjoin a litigant from filing new actions in *federal* court. *Giordano*, 57 Wn. App. at 78-79.

Because the court has inherent power to rein in the conduct of disruptive litigants, the court may issue injunctive relief *sua sponte*. *Yurtis*, 143 Wn. App. at 693.

E. Tools to Exercise Inherent Authority

RCW 2.28.010(3) provides a court with broad power to provide for the orderly conduct of proceedings before it or its officers. This provides courts considerable discretion and creativity in fashioning remedies to curb abusive litigants. *Yurtis*, 143 Wn. App. at 693. The list that follows is a non-exhaustive sampling of available mechanisms for combating abusive litigation.

- **Require authorization for the filing of new actions**. *See Harmon v. Bennett*, 126 Wn. App. 1064 (2005) (unpublished) (affirming trial court order prohibiting abusive litigant from filing further lawsuits without express permission from court); *In re Martin-Trigona*, 763 F.2d 140, 142 (2d Cir. 1985) (upholding order enjoining vexatious litigants from filing "any new lawsuit, action, proceeding, or matter in any federal court, agency, tribunal, committee, or other federal forum of the United States" without leave of the forum).

- **Impose conditions on the filing of new actions or appeals**. *Ng v. Quiet Forest II Condominium Owners Ass'n*, 92 Wn. App. 1026 (1998) (unpublished) (upholding trial court order enjoining litigant from filing new actions without meeting certain conditions where litigant had filed multiple duplicative lawsuits and had not responded to sanctions). *Lysiak v. Comm'r of Internal Revenue*, 816 F.2d. 311 (7th Cir. 1987) (requiring abusive litigant to seek the court's leave to appeal and, in so doing, certify that his appeal is taken in good faith and that the claims he raises are not frivolous, and that they have not been raised and disposed of on the merits by this Court in previous appeals).

- **Require abusive litigant to attach court opinions, previous filings, and/or order of injunction to all subsequent filings.** *Harrison v. Seay*, 856 F. Supp.

1275 (W.D. Tenn. 1994) (barring abusive litigant from filing future complaints without attaching a copy of the injunction and an affidavit listing all pending suits and all previous actions involving the same defendants).

- **Limit number of allowable filings.** *In re Marriage of Giordano*, 57 Wn. App. at 78 (upholding moratorium on motions until trial, with certain exceptions); *In re Tyler*, 839 F.2d 1290 (8th Cir. 1988) (limiting number of allowable in forma pauperis petitions per month).

- **Require abusive litigant to post a bond for attorneys' fees at outset**. *Berry v. Deutsche Bank Trust Co. Americas*, 632 F. Supp. 2d 300, 307-08 (S.D.N.Y. 2009) (requiring plaintiff to post appeal bond based on history of duplicative and meritless filings and failure to pay previous fee awards).

- **Enjoin further actions or appeals.** *Burdick v. Burdick*, 148 Wash. 115 (1928) (upholding order enjoining an action brought purely for vexatious purposes); *Yurtis*, 143 Wn. App. at 696 (barring litigant from filing any appeals or further claims against opposing party).

- **Condition further proceedings on payment of attorneys' fees and/or sanctions.** *In re Marriage of Lily*, 75 Wn. App. at 720 (upholding trial court order prohibiting further proceedings until attorneys' fees award for intransigence had been paid); *Stevenson v. Canning*, 166 Wn. App. 1027 (2012) (unpublished) (conditioning abusive litigant's right to participate further in proceedings on payment of sanctions owed).

- **Retain jurisdiction over a matter to control abusive litigation tactics.** *In re Marriage of Hollingshead*, 157 Wn. App. 1039 (2010) (unpublished) (upholding trial court's retention of jurisdiction as a proper restriction on abusive litigant).

- **Impose sanctions.** *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000) (discussing court's inherent authority to sanction litigation conduct outside the context of Rule 11); *see generally* CR 11 (allowing sanctions to be imposed by trial court); RAP. 18.9 (allowing sanctions to be imposed by appellate court).

III. Sanctions Under Civil Rule 11

In addition to the inherent authority of courts to control proceedings and litigants, Civil Rule 11 (CR 11) provides courts with an important tool to impose sanctions to curb abusive litigation tactics of litigants and/or attorneys.

A. CR 11 in the Context of Abusive Litigation

CR 11 was adopted to deter baseless filings, to curb abuses of the judicial system, and to reduce delaying tactics, procedural harassment, and mounting legal costs. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). The Rule requires that every pleading, written motion, or legal memorandum signed by an attorney or self-represented litigant to be:

- Well grounded in fact,
- Warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and
- Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A violation of CR 11 and consequent sanctions may be imposed sua sponte by the court. Courts have wide discretion as to how to sanction those violating CR 11. *Snohomish County v. Citybank*, 100 Wn. App. 35, 43, 995 P.2d 119 (2000). Although CR 11 sanctions often involve monetary sanctions, the rule provides discretion for courts to be creative in finding effective solutions to frivolous and improper litigation.

Washington's version of CR 11 is similar to its federal counterpart. Given the overall similarity, Washington state courts may look to the federal courts' interpretation of Federal Rule of Civil Procedure 11 for guidance. *Miller v. Badgley*, 51 Wn. App. 285, 300 n.10, 753 P.2d 530 (1988).

B. Scope of CR 11

CR 11 applies to every pleading, motion, and legal memorandum submitted to the court. This definition includes affidavits and declarations, as well as advocacy related to documents previously submitted to the court. *Miller*, 51 Wn. App. at 302-03 (holding that an affidavit was improper under CR 11); *MacDonald v. Korum Ford*, 80 Wn. App. 877, 881-82, 912 P.3d 1052 (1996) (holding that party violated CR 11 because it pursued claim even after deposition revealed it to be frivolous).

The rule requires that pleadings, motions, and legal memorandum submitted to the court be signed, either by an attorney of record or by a pro se litigant. A self-represented litigant may be sanctioned under CR 11. *In re Lindquist*, 172 Wn.2d 120, 136, 258 P.3d 9 (2011).

By its terms, CR 11 addresses two types of problems: (1) filings that lack a legal or factual basis or (2) filings interposed for any improper purpose. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217-20, 829 P.2d 1099 (1992). To sanction a party for violating CR 11, a court need only find that the party's filing either lacks a basis or is filed for an improper purpose.

1. Well Grounded in Fact and Law

CR 11 requires an attorney or self-represented litigant to undertake "an inquiry reasonable under the circumstances" prior to signing pleadings, motions and legal memorandum.

A nonexclusive list of factors that a court may consider when assessing whether an inquiry is reasonable and whether the subsequent document is well grounded in fact and law are: (1) time available to the signer; (2) whether a signing attorney accepted a case from another member of the bar; (3) the complexity of the factual and legal issues; and (4) the need for discovery to develop factual circumstances underlying a claim. *Miller*, 51 Wn. App. at 301-02.

The court may also consider the extent of the attorney's reliance upon the client for factual support, but an attorney's "'blind reliance' on a client . . . will seldom constitute a reasonable inquiry." *Id.*

Courts have rejected arguments that CR 11 sanctions will "chill an attorney's enthusiasm or creativity in pursuing new theories in an area of the law." *Layne v. Hyde*, 54 Wn. App. 125, 134-5, 773 P.2d 83 (1989). If a court finds that a legal argument "cannot be supported by any rational argument on the law or facts," then it is improper. *Id.*

2. Improper Purpose

An improper purpose under CR 11 encompasses filings that constitute delaying tactics, procedural harassment, and/or create mounting legal costs. *Bryant*, 119 Wn.2d at 219. The court need not find that the motions are frivolous if successive motions and papers have become so harassing and vexatious that they justify sanctions even if they are not totally frivolous. *Aetna Life Ins. Co. v. Alla Med. Serv., Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988).

The court is given wide discretion under CR 11 to determine what constitutes an "improper purpose." *Copper v. Viking Ventures*, 53 Wn. App. 739, 742-43, 770 P.2d 659 (1989). For example, Washington courts have found an improper purpose where:

- An attorney attempted to file multiple affidavits of prejudice. *Suarez v. Newquest*, 70 Wn. App. 827, 834, 855 P.2d 1200 (1993).

- A party threatened to "destroy" the opposing party and force her to "incur substantial legal costs. *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999).

C. Operation of CR 11

Prior to the imposition of sanctions under CR 11, either the moving party or the court itself should notify the offending party of the objectionable conduct and provide him or her with an opportunity to mitigate the sanction. *Biggs*, 124 Wn.2d at 198 n.2, 202. A general notice of possible CR 11 sanctions is sufficient. *Id.* If a party, rather than the court, moves for sanctions, it bears the burden to justify the motion.

A court evaluates the claims of a CR 11 violation using an objective standard: "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justifiable." *Bryant*, 119 Wn.2d at 220.

D. Permissible Sanctions Under CR 11

If an attorney or a party violates CR 11, courts have wide discretion to craft a sanction that is "appropriate."

CR 11 provides: "If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee."

While the sanction language of CR 11 explicitly authorizes monetary penalties, Washington courts have emphasized that a court's crafting of "appropriate" sanctions is most important. *Miller*, 51 Wn. App. at 303. What is appropriate will be a sanction that most effectively deters baseless filings and curbs the abuses of the judicial system. *Euster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 389 (2002). Thus, a sanction imposed under CR 11 must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. *Miller*, 51 Wn. App. at 300. The sanction may include nonmonetary directives. *Id.*

The sanctions fashioned by federal courts provide guidance for some possible non-monetary sanctions. For example, federal courts have sanctioned a party or an attorney by:

- Dismissing the entire case with prejudice. *Combs v. Rockwell Intl. Corp.*, 927 F.2d 486, 488 (9th Cir. 1991).

- Barring a litigant from filing similar suits without leave of the court. *Stone v. Baum*, 409 F. Supp. 2d 1164, 1171 (D. Ariz. 2005).

- Referring the matter to the state bar association. *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 808 (5th Cir. 2003).

- Resolving all disputes regarding jurisdictional issues in favor of the non-offending party. *Boron v. West Texas Exports, Inc.*, 680 F. Supp. 1532, 1537-38 (S.D. Fla. 1988).

E. Use of CR 11 Sanctions in Cases Involving Domestic Violence Survivors

There are few published cases that illustrate the use of CR 11 sanctions against an abusive litigant in the context of domestic violence. Indeed, it is been observed that relatively few cases involving sanctions under CR 11 reach the appellate level. Frederic C. Tausand & Lisa L. Johnson, *Current Status of Rule 11 In the Ninth Circuit and Washington State*, 14 U. Puget Sound L. Rev. 419, 443 (1991). However, those cases that do use CR 11 against abusive litigants in the context of domestic violence illustrate how the rule may be used to fashion appropriate sanctions.

In *Danvers v. Danvers*, for instance, the court affirmed the district court's imposition of Rule 11 sanctions against the plaintiff, the defendant's former husband, because he brought the claim to harass her and to increase her litigation costs. *Danvers v. Danvers*, 959 F.2d 601, 604 (6th Cir. 1992). The sanctions were the amount of the defendant's attorney's fees. The court noted the prior family law issues between the parties, including the "allegation of domestic violence." The husband's complaint "alleged a conspiracy between the defendant and the judge" that he alleged "deprived him of his constitutional right to a parental relationship with his son. These claims match common tactics used by abusers.

Given the language of CR 11 and the discretion it provides for effective sanctions, it can be a powerful tool in dealing with abusive litigation in the context of domestic violence. However, courts should be aware that a motion for CR 11 sanctions may also be misused by the abuser as a weapon against a survivor.

IV. Awarding Attorneys' Fees and Expenses

Washington law authorizes, and in some instances requires, courts to award attorneys' fees and expenses to a party who is subjected to frivolous, vexatious, or abusive litigation. Awards of

attorneys' fees can be an effective way to curb abusive litigation and send an important signal to survivors that the court will not tolerate abusive tactics.

A. Mandatory Awards of Attorneys' Fees in Family Law Cases

Washington statutes specify a number of instances in which courts are required to award attorneys' fees in family law proceedings when a party brings a baseless motion or otherwise disturbs the integrity of the process without good reason. For example:

- If the court finds that a motion for contempt for noncompliance or interference with a parenting plan was brought without reasonable basis, it "shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars." RCW 26.09.160(7).

- When a parenting plan provides an alternative dispute resolution process, "the court shall award attorneys' fees and financial sanctions to the prevailing parent" where it finds that "a parent has used or frustrated the dispute resolution process without good reason." RCW 26.09.184(4)(d).

- If a court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court "shall assess the attorney's fees and court costs of the nonmoving parent against the moving party." RCW 26.09.260(13).

B. Attorneys' Fees Based on the Resources of the Parties

RCW 26.09.140 provides a court may "from time to time after considering the resources of both parties" order a party to pay costs to the other party as well as attorneys' fees. The court may order that attorneys' fees be paid directly to the attorney, and in such cases, the attorney has the authority to enforce the order.

A trial court has great discretion in setting fee awards, and the appellate court will not reverse the determination unless it is untenable or manifestly unreasonable. *Edwards v. Edwards*, 83 Wn. App. 715, 724-25, 924 P.2d 44 (1996).

In determining whether to award costs and fees pursuant to RCW 26.09.140, courts generally consider the need of the party requesting the fees, the ability to pay of the party against whom the fee is being requested, and the general equity of the fee given the disposition of the marital property. *In re Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509 (1996).

C. Attorneys' Fees Based on Intransigence

Courts also consider whether intransigence on the part of one of the parties caused the other party to incur additional legal expenses. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563-64, 918 P.2d 954 (1996). Examples of intransigence may include engaging in "foot-dragging" or obstruction, filing repeated unnecessary motions, or making a trial unduly difficult. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Once intransigence is established, the court need not consider the financial needs of the party requesting fees. *Crosetto*, 82 Wn. App. at 564; *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999) (party's intransigence can substantiate a trial court's award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy).

D. Attorneys' Fees in Domestic Violence Protection Order Cases

Following a domestic violence protection order hearing, a court may require the respondent to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees, as well as administrative court costs and service fees. RCW 26.50.060(1)(g).

By contrast, when a petitioner is unsuccessful in seeking a domestic violence protection order, the respondent is not entitled to seek attorneys' fees and costs. *See Hecker v. Cortinas*, 110 Wn. App. 865, 871, 43 P.3d 50 (2002).

E. Attorneys' Fees for Frivolous Actions or Defenses

RCW 4.84.185 allows a court to award fees and expenses to the prevailing party upon written findings by the judge that an action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause.

The purpose of the statute is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in responding to meritless cases. *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). An action is "frivolous" within the meaning of this statute if it cannot be supported by any rational argument on the law or facts. *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011).

F. Attorneys' Fees on Appeal

RCW 26.09.140 authorizes equitable awards of attorneys' fees incurred on appeal, as well as statutory costs. In determining whether to award fees and costs on appeal pursuant to RCW 26.09.140, courts look to the merits of the appeal in addition to the factors listed in the statute. *In re Marriage of Davison*, 112 Wn. App. 251, 260, 48 P.3d 358 (2002).

RAP 14.2 allows an appellate court to award costs to the prevailing party, and RAP 18.1 sets forth the procedures for recovering attorneys' fees or expenses on appeal.

V. Case Management Techniques for Curbing Abusive Litigation Against Domestic Violence Survivors

As discussed in previous sections, judicial officers have the inherent authority to control court proceedings and to sanction abusive litigants. In addition to the specific mechanisms detailed above, the following case management techniques may be useful in curbing abusive litigation tactics against domestic violence survivors.

A. Consolidating All Related Cases Before the Same Judicial Officer

Courts have discretion to consolidate multiple cases under one unified cause of action before the same judicial officer. Washington Civil Rule 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation is an important management tool in domestic relations cases where the same parties are involved in protection order, dissolution, custody, or dependency matters that overlap.

If the court has jurisdiction over the parties and no other procedure is established by statute or rule to resolve complex overlapping issues, other civil matters may also be consolidated with domestic relations matters. *Angelo v. Angelo*, 142 Wn. App. 622, 175 P.3d 1096 (2008) (upholding trial court's consolidation of tort and dissolution cases).

It is often not clear to self-represented parties that they may request consolidation or where such motions are properly filed. The procedure is often guided by local court rules. Providing clarity to unrepresented parties on the proper local procedure should be emphasized.

B. Evaluating Requests for Continuances Carefully

Survivors and advocates report that abusers often attempt to prolong legal proceedings as long as possible in order to cause financial and emotional harm and

to maintain control over the survivor. As a result, requests for continuances should be evaluated carefully in cases involving domestic violence survivors.

The decision to grant or deny a continuance is within the discretion of the trial court and will only be disturbed if the grounds for the decision are manifestly unreasonable or untenable. *State v. Chichester*, 141 Wn. App. 446, 453, 170 P.3d 583 (2007). Courts may consider many factors, including "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *State v. Downing*, 151 Wn.2d 265, 273 87 P.3d 1169 (2004). Ultimately, a decision depends on the facts of the case. *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 242 (1974).

1. Continuances of Motion Hearings

Courts will often grant at least one continuance request to each party. However, courts should ensure that each request for a continuance be justified. More than one request for a continuance should trigger the court to assess the factors above, and facts of the case.

If domestic violence is alleged, the court should consider the possibility that the abuser is using additional continuance requests to drag out the litigation process, to inflict an emotional and financial toll upon the survivor, and/or to discourage the survivor from pursuing the matter.

2. Parallel Criminal Investigations or Cases

In protection order and family law proceedings, requests for continuances due to a concurrent criminal investigation should not be repeatedly granted, and only for a reasonable period of time. Potential Fifth Amendment issues should be identified, and if there is an investigation or charges filed, the respondent should be advised of his rights, and allowed time to consult with an attorney about his or her rights.

However, the protection order or family law proceedings should not be continued pending the outcome of a criminal investigation, as this places an undue burden on survivors to continue coming to court while the investigation is ongoing. If a continuance is granted on this basis, it should be once, and for a reasonable amount of time to resolve criminal issues. Otherwise, the abuser has been advised of his or her rights and does not have to respond should he or she choose to invoke those rights.

3. Continuing a Trial Date

A trial date may be continued, but only for good cause. CR 40(d). Local rules may require extraordinary circumstances if the deadline for changing the trial date has passed according to a case schedule (*E.g.*, King County Local Civil Rule 40(e)(2)). Judges should exercise discretion in domestic violence cases to prevent the abusive tactic of seeking continuances frequently and without good cause.

C. Requiring Confirmation of Motion Hearings

Some local court rules require that litigants confirm family law motions two to three days prior to the scheduled hearing. (*E.g.*, King County Local Family Law Rule 6(c)). The Washington Civil Rules do not require confirmation, but nor do they prohibit the requirement.

Requiring confirmation may help to ensure that motions are not filed frivolously or to further abusive litigation. Courts may use their inherent power to control litigation by ordering confirmation of motions even when not required by local rule.

Further, if a litigant has established a pattern of filing, yet striking or failing to timely confirm a motion hearing, the courts may again use their inherent authority to impose sanctions on the non-complying litigant.

D. Ordering Dismissals of Cases

The court may grant an involuntary dismissal of a case when the moving party has failed to prosecute the case, or failed to comply with the rules or court orders. CR 41(b). If no action has occurred in a case for a year, the clerk of court can dismiss the action upon notice to the parties. CR 41(b)(2).

A party can make a motion to dismiss based on failure to prosecute, or sometimes under local rules for failure to follow the case schedule. Other bases for dismissal include lack of jurisdiction or insufficient process/service. CR 12(b).

Courts can curb abusive litigation by dismissing actions that are not properly filed or prosecuted. In addition, a court can help curb abusive litigation by being aware of previous dismissals in a case, or by the parties. In addition, courts may require an abusive litigant to include previous orders of dismissal with any new petition or motion filed.

E. Issuing Oral Admonishments and Rulings

Courts should not overlook their ability to make oral rulings or admonishments of the parties before it. As discussed in Section II, the court has the authority and an obligation to restrain abusive litigants and with that comes broad authority to fashion appropriate remedies. If the court is confronted with an abusive litigant, the court has the authority and discretion to orally admonish the litigant and to direct him or her to reform behavior.

A court does not need to enter formal findings or enter any binding order to speak frankly and candidly to the litigants before it. An oral ruling or admonishment may not have any binding effect. *State v. Bryant*, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995) (Oral ruling has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.). Nonetheless, it can provide the parties with a clear understanding of where the court stands.

Survivors report that admonishments are an important and often effective tool for deterring an abusive litigant from continuing to engage in the behavior addressed by the court. Further, if the abusive litigant does not stop engaging in the abusive tactic addressed by the court, then the previous oral ruling or admonishment by the court can be incorporated into a subsequent order as a finding of fact or basis for entering the order. *Pearson v. State Dept. of Labor and Industries,* 164 Wn. App. 426, 441, 262 P.3d 837 (2011) (oral opinion of the court which is later incorporated into a written opinion can be relied upon if the oral opinion is consistent with the findings and judgment of the written opinion).

F. Screening Motions or Complaints Before Requiring a Response or Appearance from the Non-Moving Party

When an abusive litigant is engaging in the common tactic of filing numerous documents with the court that require a survivor to make repeated responses and/or court appearances, the court may enter an order indicating that the non-moving party need not respond to a motion or appear for a hearing unless requested by the court. Such a process is similar to local court rules that provide a party should not file a response to a motion for reconsideration unless requested by the court. (*E.g.*, King County Local Civil Rules 59(b)).

G. Placing Reasonable Limits on Discovery

Discovery can often be a point in litigation where the parties are permitted under the rules to ask invasive questions or request private documents. With some exceptions, if the discovery request is "reasonably calculated to lead to the discovery of admissible evidence," the request is likely properly within the scope of discovery. CR 26(b).

However, where a party is demonstrating abusive tactics and discovery is ongoing, the court has the authority to limit the scope of discovery in several ways. CR 26(f). A non-exhaustive list of options include:

1. **Require a discovery conference between the parties and/or the court.** Under CR 26(f), the parties may be directed by the court to have a discovery conference, or a party may request to have a discovery conference with the court. The rule allows the parties to limit the scope as necessary, which means that the court has the authority to properly and reasonably limit the scope of discovery in cases where there is a history of domestic violence and/or abusive litigants. The rule also requires each party to participate in good faith.
   NOTE: Where one or both of the parties is self-represented and there is any allegation of domestic violence or abusive litigation tactics, the court should step in at the outset and hold a discovery conference to limit the scope and identify any issues that may require a protective order or other relief, such as an *in camera* review of more sensitive materials.

2. **Limit the persons subject to discovery.** Where the survivor can identify persons who may have relevant but limited knowledge, the court may limit the scope of discovery as to a particular person. Similarly, where a party cannot show the relevance of deposing a certain witness, the court may prohibit an abusive litigant from taking that witness's deposition unless there is a showing of good cause.

3. **Limit the length of depositions or the number of interrogatories**.

4. **Grant protective orders for specific issues or other areas of discovery**. If a survivor can identify any issues or areas of discovery that may become unnecessarily invasive or will involve requests for irrelevant information, a protective order can provide the relief needed. Under CR 26(c), either a party or the person from whom discovery is sought, may seek a protective order from the court, which may be granted "where justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense."

5. **Prohibit certain discovery methods to protect a party from harassment/abusive litigant behavior**. CR 26(c) provides the court the authority to protect parties from "annoyance, embarrassment, oppression or undue burden or expense" by limiting, among other things, the methods and the terms and conditions upon which the discovery is to take place.

6. **Impose sanctions for violations.** If the court orders any limitations on discovery pursuant to CR 26(f) and a party fails to obey the order, the court may make such orders in regard to the failure as are just, including a variety of sanctions under CR 37(b).[11] The language of CR 37(b) is clear that the sanctions listed are not an exhaustive list, and that the court has authority to fashion other remedies it deems appropriate to the case. *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (courts have broad discretion as to the choices of sanctions for violation of a discovery order).

VI. Anti-SLAPP Remedies

It is not uncommon for abusers to file civil lawsuits against a survivor based on statements the survivor made in court or in written pleadings. Abusers have also sued survivors for calling law enforcement to report domestic violence.

Washington has adopted an "anti-SLAPP" (Strategic Litigation Against Public Participation) law that provides broad immunity from civil liability to individuals based on their oral or written communications with government agencies, such as the police or the courts. RCW 4.24.510–.525. Advocates have successfully invoked similar anti-SLAPP laws in Washington and in other states to address abusive litigation directed against domestic and sexual violence survivors.[12]

A. History of Washington's Anti-SLAPP Law

Washington's anti-SLAPP law was enacted in 1989, and was the first law of its kind in the country. RCW 4.24.500–.510.

In 2002, the Legislature amended the statute to eliminate a requirement that a communication must be made in "good faith" in order for the person being sued to enjoy immunity from civil liability.[13] This change in the law is particularly significant for domestic violence survivors. Eliminating this requirement removes any burden from the survivor to prove that a claim/complaint was made in "good faith" so as not to dissuade survivors from reporting protection order violations or any reports of violence to the police out of fear of being sued.

The 2002 amendments also added a $10,000 statutory penalty against litigants who filed claims in violation of the anti-SLAPP law, with the proviso that such statutory

[11] Sanctions could include an order compelling discovery, an award of expenses and attorney's fees, an order refusing to allow the disobedient party to support or oppose designated claims or defenses, an order striking out parts of or entire pleadings or staying further proceedings until order is obeyed, or an order finding contempt.

[12] Wendy Murphy, *Massachusetts Anti-SLAPP statute used to dismiss abuser's retaliatory litigation,* Sexual Assault Report (1998).

[13] Bruce E.H. Johnson & Sarah K. Duran, *A View From the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495, 511 (2012).

damages may be denied if the court finds that information was communicated in bad faith. Notably, "[b]ad faith does not deny the speaker immunity; it merely prevents him or her from receiving the $10,000 statutory penalty."[14] RCW 4.24.510.

In 2010, the Legislature added new provisions to the anti-SLAPP law, which were separately codified as a new section of the law at RCW 4.24.525. The new provisions expanded the scope of the anti-SLAPP law by providing broader protections for the types of public participation covered under the Act and by establishing special procedures for resolving claims. However, the 2010 statute, as codified at RCW 4.24.525, was found to be unconstitutional by the Washington Supreme Court in 2015. *Davis v.* Cox, ___ Wn.2d ___, 2015 Wash. LEXIS 568 (May 28, 2015).

It should be noted that the decision in *Davis v. Cox* did not concern or strike down the previously enacted provisions of the anti-SLAPP law, which are codified at RCW 4.24.500 - .520.

B. Protections Under the Anti-SLAPP Law

1. **Civil immunity from claims based on communications to government agencies**: RCW 4.24.510 provides that "[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization."

2. **Civil immunity does not depend on whether a communication was made in good faith:** RCW 4.24.510 provides immunity regardless of whether a complaint to a government agency was made in good faith. In 2002, the Legislature specifically amended the anti-SLAPP statute to remove a "good faith" requirement for civil immunity based on communications protected by the law. *See Bailey v. State*, 147 Wn. App. 251, 261, 191 P.3d 1285 (2008) (noting "[f]ormer RCW 4.24.510 contained a good faith requirement. This phrase was deleted by amendment [in 2002]." As a result, courts have held that civil immunity attaches under RCW 4.24.510 without the need to determine whether a communication to a government agency was made in good faith. *Id.*; *see also Lowe v. Rowe*, 173 Wn. App. 253, 260, 294 P.3d 6 (2012) (noting "the 2002 amendments eliminated the 'good faith' reporting language of the 1989 law").

[14] *Id*. at 512.

3. **Mandatory attorney fee and costs provisions:** RCW 4.24.510 provides a mandatory award of attorney's fees and costs to a party who prevails in establishing the anti-SLAPP defense provided by the statute. The award of attorney's fees does not depend on whether a communication was made in good faith. *See Lowe*, 173 Wn. App. at 264 (noting that party was entitled to attorney's fees under anti-SLAPP statute for successfully defending immunity)..

4. **Statutory damages:** RCW 4.24.510 provides that a party prevailing on an anti-SLAPP defense shall receive statutory damages in the amount of $10,000, but further provides that "[s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." As a result, the court may deny statutory damages if it determines that a prevailing party's communication to a government agency was made in bad faith. *Lowe*, 173 Wn. App. at 262.

5. **How can Anti-SLAPP laws be used against domestic violence survivors**? It is important to recognize the potential downside that anti-SLAPP laws can represent for domestic violence survivors. Anti-SLAPP laws can also be used as a weapon against survivors.[15] For instance, survivors may be prohibited from suing their abusers when the abuser attempts to harm them by making a false report to child protective services, by making a report to immigration officials, or by seeking retaliatory protection orders against the survivor, and against the survivor's friends and family.

[15] Barbara Hart, *Litigation Abuse: DV and the Law*, National Bulletin on Domestic Violence Prevention, July 2011, Vol. 17, No. 7.

Selected Resources

1. Arizona Coalition Against Domestic Violence, *Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence* (June 2003) (*available at http://www.thelizlibrary.org/therapeutic-jurisprudence/AZ-Battered-Mothers-Testimony-Project-Report.pdf*).

2. Battered Mothers' Testimony Project at the Wellesley Centers for Women, *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* (Nov. 2002).

3. Lundy Bancroft, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2d ed. 2011).

4. Barry Goldstein & Elizabeth Liu, *Representing the Domestic Violence Survivor* (2013).

5. Mo Therese Hannah & Barry Goldstein eds., *Domestic Violence, Abuse, & Child Custody: Legal Strategies & Policy Issues* (2010).

6. Barbara Hart, *Litigation Abuse: DV and the Law*, National Bulletin on Domestic Violence Prevention, July 2011, Vol. 17, No. 7.

7. Peter G. Jaffe *et al.*, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 Juv. and Family Ct. J. 57 (2003).

8. Bruce E.H. Johnson & Sarah K. Duran, *A View From the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Washington Law Review 495, 497 (2012).

9. Esther L. Lenkinski *et al.*, *Legal Bullying: Abusive Litigation Within Family Law Proceedings*, 22 Canadian Fam. L. Quarterly 337 (2004).

10. Donna J. King, *Naming the Judicial Terrorist: An Expose of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence*, 1 Tenn. J. of Race, Gender, & Social Justice 153 (2012) (*available at* http://trace.tennessee.edu/rgsj/vol1/iss1/6/).

11. Susan L. Miller and Nicole L. Smolter; *"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (2011) (*available at http://vaw.sagepub.com/content/early/2011/04/28/1077801211407290.full.pdf*).

12. National Council of Juvenile & Family Court Judges, *Batterer Manipulation of the Courts to Further Their Abuse, and Remedies for Judges*, Synergy, Vol. 12 No. 1 (2008) (*available at http://www.ncjfcj.org/sites/default/files/synergy-12-1.pdf*).

13. National Council of Juvenile & Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases*, at 22-24 (2008) (*available at* http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf).

14. Leah J. Pollema, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 Univ. Mo. K.C. L. Rev. 1107 (2007).

15. Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. Soc. Just. 1053 (2011).

16. Public Participation Project, *State Anti-SLAPP Laws and Judicial Decisions* (*available at* http://www.anti-slapp.org/your-states-free-speech-protection).

17. Kim Y. Slote *et al.*, *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 Violence Against Women 1367 (2005).

18. Rita Smith and Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*. 36 No. 4 Judges J. 38 (1997).

19. Andrea Vollans, *Court-Related Abuse and Harassment: Leaving an Abuser Can Be Harder Than Staying*; YWCA Vancouver, Canada (2010) (*available at http://www.bcwomens.ca/NR/rdonlyres/8D65CADE-8541-4398-B264-7C28CED7D208/50364/LitigationAbuseFINAL.pdf).*

20. Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*. 3 Domestic Violence Report 67 (1998) (*available at http://www.ncadv.org/conferences/2012handouts/Zorza,%20Joan--Batterer.Manipulation.&.Retaliation.in.Courts.pdf*).

APPENDIX I

DOMESTIC VIOLENCE MANUAL FOR JUDGES
HISTORY and AUTHORSHIP

The Washington State *Domestic Violence Manual for Judges, 2015,* is an update of the manual originally created in 1992. For more than two decades, Washington State judges, attorneys, law school professors, students, and domestic violence experts have assisted the Gender and Justice Commission with this resource manual. This appendix contains a brief history and lists all those who have reviewed, revised, recommended, written, and edited one or more sections of the *Domestic Violence Manual for Judges.* Through their work Washington State has a unique educational resource that explains the legal issues that arise in domestic violence cases and provides additional information on the complex issues that impact victims, children, and perpetrators in domestic violence cases.

The *Domestic Violence Manual for Judges, 2015,* was produced by the Washington State Supreme Court Gender and Justice Commission. The Commission, previously known as the Gender and Justice Implementation Committee, provided leadership and guidance as to both form and content of the five previous manuals: *Domestic Violence Manual for Judges, 2006; Domestic Violence Manual for Judges, 2001; Domestic Violence Manual for Judges, 1997; Domestic Violence Manual for Judges, Vol. II—Civil, 1993 and Domestic Violence Manual for Judges, Vol. I—Criminal, 1992.* The Commission provides the resources necessary to keep the judges' manual up to date.

Portions of the first two volumes of the *Domestic Violence Manual for Judges* were adapted with permission from the model judicial education publications:

1. *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases. A National Model for Judicial Education* (1991), developed under the leadership of the Family Violence Prevention Fund's National Judicial Education on Domestic Violence Advisory Committee and co-authored by Janet Carter, Candace Heisler, and Nancy K.D. Lemon; and
2. *Domestic Violence in Civil Court Cases. A National Model for Judicial Education* (1992), co-authored by Janet Carter, Jill Davies, Anne L. Ganley, Ph.D., Candace Heisler, Catherine Klein, Nancy K.D. Lemon, and Leslye Orloff. Editors were Jaqueline Agtuca, Janet Carter, and Candace Heisler.

Production was made possible by grants from the State Justice Institute.

In 1997, the two volumes were combined into one manual.

In 1999, new chapters on *Domestic Violence and Rural Courts* and *Domestic Violence and Tribal Courts* were written. The production of these chapters was made possible with funding from the Rural Domestic Violence and Child

Victimization Enforcement Grant Program of the U.S. Department of Justice, Office of Justice Programs.

The *Domestic Violence Manual for Judges, 2001,* included the two new chapters and appendixes on perpetrator treatment, victim reluctance to testify, federal laws, and selected resource information.

In the *Domestic Violence Manual for Judges, 2006,* the substance of previous Chapter 7*, Battered Women's Syndrome,* was combined with Chapter 6, *Evidentiary Issues*. Previous Chapter 14, *Spousal Torts,* was eliminated. Chapters 7 – 14 were renumbered. Six new appendixes were added on domestic violence assessment, sexual orientation issues, collateral consequences of conviction, immigration, and international child abduction. See table of contents.

In the *Domestic Violence Manual for Judges, 2015,* Chapter 13, *Domestic Violence in Rural Courts,* was eliminated. One new appendix E was added on abusive litigation, and appendix F, on immigration was condensed due to the creation of recently published comprehensive desk books on the subject. See table of contents.

The Gender and Justice Commission appreciates the efforts of all the authors and advisors who dedicated time and talent to the *Domestic Violence Manual for Judges*. Special commendation is given to Dr. Anne Ganley for her continuing work to ensuring this resource continues to be of value to the judicial officers in Washington State.

Domestic Violence Manual for Judges, 2015

Editor:

Grace Huang, J.D., Washington State Coalition Against Domestic Violence

Content Revisions:

Anne L. Ganley, Ph.D.
Megan Dorwin, M.S.W. Washington State Coalition Against Domestic Violence
David Martin, J.D., King County Prosecutors Office
Honorable Sheryl Gordon McCloud, Washington State Supreme Court
Honorable Judy Jasprica, Pierce County District Court
Honorable Marilyn Paja, Kitsap County District Court
Honorable Christopher Wickham, Thurston County Superior court
Honorable Regina Cahan, King County Superior Court
Honorable Joan DuBuque, Ret., King County Superior Court
Honorable Anne Hirsch, Thurston County Superior Court

Honorable Elizabeth Berns, King County Superior Court
Margaret Hobart, Ph.D., Northwest Network Bi, Trans, Lesbian & Gay Survivors of Abuse
Grace Huang, J.D., Washington State Coalition Against Domestic Violence
Antoinette Bonsignore, J.D.
Honorable Rich Melnick, Washington State Court of Appeals Division II
Honorable Michael H. Evans, Cowlitz County Superior Court
Honorable Eric Z. Lucas, Snohomish County Superior Court
Honorable Randy A. Doucet, Tulalip Tribal Court
Honorable Mark W. Pouley, Swinomish Tribal Court
Honorable Tom Tremaine, Kalispel Tribal Court
Sara Ainsworth, Seattle University School of Law

New Appendix:

David Ward, J.D., Legal Voice

Law Student Legal Researchers:

Rachel Bryant
Nicole Gainey
Emily Henry
Lindsey Kim
Angela Linhardt
Lauren Ludwick
Natalia Morozova
Ariana Orford
Breane Schuster
Katherine Shipman
Tristin Sullivan-Leppa
Julie Turley
Sarah Villian

Technical Editing:

Erin Doherty, Editrix Services

Coordination:

Pam Dittman
Danielle Pugh-Markie

Domestic Violence Manual for Judges, 2006

Editor: Honorable Helen Halpert, King County Superior Court

Consultant: Anne L. Ganley, Ph.D.

Content Revisions:

Honorable James Doerty, King County Superior Court
Honorable Randy A. Doucet, Tulalip Tribal Court
Honorable Joan DuBuque, King County Superior Court
Anne L. Ganley, Ph.D.
Honorable Glenna Hall, King County Superior Court
Honorable Helen Halpert, King County Superior Court
Commissioner William Knebes, Clallam County Superior Court
Commissioner Les Ponomarchuk, King County Superior Court

New Appendixes:

Brendan W. Donckers, Seattle University School of Law and the Hague Convention Chapter Advisory Committee
Grace S. Huang, Washington State Coalition Against Domestic Violence

Technical Editing:

Gloria Hemmen, Executive Director, Gender and Justice Commission
Susan Peterson, Secretary, Administrative Office of the Courts

Domestic Violence Manual for Judges, 2001

Substantive Editing and Revisions:

Honorable Helen Halpert, King County Superior Court
Anne L. Ganley, Ph.D., Consultant

Chapter Revisions:

Honorable James Doerty, King County Superior Court
Commissioner Kimberley Prochnau, King County Superior Court
Honorable Palmer Robinson, King County Superior Court
Professor Gail Hammer, Gonzaga University School of Law
Brandy Meyer, Gonzaga University School of Law
Johanna Gomez, Gonzaga University School of Law

Technical Editing and Formatting:

Gloria Hemmen, Executive Director, Gender and Justice Commission
Administrative Office of the Courts
E. Naomi Hanson, Consultant

New Chapters Completed in 1999

Chapter 15—Domestic Violence and Rural Courts

Primary Author:

Commissioner William G. Knebes, Clallam County Superior Court

Substantive Editing and Revisions:

Honorable Lynda Eaton, Ferry County District Court
Margaret E. Fisher, Project Director, Office of the Administrator for the Courts.
Anne L. Ganley, Ph.D., Domestic Violence Expert
Mary Pontarolo, Washington State Coalition Against Domestic Violence
Honorable Heather Van Nuys, Yakima County Superior Court

Chapter 16—Domestic Violence and Tribal Courts

Primary Author:

Honorable Randy A. Doucet, Chief Judge of the Coushatta Tribal Court in Louisiana
and formerly Chief Judge of the Lummi Tribe

Substantive Editing and Revisions:

Honorable Lynda Eaton, Ferry County District Court
Commissioner Katherine Eldemar, Whatcom County Superior Court
Margaret E. Fisher, Project Director, Office of the Administrator for the Courts.
Anne L. Ganley, Ph.D., Domestic Violence Expert
Dan Kamkoff, Director of the Lummi Victims of Crime
Honorable Susan Owens, Lower Elwha Tribal Court and Clallam County District Court
Honorable Julian Pinkham, Children's Court of the Yakama Nation
Mary Pontarolo, Washington State Coalition Against Domestic Violence
Honorable Heather Van Nuys, Yakima County Superior Court
Former Chief Judge Mary Wynne, Colville Federated Tribes

Technical Editing:

Margaret E. Fisher, Project Director, Office of the Administrator for the Courts

---

Domestic Violence Manual for Judges, 1997

Substantive Editing and Revisions:

Honorable Helen Halpert, Seattle Municipal Court
Anne L. Ganley, Ph.D., Veterans Administration Medical Center
Honorable Faye Kennedy, Court of Appeals, Division I
Honorable Carol Wardell, Chelan/Douglas Counties Superior Court
Karl Tegland, Attorney at Law

Technical Editing:

Gloria Hemmen, Project Director, Gender and Justice Commission
Molly Hemmen, Seattle University School of Law
Ross Williamson, Office of the Administrator for the Courts

Domestic Violence Manual for Judges, Vol. II - Civil (1993)

Advisory Committee and Authors (1992-93):

Honorable Faith Enyeart Ireland, Chair, King County Superior Court
Tim Dore, Oles, Morison & Rinker
Anne L. Ganley, Ph.D., Veterans Administration Medical Center
Gloria Hemmen, Project Director, Office of the Administrator for the Courts
Honorable Faye Kennedy, Court of Appeals, Division I
Peggy Paul, King County Prosecuting Attorney's Office
Mary Pontarolo, Washington State Coalition Against Domestic Violence
Honorable Clifford L. (Kip) Stilz, Jr., Thurston County District Court
Joan Sullivan, Attorney at Law

Reviewers:

Sharon E. Burrows, Washington Women Lawyers
Mabrys C. DuBuys, Washington Women Lawyers
Mary Jenner, Washington Women Lawyers
Honorable Kathleen O'Connor, Spokane County Superior Court

Technical Editing:

Gloria Hemmen, Project Director, Office of the Administrator for the Courts
Donna Cummings, Office of the Administrator for the Courts

Domestic Violence Manual for Judges, Vol. I - Criminal (1992)

Primary Authors:

Honorable Helen Halpert, Seattle Municipal Court
Anne L. Ganley, Ph.D., Veterans Administration Medical Center
Karl Tegland, Attorney at Law

Contributing Authors and Reviewers (1991-92):

Honorable Joan B. Allison, King County Superior Court
Honorable Joan DuBuque, King County Superior Court
Susan Hannibal, Seattle Office for Women's Rights
Sheila Hargesheimer, Seattle Family Violence Project
Honorable Ronald Kessler, Seattle Municipal Court
Honorable Nicole MacInnes, Seattle Municipal Court
Honorable Clifford L. (Kip) Stilz, Jr., Thurston County District Court

Advisory Committee (1991-92):

Honorable George Colby, Chair, Yakima District Court
Honorable Kay Anderson, Snohomish County Clerk
Honorable Rosemary Bordlemay, King County District Court, Northeast
Honorable Joan DuBuque, King County Superior Court
Honorable Helen Halpert, Seattle Municipal Court
Susan Hannibal, Seattle Office for Women's Rights
Sheila Hargesheimer, Seattle Family Violence Project
Honorable Carolyn Hayek, King County District Court, Federal Way
Gloria Hemmen, Project Director, Office of the Administrator for the Courts

Technical Editing:

Gloria Hemmen, Project Director, Office of the Administrator for the Courts
Donna Cummings, Office of the Administrator for the Courts

APPENDIX J

Guidelines for Domestic Violence Protection, Anti-Stalking, & Anti-Harassment Orders

- Domestic violence is learned behavior.
- Domestic violence typically involves controlling behavior encompassing different types of abuse.
- It is the perpetrator -not substance abuse, not the victim, not the relationship- that causes domestic violence.
- Danger to the victim and children is likely to increase at the time of separation.
- The victim's behavior is often a way of ensuring survival.

Civil protection orders (RCW 26.50)

1. Jurisdiction

   Superior, District, and Municipal Courts may issue temporary and permanent orders, except District and Municipal Courts must transfer certain cases to Superior Court after entry of a temporary order. RCW 26.50.010(4) and RCW 26.50.020(5).

2. Transfer of jurisdiction to Superior Court
   - Superior Court is already hearing this matter or a RCW Chap. 13.34 case.
   - Issues exist involving children.
   - Petitioner requests exclusion of respondent from a shared dwelling. RCW 26.50.020(5)

3. Availability
   - Available under RCW 26.50 (civil protection orders), RCW 26.09 (dissolution or legal separation), RCW 26.10 (third-party custody), and RCW 26.26 (paternity). RCW 26.50.025.

4. Parties

   "Family or household members" includes:
   - Spouses and former spouses.
   - Parents of a child.
   - Adults related by blood or marriage.
   - Adults who are presently residing together or who have resided together in the past.
   - Persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship.
   - Persons 16 years of age or older who have or have had a dating

relationship.
- Persons with a biological or legal parent-child relationship, such as stepparents or grandparents. RCW 26.50.010(2).

"Dating violence"

- Persons 13 years of age or older who has been a victim of violence in dating relationship with a person 16 years or older.

5. Definition
   "Domestic violence" means physical harm, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking. RCW 26.50.010(1).

6. No contact
   No contact requested? Is some contact desired? If so, be specific as to what is restrained. RCW 26:50.070.

7. Exclusion - location
   Exclusion from a location requested? Petitioner's residence, workplace, school, or child's daycare or school. RCW 26.50.060(1)(b) and 26.50.070.

8. Prohibition - distance
   Prohibition from a specified location requested- Set the distance from the specific locations so law enforcement can reasonably measure and enforce, i.e., 100 feet or 100 yards. RCW 26.50.060(1)(c) and 26.50.070.

9. Children
   - Who is the legal custodian?
   - Are there any existing court orders affecting custody? Check JIS or JABS. RCW 26.50.135{c).
   - Temporary residential provisions can be ordered, but a full parenting plan is not required. RCW 26.50.060(1)(d).

10. Personal property
    Court has jurisdiction to award:
    - "Essential personal effects" which means items necessary for a person's immediate health, welfare, and livelihood. RCW 26.50.010(7).
    - Use of a vehicle. RCW 26.50.060(1)(f) and (l).

11. Firearms. RCW 9.41.800
    Court ***shall*** require surrender to law enforcement or other person if order:
    - Issued after a hearing where the respondent received actual notice and had opportunity to participate.
    - Includes a finding that respondent represents a credible threat to physical safety of intimate partner or child of intimate partner
    - Restrains the respondent from harassing, stalking, threats, or other conduct that would place an intimate partner in reasonable fear of bodily injury and bars use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

Non-Intimate Partners

- Firearms can also be ordered surrendered in cases involving relatives by blood or marriage and dating relationships where the court finds the respondent has shown, used, displayed, or threatened with a firearm or other deadly weapon in a felony **or** has committed a domestic violence misdemeanor or felony. RCW 26.50.060(1)(j), RCW 26.50.070, RCW 9.41.040 and RCW 9.41.800.

Federal firearms prohibition applies when:

- Same circumstances as state law involving intimate partners
- The order restrains the person from harassing, stalking or threatening an intimate partner or child; and ***either*** the court finds the person presents a credible threat of harm ***or*** the order contains explicit language restraining the person from using, attempting to use or threatening to use physical force against the intimate partner or child. 18 USC 922(g)(8).

12. Duration
    Fixed period or permanent (indefinite). If children involved, then one year if the order is issued under RCW 26.50, but can be longer or indefinite under RCW chapters 26.09, 26.26 and 26.10. RCW 26.50.060(2).

13. Realignment of the parties
    Mutual orders are not allowed, but the court may realign the designation of the parties where the court finds the original petitioner is the perpetrator. RCW 26.50.060(4) and (5).

14. Evidence rules
    Evidence rules do **not** apply. ER 1101(c)(4).

Oral instructions to accompany entry of protection orders

- A violation is a criminal offense.
- Any assault that is a violation, or possession of firearms is a Class C felony.
- Provide Date Certain to Submit Proof that Firearms Surrendered.
- A violation may be grounds for deportation for immigrants.
- This is the court's order. The petitioner cannot modify the order.

Minors as parties in DV, stalking, or antiharassment cases

- Guardian or next friend must appear for minors except for 16- and 17-year-olds in civil protection order proceedings. RCW 4.08.050, RCW 7.92.050, RCW 26.50.020(2) and (3).
- Procedure is at the discretion of the court with most courts appointing a parent, public defender, or other adult to serve as guardian.

Domestic Violence Perpetrator treatment

1. Availability
   May be ordered as part of a civil protection order. RCW 26.50.060(1)(e).

2. Certified program required if perpetrator treatment is ordered
   Treatment by an agency certified under WAC 388-60 should be required. RCW 26.50.150.

3. Anger management
   Anger management classes are inappropriate for addressing domestic violence perpetrators and are not certified.

4. Other types of counseling
   Marital, couple, and religious counseling are not appropriate to address domestic violence as they implicate the victim as part of the problem.

Modification/termination requests

1. Procedure
   Require notice and hearing. RCW 26.50.130.

2. Court discretion
   - Public policy gives the court discretion to modify, terminate, or maintain the order. *State v. Dejarlais,* 136 Wn.2d 939, 969 P.2d 90 (1998).

3. Modification or Termination of Orders of duration two years or longer
   - Require initial Show Cause Hearing demonstrating a substantial change in circumstances relating to whether the restrained party is likely to commit acts of domestic violence
   - Protected party has no burden of proving current reasonable fear of imminent harm

4. Educate petitioners
   - Educate the petitioner on the alternatives to termination of the protection order, including eliminating portions or modifying restrictive language.

5. Dismiss with grace
   Dismiss the petition, not the petitioner. Remind the parties that the court is always available in the event an order is needed in the future.

Foreign protection orders

1. Definition
   "Foreign protection order" means an injunction or order related to domestic or family abuse, sexual abuse, or stalking. RCW 26.52.010(3).

2. Applicability
   Applies to civil or criminal orders issued by a court of a state, a U.S. territory or possession, Puerto Rico, the District of Columbia, the U.S. military, or a Native American tribe. RCW 26.52.010(3).

3. Validity
   The issuing court must have jurisdiction over the parties and subject matter, and the person under restraint must be given notice and the opportunity to be heard. RCW 26.52.020.

4. Washington State filing unnecessary
   Filing is not a prerequisite to enforcement in this state, but the clerk must file a proper foreign protection order without a fee if requested. RCW 26.52.030

5. Child custody disputes
   Child custody disputes are resolved by applying RCW Chap. 26.27 and the PKPA 28 U .S.C. 1738A. RCW 26.52.080(1).

6. Writ of habeas corpus
   Writ of habeas corpus must be issued from a Superior Court in Washington in order for law enforcement to remove the child from his or her current placement absent abuse or neglect. RCW 26.52.080(2).

7. Violations
   Violations are punishable under RCW 26.50.110. RCW 26.52.070.

Criminal no-contact orders (RCW 10.99)

1. Availability
   May be issued before, after, or concurrent with civil protection orders.

2. Pre-arraignment
   Order may be issued after an arrest or a charge. RCW 10.99.040{2). Expires at arraignment or within 72 hours if no charges filed. RCW 10.99.040(5).

3. Arraignment
   Court may extend the pre-arraignment order or issue a new one. Order expires if charges are dismissed or upon acquittal. RCW 10.99.040(3).

4. Post-trial
   Order may be issued after a finding of guilt. Expires upon termination of the sentence or elimination of that condition of the sentence. RCW 10.99.050(1)

Anti Stalking Orders (RCW 7.92)

1. Jurisdiction
   District Court has primary jurisdiction and Superior Court has concurrent jurisdiction to accept transfers. RCW 7.92.050

2. Transfer of jurisdiction
   - In cases involving minors,
   - Where is a pending Superior court action involving the parties, the action involves possession of property,
   - Where the action would interfere with a respondent's care, control, or custody of the respondent's minor child.
   - Municipal Court may exercise jurisdiction pursuant to Court Rule. RCW 7.92.050.

3. Petitioner
   - A person who does not qualify for a domestic violence protection order, and is a victim of any stalking conduct.
   - Petitioner shall not be required to pay fees

4. Minor Petitioner-Minor Respondent
   - Petitioner 16 may file (not required to have a guardian or next friend). Parent or guardian may petition on behalf of any minor, including minors 16 or 17. Interested person may petition on behalf of vulnerable adult.
   - Court may appoint a guardian ad litem for either petitioner or respondent.
   - If Respondent is 15 or younger and not emancipated, a guardian ad litem must be appointed.

5. Stalking conduct
   - Includes stalking defined in RCW 9A.46.110,
   - Cyberstalking defined in RCW 9.61.260 or r
   - Repeated contacts, attempts to contact, monitoring, tracking, keeping under observation, or following another person and causing a person to feel intimidated, frightened, or threatened.

6. Relief Available
   - Restrain contact, including non-physical contact or through third parties
   - Exclude from petitioner's residence, workplace, school, or daycare, workplace, or school of petitioner's children.
   - Restrain from coming within specified distance from a location
   - Restrain from surveillance of petitioner or petitioner's children.
   - Other injunctive relief to protect the petitioner, including mental health or chemical dependency evaluation.
   - Require respondent to pay costs including attorneys' fees.

7. Duration
   Fixed period or permanent (indefinite). RCW 7.92.130.

Antiharassment orders

1. Jurisdiction
   District Court is primary and Superior Court has concurrent jurisdiction to accept transfers. RCW 10.14.150.

2. Transfer of jurisdiction
   - When the respondent is under the age of 18.
   - When other meritorious reasons exist. RCW 10.14.150.

3. Petitioners
   Petitioners do not need to establish a special relationship to the respondent and can include parents of minors under 18 years of age requesting an order restraining an adult. RCW 10.14.040(6).

4. Minor petitioner- minor respondent
   Parent or guardian may request an antiharassment order on behalf of a minor against a respondent who is less than 18 year of age who has committed or been investigated for an offense against the minor. RCW 10.14.040(7).

5. Unlawful harassment
   "Unlawful harassment" requires a knowing and willful course of conduct that seriously annoys, alarms, harasses, or is detrimental and serves no legitimate or lawful purpose. "Reasonable person" or "reasonable parent" standard. RCW 10.14.020(1).

6. Relief available
   Antiharassment order may:
   - Restrain contact.
   - Restrain surveillance.
   - Prohibit respondent from being within a specified distance of petitioner's residence or workplace.
   - Require surrender of weapons pursuant to RCW 9.41.800.
   - Prohibit a minor respondent from attending petitioner's child's school. RCW 10.14.080(6) and (7).

7. Duration
   One year maximum unless the court finds the respondent is likely to resume harassment once the order expires, then it can be for a fixed or permanent duration. RCW 10.14.080(4).

8. Violations
   Violations by adults are gross misdemeanors or punishable by contempt. Violations by respondents less than 18 years of age are punishable by contempt under RCW Chapter 7.21. RCW 10.14.120.

Barriers to victims leaving

1. Perpetrator violence
   Perpetrator's escalating violence and control.
   Perpetrator’s threats and access to firearms.

2. Life Induced Risks, such as economic barriers
   Lack of housing, loss of income for self and children, lack of childcare, loss of health, transportation, or other resources.

3. Protection of the children
   Connection to the perpetrator through the perpetrator's access to the children, including within court orders in parenting plans and within protection orders.

4. Lack of support
   Religious, cultural, or family values that the family unit must be preserved at all costs, or
   Victim blaming by service providers, law enforcement, the courts, by friends, family, or in the workplace.

5. Effects of trauma
   Immobilization by psychological and physical trauma, post-traumatic stress disorder.

6. Inadequacy of court response
   Failure of court to hold perpetrators accountable or protect victims,
   Unclear, vague, or otherwise inadequate court orders that allow for ongoing harassment, manipulation, abuse, including abusive litigation.

Web sites and resources

- Forms: www.courts.wa.gov/forms/
- Domestic Violence Manual for Judges, produced by the Washington State Gender and Justice Commission.
- National Council of Juvenile and Family Court Judges-Domestic Violence Section-http://www.ncjfcj.org/our-work/domestic-violence
- American Bar Association: www.americanbar.org/groups/domestic_violence/resources.html
- Washington State Coalition Against Domestic Violence, www.wscadv.org
- King County Prosecutor' Protection Order Program- http://www.kingcounty.gov/Prosecutor/protectionorders.aspx
- Northwest Justice Project-Domestic Violence Page http://www.washingtonlawhelp.org/issues/domestic-violence-antiharassment/domestic-violence-1

APPENDIX K

RESOURCE MATERIALS ON DOMESTIC VIOLENCE

Selected Domestic Violence Resource Links

Address Confidentiality Program, Office of the Secretary of State
http://www.secstate.wa.gov/acp/
PO Box 257, Olympia, WA 98507-0257, 1-800-822-1065 (in Washington) or 1-360-753-2972, TDD 1-800-664-9677 (in Washington) or 1-360-664-0515.

American Bar Association Commission on Domestic Violence
http://www.abanet.org/domviol/
Domestic violence resources, information about legal research and analysis, teaching domestic violence law, and facts about the commission.

ASISTA Immigration Assistance
http://www.asistahelp.org/en/access_the_clearinghouse/training_materials/
ASISTA provides technical assistance in battered immigrant cases.
This is a link to the training materials with a section specifically for Judges.

Battered Women's Justice Project
http://www.bwjp.org
The Battered Women's Justice Project is a collaboration of three nationally recognized projects that provide training, technical assistance, and other resources on domestic violence related to civil court access and representation, criminal justice response, and battered women's self-defense issues. 800-903-0111

Centers for Disease Control and Prevention
http://www.cdc.gov/
Health statistics and topics, including information about domestic violence.
Of particular interest are links to *The National Intimate Partner and Sexual Violence Survey 2010 Summary Report,*
http://www.cdc.gov/violenceprevention/nisvs/2010_report.html, and to information on the Adverse Childhood Experiences study from the Division of Violence Prevention.
http://www.cdc.gov/violenceprevention/acestudy/

Everybody's Business: The Report of the Governor's Domestic Violence Action Group (October 1999)
http://www.digitalarchives.wa.gov/governorlocke/taskcomm/action/action.htm#howfar
The Governor's Domestic Violence Action Group was convened to examine the Linda David case. They reported on the larger issues of domestic violence and violence perpetrated by caregivers against the elderly and people with disabilities.

FaithTrust Institute (Formerly Center for the Prevention of Sexual and Domestic Violence)

http://www.faithtrustinstitute.org/
The Institute has a number of resources to help religious leaders and communities, as well as secular organizations, understand religious issues associated with domestic violence.

Futures Without Violence
http://futureswithoutviolence.org
Information on the "Start Strong: Building Healthy Teen Relationships" campaign and the National Institute on Fatherhood and Domestic Violence, the impact of domestic violence on health care and the workplace, international efforts to end domestic violence, child protection, and immigrant women.

Greenbook Initiative
http://www.thegreenbook.info
Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice, also known as the "Greenbook," published by the National Council for Family and Juvenile Court Judges, summarizes a set of recommendations designed to help dependency courts and child welfare and domestic violence agencies better serve families experiencing violence.

King County Coalition Against Domestic Violence (KCCADV)
http://www.kccadv.org/overview_help.html
In countywide public policy and education efforts, the Coalition provides leadership on behalf of community-based victim service agencies and their allies. The Coalition strives to represent the diverse interests of victims and survivors of domestic violence.

Legal Momentum
http://www.legalmomentum.org/national-judicial-education-program
Legal Momentum's National Judicial Education Program educates judges, attorneys, and justice system professionals about gender bias in criminal, civil, family, and juvenile law, with a particular focus on sexual assault cases and cases involving the intersection of sexual assault and domestic violence.

Minnesota Center Against Violence and Abuse
http://www.mincava.umn.edu
Electronic clearinghouse provides education, research, and access to convenient resources on the web that deal with the topics of violence and abuse.

National Resource Center on Domestic Violence
http://www.nrcdv.org
Provides resources for victims of domestic violence.

National Online Resource Center on Violence Against Women
http://www.vawnet.org/
Research links on domestic and sexual violence.

Northwest Network of Bi, Trans, Lesbian, and Gay Survivors of Abuse

http://www.nwnetwork.org
Training, technical assistance, and resources for supporting for LGBTQ survivors of domestic violence and sexual assault, including advocacy-based counseling, support groups, safety and support planning, basic legal advocacy, resources, and referrals.

National Center for State Courts
http://www.ncsc.org/Topics/Children-Families-and-Elders/Domestic-Violence/Resource-Guide.aspx
The Center provides links to resources, research articles, and training opportunities.

National Clearinghouse on Abuse Later in Life
www.ncall.us
Resources to support coordinated community responses to address abuse in later life.

The National Coalition Against Domestic Violence
http://www.ncadv.org
Resources, public policy, community response to domestic violence and information on getting help for victims.

National Council of Juvenile and Family Court Judges (NCJFCJ)
http://www.ncjfcj.org/our-work/domestic-violence
Provides publications, national conferences, extensive trainings, and ongoing technical assistance on matters relating to domestic violence.

The National Domestic Violence Hotline
http://www.thehotline.org
Links, information about the hotline services. 1-800-799 SAFE, TDD 1-800-787-3224

Office of Crime Victims Advocacy (OCVA)
http://www.ocva.wa.gov/
OCVA serves as a voice for crime victims in Washington State. They administer the Violence Against Women Grant funds and programs related to domestic violence and sexual assault.

Department of Social and Health Services (DSHS)
https://www.dshs.wa.gov/ca/domestic-violence
DSHS administers state and federal funding that supports community-based domestic violence services and certifies domestic violence perpetrator treatment programs.

United States Government

FBI Uniform Crime Reports
http://www.fbi.gov/ucr/ucr.htm

Office of the Federal Register: **Public and Private Laws**
http://www.gpoaccess.gov/plaws/index.html

National Criminal Justice Reference Service
https://www.ncjrs.gov
Department of Justice Office of Justice Programs source for publications of DOJ-funded research and reports.

Office on Violence Against Women
http://www.justice.gov/ovw
Promising practices and model programs for law enforcement practitioners, prosecutors, and victim advocates. Resource information.

Washington State Coalition Against Domestic Violence (WSCADV)
http://www.wscadv.org/
The Coalition, through its leadership and networking, supports individuals and organizations to increase their capacity to provide quality services for victims, public education, and advocacy. Of note is the Washington State Fatality Review Project, with research and reports available at http://dvfatalityreview.org.

Washington State Courts
http://www.courts.wa.gov
For the general public.

http://inside.courts.wa.gov/
Secure login site for authorized court users.

Audiovisual Catalogue
http://inside.courts.wa.gov/index.cfm?fa=cntlAvcatalog.showAvcatalogHome

Domestic Violence Forms and Instructions
http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=16

Judicial Access Browser: Accessible to Judicial Officers
http://jabs.courts.wa.gov

Center for Court Research
The research division of the Administrative Office of the Courts.
https://www.courts.wa.gov/wsccr/

Selected Domestic Violence Research Study and Resource Links

Recent Studies

Mathew J. Breiding, et. al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Report on Intimate Partner Violence*, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTERS FOR DISEASE CONTROL AND PREVENTION, 2014, available at http://www.cdc.gov/violenceprevention/nisvs/2010_ipvreport.html

Elizabeth Drake, et. al., *Recidivism Trends of Domestic Violence Offenders in Washington State*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, 1-9, 2013, available at: http://www.wsipp.wa.gov/ReportFile/1541/Wsipp_Recidivism-Trends-of-Domestic-Violence-Offenders-in-Washington-State_Full-Report.pdf

Thomas P. George, Domestic Violence Sentencing Conditions and Recidivism, WASHINGTON STATE CENTER FOR COURT RESEARCH: ADMINISTRATIVE OFFICE OF THE COURTS, 2010, available at http://www.ofm.wa.gov/sac/nchip/DV_sentencing_conditions_recidivism.pdf

Washington State Department of Health, Domestic Violence in Washington, 2013, available at http://www.doh.wa.gov/Portals/1/Documents/5500/IV-DV2013.pdf

Sarah Veele, *Domestic Violence in Washington State: 1999-2010*, WASHINGTON STATE CENTER FOR COURT RESEARCH, 1-23, available at: http://www.ofm.wa.gov/sac/nchip/domestic_violence_in_wa_1999-2010.pdf

Court Response

Joe Giarrusso Jr. & Elizabeth P. Hines, *Domestic Violence and the Courtroom: Knowing the Issues... Understanding the Victim*, AMERICAN JUDGES ASSOCIATION, 2012, available at http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf .

Harrell, A., Castro, J., Newmark, L., & Visher, C. (2007). Final Report on the Evaluation of the Judicial Oversight Demonstration: Executive Summary. Washington D.C.: U.S. Department of Justice 1999-WT-VX-K005, National Institute of Justice, NCJ 219386. Retrieved from http://www.urban.org/publications/411498.html

Klein, A. (2008). Practical implications of current domestic violence research, Part I: Law Enforcement. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/222319.pdf

Klein, A. (2008). Practical implications of current domestic violence research, Part II: Prosecution. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/222320.pdf

Klein, A. (2008). Practical implications of current domestic violence research, Part III: Judges. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/222321.pdf

Behavioral Definition of Domestic Violence

Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life*, OXFORD UNIVERSITY PRESS, 2007, Chapter 1 available at http://www.ssw.umaryland.edu/domesticviolence/files/Evan_Stark_Article_Coercive_Control.pdf

Economics Against Abuse, *Crisis: Economics and Domestic Violence Research Findings*, Allstate Foundation, Accessed March 3rd. 2014, available at http://www.clicktoempower.org/sites/default/files/executive_summary.pdf

Katrina Baum, et. al., *Stalking Victimization in the United States*, BUREAU OF JUSTICE STATISTICS, 2009, available at http://www.ovw.usdoj.gov/docs/stalking-victimization.pdf

Susan Herman, et. al., *Problem-Oriented Guides for Police Problem-Specific Guides Series: Stalking*, NATIONAL CENTER FOR VICTIMS OF CRIME, 2004, available at http://www.victimsofcrime.org/docs/src/stalking-problem-oriented-policiing-guide.pdf?sfvrsn=0

T.K. Logan , Research on Partner stalking: Putting the Pieces Together, Lexington, KY: University of Kentucky, Department of Behavioral Science & Center on Drug and Alcohol Research. http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf

Model Stalking Code Advisory Code, *The Model Stalking Code Revisited; Responding to the New Realities of Stalking*, NATIONAL CENTER FOR VICTIMS OF CRIME, 2007, available at http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0

Stalking Resource Center, *Stalking Response Tips for Judges*, NATIONAL CENTER FOR VICTIMS OF CRIME, 2014, available at http://www.ovw.usdoj.gov/docs/tips-for-judges.pdf
Farrah Tassy & Barbara Winstead, *Relationship and Individual Characteristics as*

Adolescent Dating Violence

Andrew Klein, et. al., *Final Report: An Exploratory Study of Juvenile Orders of Protection as a Remedy for Dating Violence*, 2013, available at http://www.ahpnet.com/Misc/final-submitted-report-April-15-2013.aspx

Howard N. Snyder & Carl McCurley, Domestic Assaults by Juvenile Offenders, U.S. DOJ: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 2008, available at *https://www.ncjrs.gov/pdffiles1/ojjdp/219180.pdf*

Long Term Health Consequences

Amy E Bonomi, et. al., *Health Care Utilization and Costs Associated With Physical and Non-Physical Intimate Partner Violence*, HEALTH SERV RES., 44(3):1052–1067, 2009, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2699921/

Amy E Bonomi, et. al., *History of Dating Violence and the Association With Late Adolescent Health*, BMC PUBLIC HEALTH, 13(1), 821-833, 2013. Available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3847300/pdf/1471-2458-13-821.pdf

Kylee Trevillion, et. al., *Experiences of Domestic Violence and Mental Disorders: A Systematic Review and Meta-Analysis*, PLOS ONE, 7(12), 1-12, 2012, available at http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0051740&representation=PDF

Immigrant Barriers

Robert Wood Johnson Foundation, *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices and Recommendations*, FAMILY VIOLENCE PREVENTION FUND, 2009, available at http://www.rwjf.org/content/dam/farm/reports/reports/2009/rwjf38645

Native Communities

Native American Communities Justice Project, *Beginning the Dialogue: Domestic Violence, Sexual Assault, Stalking & Teen-Dating Violence Research Report*, JUDICIAL COUNCIL OF CALIFORNIA/ADMINISTRATIVE OFFICE OF THE COURTS, 2010, available at http://courts.ca.gov/documents/NACJPResearchReport051310.pdf

Children and Parenting

Jerry J. Bowles, et. al., *A Judicial Guide to Child Safety in Custody Cases*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *2008, available at* http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf

Clare Dalton, et. al., *Navigating Custody and Visitation in Cases with Domestic Violence: A Judge`s Guide*, 2006, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *2006, available at* http://www.thelizlibrary.org/liz/NCFCJ-guidebook.pdf

Sherry Hamby, et. al., *Children's Exposure to Intimate Partner Violence and Other Family Violence*, U.S. DOJ: OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *2011, available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf

Sherry Hamby, et. al., *The Overlap of Witnessing Partner Violence With Child Maltreatment and Other Victimizations in A Nationally Representative Survey of Youth*, CHILD ABUSE & NEGLECT, 34, 734–741, 2010, available at http://www.unh.edu/news/docs/CCRC_Oct2010.pdf

Ann Rosewater & Leigh Goodmark, *Steps Toward Safety: Improving Systemic and Community Responses for Families Experiencing Domestic Violence*, THE FAMILY VIOLENCE PREVENTION FUND, *2007, available at* http://www.thegreenbook.info/documents/Steps_Toward_Safety.pdf

Katreena Scott and Fernando Mederos, *Parenting Interventions for Men Who Batter,* NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE, *2012, available at* http://www.vawnet.org/summary.php?doc_id=3270&find_type=web_desc_AR

Alicia Summers, *Children`s Exposure to Domestic Violence: A Guide to Research and Resources,* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 2006, available at http://www.ncjfcj.org/sites/default/files/Childrens%20Exposure%20to%20Violence.pdf

Tracee Parker, et. al., *Danger Zone: Battered Mothers and Their Families in Supervised Visitation*, VIOLENCE AGAINST WOMEN, 14(11), 1313-1325, 2008, available at: http://www.thegreenbook.info/summit/documents/intsafesup.pdf

Cris M. Sullivan, et. al., *Beyond Searching for Deficits: Evidence That Physically and Emotionally Abused Women are Nurturing Parents*, JOURNAL OF EMOTIONAL ABUSE, 2(1), 51-71, 2000, accessible at http://vaw.msu.edu/wp-content/uploads/2013/10/Beyond-search-for-deficits.pdf

Child Maltreatment

Leigh Goodmark & Ann Rosewater, *Bringing the Greenbook to Life: A Resource Guide for Communities*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 2008, available at http://www.thegreenbook.info/documents/BJA.pdf.

Stacy M. Lowry & Olga Trujillo, *Cross System Dialogue: An Effective Strategy to Promote Communication between the Domestic Violence Community, Child Welfare System, and the Courts*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 2008, available at http://www.thegreenbook.info/documents/crosssystemdialogue.pdf

David Mandel, *Safe and Together*, Accessed on March 17th, 2014, available at http://safe-and-together.endingviolence.com/blog/?cat=23

Impact on Criminal and Civil Courts

American Judges Association, *Domestic Violence and the Courtroom: Knowing The Issues... Understanding The Victim*, 2013, available at http://aja.ncsc.dni.us/domviol/publications_domviobooklet.htm

American Judges Association, *Effective Adjudication of Domestic Abuse Cases*, 2009, available at http://education.amjudges.org/

Anne H. Crowe, et. al., *Community Corrections Response to Domestic Violence: Guidelines for Practice,* AMERICAN PROBATION AND PAROLE ASSOCIATION, 2009, available at http://www.appa-net.org/eweb/docs/APPA/pubs/CCRDV.pdf

E. Branch & Amy Pincolini-Ford, *Family Violence Legislative Update*, *NATIONAL CENTER OF JUVENILE AND FAMILY COURT JUDGES, 2013,* available at http://www.ncjfcj.org/sites/default/files/legislative_update_18.pdf

Center for Court Innovation, Bridging Theory and Practice: A Roundtable about Court Responses to Domestic Violence, Last viewed March 3, 2014, available at http://www.courtinnovation.org/sites/default/files/BIP_Roundtable.pdf

David Hirschel, et. al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases,* U.S. DOJ, 2007, available at https://www.ncjrs.gov/pdffiles1/nij/grants/218355.pdf

Andrew Klein, *Enforcing Domestic Violence Firearm Prohibitions*, OFFICE ON VIOLENCE AGAINST WOMEN, 2006, available at http://www.bwjp.org/files/bwjp/articles/Enforcing_Firearms_Prohibitions.pdf

Melissa Labriola, et al., *A National Portrait of Domestic Violence Courts, CENTER FOR COURT INNOVATION, 2010,* available at *https://www.ncjrs.gov/pdffiles1/nij/grants/229659.pdf*

T.K. Logan, et al., *Civil Protective Order outcomes: Violations and perceptions of effectiveness*. JOURNAL OF INTERPERSONAL VIOLENCE 24(4), 675-692, 2009, based on findings from study at https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf

National Center for State Courts, *VAWA and the Courts*, available at http://www.vawaandcourts.org/

Maureen Sheeran & Emilie Meyer, *Civil Protection Orders: A Guide for Improving Practice, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 2010,* available at http://www.ncjfcj.org/resource-library/publications/civil-protection-orders-guide-improving-practice

Brenda K. Uekert, *Court Interpretation in Protection Order Hearings Benchcard, NATIONAL CENTER FOR STATE COURTS, 2006,* available at http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/103

Batterer Intervention

David *Adams, Certified Batterer Intervention Programs: History, Philosophies, Techniques, Collaborations, Innovations and Challenges*, FUTURES WITHOUT VIOLENCE, available at http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Certified%20Batterer%20Intervention%20Programs.pdf

AQUILA Working Group, Batterer Program Evaluations Using a Systems Perspective and showing an impact of batterer programs in context, Batterer Intervention Services Coalition of Michigan, Viewed on March 11, 2014 , available at http://www.biscmi.org/aquila/Batterer%20Program%20Evaluations%20Using.pdf

Amanda B. Cissner & Nora K. Puffett, *Do Batterer Program Length or Approach Affect Completion or Re-Arrest Rates?* CENTER FOR COURT INNOVATION, 2006, available at: http://www.courtinnovation.org/sites/default/files/IDCC_DCAP final.pdf

Jeffrey L. Edleson, *Groupwork with Men Who Batter: What the Research Literature Indicates*, NATIONAL RESOURCE CENTER ON VIOLENCE AGAINST WOMEN, 1-14, 2012, available, at http://www.vawnet.org/Assoc_Files_VAWnet/AR_GroupworkMenWhoBatter.pdf

Edward W. Gondolf, *The Survival of Batterer Programs? Responding to "Evidence-Based Practice" and Improving Program Operation*, Presented at BATTERER INTERVENTION: DOING THE WORK AND MEASURING THE PROGRESS,‖ December 3 & 4, 2009, available at: https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/The Survival of Batterer Programs.pdf

Melissa Labriola, et. al., *Court Responses to Batterer Program Noncompliance, A National Perspective*, CENTER FOR COURT INNOVATION, 2007, available at: https://www.ncjrs.gov/pdffiles1/nij/grants/230399.pdf

T.K. Logan, *Tools and Interventions for Offenders: Where do we go Next?* INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, 57(10), 1187-1188, 2013, available at http://ijo.sagepub.com/content/57/10/1187.full.pdf+html

Michael Paymar & Graham Barnes, *Countering Confusion about the Duluth Model*, BATTERED WOMEN'S JUSTICE PROJECT, available at http://www.bwjp.org/files/bwjp/articles/Countering_Confusion_Duluth_Model.pdf

Femicide/Homicide and Lethality

Bernie Auchter, *Men Who Murder Their Families: What the Research Tells Us*, NATIONAL INSTITUTE OF JUSTICE, 2010, available at http://www.nij.gov/journals/266/pages/murderfamilies.aspx

Lynn Hecht Schafran, *Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence*, JUDICATURE 93(3), available at http://www.ncdsv.org/images/HechtSchafran_RiskAssessmentAndIPSA_2010.pdf

Risk Assessment

Jacquelyn C. Campbell & Nancy Glass, *Danger Assessment*, JOHNS HOPKINS SCHOOL OF NURSING, 2014, available at http://www.dangerassessment.org/

Janice Roehl, et. al., *Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study*, NATIONAL INSTITUTE OF JUSTICE, 2005, available at https://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf