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.

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[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.

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[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

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[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).