

**DECIDING CHILD CUSTODY WHEN THERE IS
DOMESTIC VIOLENCE:
A BENCHBOOK FOR PENNSYLVANIA COURTS**

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The **Women's Law Project** (WLP) is a public interest law center, committed to fighting discrimination and injustice against women and to advancing the legal, health, economic and societal status of women and their families. The WLP engages in high-impact litigation and leads advocacy, education and public policy efforts on behalf of women and children, and is recognized as a national leader in the field of women's rights, as well as a unique resource for women in Pennsylvania. It has been WLP's goal since its founding in 1974 to provide women with knowledge to empower them to address the problems in their own lives, to work to eliminate gender discrimination in laws and institutions, and to promote changes in the legal system that directly affect the status and opportunities of women.

The **Support Center for Child Advocates** (Child Advocates), founded in 1977, is the country's oldest and largest pro bono legal and social services agency for children. Its mission is to advocate for abused and neglected children in Philadelphia with the goal of securing a permanent, nurturing environment for every child. Child Advocates teams specially trained volunteer attorneys with staff social workers and lawyers who are specialists in child welfare practice and children's legal issues. Working together in this unique service model, Child Advocates protects children by securing social services, finding alternative homes and helping them testify in court.

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Copies of the Benchbook are available on our websites at: www.womenslawproject.org and www.advokid.org.

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I. Introduction

Domestic relations courts often must make custody decisions about children in families where there is domestic violence — a pattern of behavior that includes the use or threat of violence and intimidation for the purpose of gaining power and control over a current or former family or household member. These decisions are made in protection from abuse cases, in which the court is authorized to include custody and visitation provisions in temporary orders, as well as in custody cases.

The purpose of this Benchbook is to assist judges in addressing custody where there is domestic violence. This Benchbook highlights and summarizes applicable Pennsylvania statutory provisions and appellate decisions, and includes recommendations from experts regarding both procedural tools and evidentiary questions that will help ensure resolutions to custody and visitation disputes that enhance the safety of victims while serving the best interest of children. Finally, this Benchbook includes relevant research to help the court understand the complex impact family violence has on children, and to dispel common myths and stereotypes about domestic violence.

II. Protection From Abuse Proceedings

A. The Protection From Abuse Act

The overall purpose of the Protection From Abuse (PFA) Act is to protect victims of domestic violence. *Lee v. Carney*, 435 Pa. Super. 405, 645 A.2d 1363 (1994). To accomplish its protective purpose, the Act offers victims the opportunity to petition for a broad spectrum of judicial relief through emergency, temporary, and final PFA orders in addition to providing for enhanced law enforcement responsibilities and strict confidentiality requirements. *See infra* Apps. F-1, F-2 (PFA statute and rules in their entirety).

1. Definition of Abuse

The PFA Act defines “abuse” as:

The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
- (2) Placing another in reasonable fear of imminent serious bodily injury.
- (3) The infliction of false imprisonment pursuant to 18 Pa. C.S. § 2903 (relating to false imprisonment).
- (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 66 (relating to child protective services).

- (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S.A. § 6102(a).

A person need not suffer actual injury to qualify for a PFA order. Nor is physical contact required. Evidence of a reasonable fear of imminent bodily injury is sufficient to support issuance of a PFA order. *See Burke v. Bauman*, 2002 PA Super. 396, ¶¶ 7-8, 814 A.2d 206, 208 (recognizing that it is possible for a person to be placed in reasonable fear of imminent bodily injury based on telephone calls, particularly when coupled with a history of violence); *Fonner v. Fonner*, 1999 PA Super. 122, ¶¶ 8-11, 731 A.2d 160, 163 (affirming issuance of PFA order against husband based upon his angry, loud badgering of wife, restricting her movement by holding arm, punching wall near her, and threatening to hit her).

2. Standard of Evidence

When the court conducts an evidentiary hearing to determine whether to issue a final PFA order, it is the petitioner's burden to show the court by a preponderance of the evidence that the abuse occurred. 23 Pa.C.S.A. § 6107(a); *see* Section IV *infra* (detailed discussion of domestic violence evidentiary issues that may be relevant in both PFA and custody proceedings). The decision by a District Attorney or the police as to whether to pursue criminal charges against a defendant is a determination regarding criminal

culpability and is not relevant to the decision by a civil court as to whether to issue a PFA. *Boykin v. Brown*, 2005 PA Super. 60, ¶¶ 7-9.

3. Domestic Violence Advocates

Advocates are specially trained and possess expertise that can be helpful in assisting domestic violence victims. The availability of an advocate to speak with a victim and accompany the victim into the courtroom can make the difference between a victim proceeding with the hearing or being intimidated by the opposing party and either agreeing to dismiss the petition or never showing up to court.

The PFA Act and Philadelphia Family Court local rule permit domestic violence advocates to accompany and to assist litigants in PFA proceedings.

PFA Act: Advocates who have undergone a minimum of forty hours of specialized domestic violence training and are affiliated with a program whose primary purpose is to provide direct assistance to domestic violence victims are authorized to accompany domestic violence victims to PFA proceedings. 23 Pa.C.S.A. § 6111.

Philadelphia: Family Court is required to allow the domestic violence advocate “who has accompanied the plaintiff to Court to be present in the courtroom throughout the proceedings.” Phila. Fam. Ct. R. 1904.4. When the victim is a pro se plaintiff, the advocate may assist the plaintiff with presentation of the facts to the court. *Id.*

4. Service of Process

A PFA may be served upon the defendant by a sheriff or competent adult. Pa. R. Civ. P. 1930.4(b). A victim of abuse may not succeed in serving the petition and order upon the defendant prior to the hearing date. In the event that personal service cannot be completed, the court is authorized to issue a special order authorizing service by another means, including service by mail. *Id.*

5. Remedies

The PFA Act is designed to provide immediate protection for victims of domestic violence that is preventive in nature through provisions that enable courts to respond quickly and flexibly. *Commw. v. Snell*, 1999 PA Super. 185, 737 A.2d 1232; *Snyder v. Snyder*, 427 Pa. Super. 494, 629 A.2d 977 (1993). The PFA Act authorizes the court to issue a PFA order that includes a wide variety of relief to protect the petitioner from abuse. In fact, a PFA order provides broader relief than a divorce criminal stay away order and may therefore be appropriate in cases in which criminal charges have been brought and a stay away order issued by the criminal court.¹

Provisions authorized to be included in a PFA order include the following:

Protection: Direction to defendant to refrain from abusing the plaintiff or minor children. 23 Pa.C.S.A. § 6108(a)(1).

Eviction & restoration of possession: Eviction of defendant from the residence or restoration of possession of the residence to the plaintiff if it is jointly owned or leased by the parties, is owned or leased by the entirety or is owned or leased solely by the plaintiff. *Id.* § 6108(a)(2); *Snyder v. Snyder*, 427 Pa. Super. 494, 629 A.2d 977 (1993) (finding that removing abusive spouses from marital home is preferred remedy under Protection from Abuse Act).

Exclusive possession of the residence: Award exclusive possession of residence to the plaintiff when the defendant is the sole owner or lessee if defendant has a duty to support the plaintiff or minor children. 23 Pa.C.S.A. § 6108(a)(3).

Temporary custody and visitation: Award temporary custody or visitation. *Id.* § 6108(a)(4).

¹ See, e.g., *Felton v. Felton*, 679 N.E.2d 672 (Ohio 1997) (holding that issuance of a no-harassment order in a divorce proceeding does not preclude issuance of protection order that, pursuant to the Ohio domestic violence statute, provides specific remedies tailored to address abuse).

Financial support: Direction to defendant to pay financial support. *Id.* § 6108(a)(5).

Stay away: Prohibition on defendant's contact with the plaintiff or minor children by restraining the defendant from entering the place of employment or business or school of the plaintiff or the minor children and from harassing the plaintiff or plaintiff's relatives or minor children. *Id.* § 6108(a)(6).

Relinquish weapons: Order defendant to relinquish weapons that have been used or were threatened to be used in an incident of abuse against the plaintiff as well as any firearm license possessed and prohibit defendant from acquiring or possessing any other weapons for the duration of the order. *Id.* § 6108(a)(7).

Compensation: Order defendant to compensate the plaintiff for reasonable losses, including:

- medical, dental, relocation, and moving expenses;
- counseling;
- loss of earnings or support;
- costs of repair or replacement of real or personal property damaged or destroyed or taken by the defendant or at the direction of the defendant *See Krassnoski v. Rosey*, 454 Pa. Super. 78, 86, 684 A.2d 635, 639 (1996) (compelling defendant to either return or pay for plaintiff's personal property when defendant has destroyed it and procuring it herself would potentially subject plaintiff to danger); *Gerace v. Gerace*, 429 Pa. Super. 203, 207, 631 A.2d 1360, 1361-62 (1993).
- other out of pocket losses for injuries sustained;
- reasonable attorney fees; *Egelman v. Egelman*, 1999 PA Super. 57, ¶¶ 18-19, 728 A.2d 360, 367 (holding that PFA Act only permits attorney's fees to be awarded to plaintiffs); *Krassnoski v. Rosey*, 454 Pa. Super. 78, 86, 684 A.2d 635, 639 (1996) (awarding of attorney's fees permitted where it is fair and appropriate means of deterring abusive conduct); *Younes v. Mansour*, 25 Phila. 497, 504 (Pa. C.P., Fam. Ct. 1993)

(providing for recovery of attorney's fees accrued both in obtaining PFA and enforcing it through contempt proceedings).

Id. § 6108(a)(8).

Anti-Stalking: Direction to defendant to refrain from stalking or harassing the plaintiff. *Id.* § 6108(a)(9).

Other: Any other appropriate relief sought by the plaintiff. *Id.* § 6108(a)(10).

6. Enforcement of Protection From Abuse Orders

a. Civil Contempt

In the event of violation of any provision of a PFA order issued in Pennsylvania or any other state, the Plaintiff may seek an order of civil contempt. 23 Pa.C.S.A. § 6114.1(a). The dominant purpose of civil contempt is to enforce compliance with a court decree intended to benefit a private party. *Brocker v. Brocker*, 429 Pa. 513, 522, 241 A.2d 336, 340 (1969).

In order to find civil contempt, in addition to establishing that the contemnor failed to obey an order, the preponderance of the evidence must establish that:

- (1) the contemnor had notice of the specific order or decree which he is alleged to have disobeyed;
- (2) the act constituting the contemnor's violation was volitional; and
- (3) the contemnor acted with wrongful intent.

In re Contempt of Court, 2004 PA Super. 102, ¶ 6, 849 A.2d 1207, 1210-11.

Upon finding civil contempt, the court may imprison the defendant until he or she complies with the provisions in the order or demonstrates intent to do so, but imprisonment may not exceed six months. 23 Pa.C.S.A. § 6114.1(c). The court may also "constrain him in accordance with law." *Id.* § 6114.1(b); *see, e.g., Nickler v. Nickler*, 45

Pa. D & C.3d 49, 56 (Ct. Com. Pl. Wash. County 1987) (holding defendant in contempt for violating PFA for withdrawing balance of his savings plan where order specifically enjoined him from “transferring, encumbering, concealing, selling, removing, or alienating any real or personal property, marital or otherwise, pending a final disposition of the matter by the master”).

b. Criminal Contempt

A court may hold the defendant in indirect criminal contempt and punish the defendant upon the filing of charges of criminal contempt by the police or the plaintiff for violation of a Pennsylvania protection order, a foreign protection order or a court-approved consent agreement. 23 Pa.C.S.A. §§ 6113.1, 6114(a); Pa. R. Civ. P. 1905.8. The purpose of holding someone in criminal contempt is to punish criminally in order to preserve the integrity of the court and protect the public good. *Cipolla v. Cipolla*, 264 Pa. Super. 53, 398 A.2d 1053 (1979).

In order to establish indirect criminal contempt, the evidence must be sufficient to establish the following four elements beyond a reasonable doubt:

- (1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited;
- (2) the contemnor must have had notice of the specific order or decree;
- (3) the act constituting the violation must have been volitional; and
- (4) the contemnor must have acted with wrongful intent.

Commw. v. Baker, 564 Pa. 192, 198, 766 A.2d 328, 331 (2001) (citations omitted).

A finding of criminal contempt can be made whether the order was entered into by agreement or after a hearing, and the Defendant’s actions need not amount to physical

violence. Following are several cases where Pennsylvania courts found defendants' actions sufficient to warrant an imposition of criminal contempt:

Commw. v. Snell, 1999 PA Super. 185, 737 A.2d 1232 (finding respondent guilty of criminal contempt twice, once for attempting to enter petitioner's home and second time for meeting petitioner at family function and engaging her in heated argument);

Commw. v. Miller, 455 Pa. Super. 534, 539-40, 689 A.2d 238, 240-41 (1997) (finding that respondent's actions in coming in close proximity/following petitioner four times in one afternoon were sufficient to support determination that respondent was in criminal contempt of PFA);

Commw. v. Nelson, 456 Pa. Super. 349, 354-55, 690 A.2d 728, 731 (1997) (finding that respondent may be found guilty of criminal contempt of consent-based PFA even though no admission of abuse was made at time PFA was issued);

Rodgers v. Norwood, 25 Phila. 213, 218-19 (Pa. C.P., Dom. Rel. 1992) (finding that defendant's failure to pay sums for medical costs to plaintiff as agreed and for damages to plaintiff's property as ordered sufficient to support finding of criminal contempt).

A sentence for criminal contempt may include imprisonment up to six months or a fine of not less than \$100 nor more than \$1000, or both, and may include other relief set forth in the Protection from Abuse Act. Pa. R. Civ. P. 1905.8(c); *see, e.g., Commw. v. Snell*, 737 A.2d at 1235 (upholding trial court's decision to extend PFA for additional year as part of respondent's sentence for second criminal contempt conviction within one year period). The defendant shall not have the right to a jury trial on such a charge, *Eichenlaub v. Eichenlaub*, 340 Pa. Super. 552, 562, 490 A.2d 918, 923 (1985), but is entitled to counsel. 23 Pa.C.S.A. § 6114(b).

7. Cross-Petitions Under the Protection From Abuse Act

Sometimes both parties file PFA petitions against one another. Cross-petitions for PFA orders may be heard simultaneously or sequentially depending on the date of filing. When issued against both parties, either in one or two documents, such orders are known as “mutual orders of protection.” There are several issues to bear in mind when faced with cross-petitions:

Determine whether each filed a timely petition: Orders may be issued against both parties only when each party has filed a timely petition. 23 Pa.C.S.A. § 6108(c); *McKelvey v. McKelvey*, 2001 PA Super. 103, 771 A.2d 63 (holding that court may not award mutual orders of protection by consent of parties in absence of filing of timely written petitions); *Heard v. Heard*, 418 Pa. Super. 250, 614 A.2d 255 (1992) (holding that court cannot issue mutual PFA orders *sua sponte*).

Determine the predominant aggressor: When conducting a hearing on cross-petitions, the court must carefully consider the evidence to determine whether PFA orders should be issued against both parties. Research shows that when domestic violence victims use violence, it is for very different purposes than that of batterers. Instead of using violence to control their partners, victims use violence to stop or escape the violence in self-defense, to respond proactively to protect themselves, and to retaliate against a long history of abuse.² The Massachusetts *Guidelines for Judicial Practice in Abuse Prevention Proceedings* advises, “The court has a responsibility to decide who is the primary aggressor, who is in danger from whom, and who needs the court’s protection. Only in the situation where each party is genuinely in danger from the other and proves that circumstance by a preponderance of the evidence should a mutual order be issued.”³ To determine the predominant aggressor, courts are encouraged to consider the larger context, including the following factors:

² See Meg Crager et al., *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region* 9-10 (2003), available at <http://www.mincava.umn.edu/documents/victimdefendant/victimdefendant.html>; Shamita Das Dasgupta, *Towards an Understanding of Women’s Use of Non-Lethal Violence in Intimate Heterosexual Relationships* 5 (2001), available at <http://www.vaw.umn.edu/documents/vawnet/towards/towards.html>.
³ *Massachusetts Guidelines for Judicial Practice, Abuse Prevention Proceedings*, Commentary to 6:07, available at <http://www.mass.gov/courts/formsandguidelines/domestic/dvc6.html#6.07> (n.d.).

- the history of domestic violence between the people involved;
- the threats and fear level of each person;
- whether either person acted in self defense;
- who is at risk of future harm.

Explore possible retaliatory motive: For many perpetrators, using the civil legal system is another means to effectively harass and abuse their victim.⁴ In the case of sequentially filed petitions, no presumptions should be made as to whether the first or second to file a petition is the “victim.” In such cases, the Massachusetts Judicial Guidelines further advise that, “(1) the court in the second action should question the plaintiff, if it suspects a retaliatory motive, and (2) where no substantial likelihood of immediate danger exists, the court may refer the plaintiff in the second action back to the court that issued the first order to seek a modification of that first order.”⁵

Be aware of consequences of issuing mutual orders: In addition to failing to identify the real abuser, mutual orders confuse the police and give them no guidance on how to enforce the order(s). In the absence of being able to identify the perpetrator from observation of the events, officers may respond to a call by either doing nothing or arresting both parties. This leaves the victim without protection and not only reinforces the abuser’s belief that it is acceptable to batter but also gives him a tool for further harassment and abuse of the victim.⁶ In addition, issuance of a PFA against the victim sends the message that the justice system victimizes rather than protects, potentially deterring victims from seeking help in the future, as well as rendering them vulnerable to other devastating consequences such as loss of custody of children and denial of immigration status.⁷

B. Addressing Custody Under the Pennsylvania Protection From Abuse Act

The law grants the court the authority to award temporary custody and visitation rights. 23 Pa.C.S.A. § 6108(a)(4). Including such relief in the PFA order provides

⁴ Joan Zorza, *Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices*, 3 DOMESTIC VIOLENCE REP. 67-68 (1999).

⁵ Massachusetts Guidelines, *supra* note 3, at 6:07.

⁶ Joan Zorza, *What is Wrong With Mutual Orders of Protection?*, 4 DOMESTIC VIOLENCE REP. 67 (1999).

⁷ Dasgupta, *supra* note 2, at 7.

immediate, short-term protection to the children and impedes abduction and threatening conduct by the perpetrator.⁸

The Protection From Abuse Act was amended in 1994 to provide safeguards designed to protect children by restricting the abuser's custody and visitation rights in the following circumstances:

Physical abuse of child and criminal interference with custody: An abuser *shall not* be granted custody, partial custody, or unsupervised visitation in cases in which the petitioner alleges and the court finds that the abuser has physically abused the children or has been convicted within the prior two years of violating Pennsylvania's statute against criminal interference with the custody of a child. *Id.* § 6108(a)(4).

Abuse of plaintiff or child: If the court finds after a hearing that the defendant has abused the plaintiff or a child, the court *may* order that the visitation be supervised by another person, such as a grandparent or family friend. *Id.* The person who agrees to supervise visitation must sign an "affidavit of accountability" swearing to be responsible for supervision. *Id.*

Serious abuse or risk of abuse: If, after a hearing, the court finds that the abuser has "inflicted serious abuse" or "poses a risk of abuse" to either the party seeking protection or the child, the court *may* order that the supervised visitation take place in a court facility to ensure that the child is safe, or the court may deny visitation entirely. *Id.*

Snatching child: If an abuser forcibly or fraudulently takes a child away from the custody and care of the other parent, the court *must* order the abuser to return the child unless doing so would place the child in danger. *Id.*

Prevention of abuse: In order to prevent further abuse to the other parent and child during periods of access, the court *must* consider and *may* impose special conditions necessary to assure the safety of the child and parent. *Id.*

⁸ Nat'l Council of Juv. & Fam. Ct. Judges, FAMILY VIOLENCE: A MODEL STATE CODE § 305, cmt. at 26 (1994) [hereinafter MODEL CODE].

C. The Relationship Between Custody Orders Under the PFA and Custody Acts

In an effort to protect themselves and their children, parents may file for PFA orders before, during, or after a custody proceeding. When there has been abuse or risk of imminent abuse as defined by the PFA Act, the Act affords a remedy designed to provide immediate protection for which there is no counterpart under the custody statute. The existence of a custody or divorce proceeding should not be used as a reason to deny a PFA order.⁹

Under the PFA Act, a parent and children can obtain immediate *ex parte* relief, without cost, that is enforceable by the police. Emergency relief is available nights, weekends, and holidays. It is important to remember the availability of this remedy in a case involving abuse and to understand how the statutory protections under the PFA Act intersect with the court's authority under the statutory provisions of the custody statute.

1. When No Pre-Existing Custody Order Is in Effect

When no pre-existing custody order exists and the party seeking a PFA order requests custody, the trial court has the authority to award that person temporary custody of the children in the PFA order. 23 Pa.C.S.A. § 6108(a)(4).

Length of orders: The custody portion of the PFA order only lasts as long as the PFA order lasts. PFA orders continue for a fixed period of time not to exceed eighteen months. *Id.* § 6108(d).

Number of extensions: The court may extend the order an unlimited number of times based on:

⁹ See, e.g., *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249 (Md. 2001) (holding that order of protection courts should not refuse to grant order of protection supported by evidence because it believes that issuance of order of protection to one parent may give that parent custody advantage in divorce case).

- evidence of subsequent acts of abuse,
- a pattern or practice that indicates continued risk of harm to the plaintiff or minor child,
- the pendency of a contempt petition.

Id. § 6108 (e)(1), (3).

No bar to filing separate custody petition: Nothing in the PFA Act bars either party from filing a petition for custody under the custody statutory provisions at any time during the length of the PFA order. *Id.* Thus, the parties may petition and receive from a custody court a permanent custody order while the PFA order is in effect. The terms of any such custody order, however, cannot conflict with those of the PFA order. *See Dye v. McCoy*, 423 Pa. Super. 334, 621 A.2d 144 (1993).

2. When a Pre-Existing Custody Order Is in Effect

Under certain circumstances, a court is authorized to address custody in a PFA order even if the defendant already has partial, shared, or full custody.

Risk to Children: The court issuing the temporary PFA order can supersede the pre-existing custody order if the court finds that the abuser is likely to abuse the children or remove them from the jurisdiction before the court hearing on the final protection order. 23 Pa.C.S.A. § 6108(a)(4).

PFA Order for Child: If the PFA order is sought specifically for the child, the court may deal with custody even though a custody order already exists. *See Dye*, 423 Pa. Super at 337, 621 A.2d at 145 (holding that if trial court finds that a child has been abused and enters protection order for the child, it must supersede or suspend any pre-existing custody order that is in conflict with terms of protection order if the protection order is necessary to protect child). The court may do so, however, only based on consideration of the best interest of the child. *Shandra v. Williams*, 2003 PA Super. 85, ¶ 1, 819 A.2d 87, 88.

III. Custody

A. The Custody Statute

The custody statute authorizes the court to determine the extent to which parents or persons acting *in loco parentis* have rights to possession and decision-making regarding children. *See* Apps. F-3, F-4 (Custody Act and Rules in their entirety).

1. Definitions

Physical Custody: the actual physical possession and control of the child, which may be allocated as follows:

- **Primary** – giving the party the right to have the child live with him or her most of the time.
- **Partial** – giving the non-primary custodian the right to take possession of the child away from the custodial parent for a certain period of time.
- **Visitation** – gives the non-custodial parent the right to visit the child but does not include the right to remove the child from the custodial parent’s control.
- **Shared** – awards physical custody to both parents in such a way as to assure the child of frequent and continuing contact with and physical access to both parents.
- **Sole** – gives the custodial parent exclusive control of the child.

See 23 Pa.C.S.A. § 5302.

Legal Custody: the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions. Legal custody may be sole or shared. The custody statute does not provide any specifics about how shared legal custody works.

The court must address both physical and legal custody.

2. Standard for Determining Custody

Section 5301 of the Pennsylvania custody statute declares the “best interest of the child” to be the guiding legal standard in custody determinations. *Id.* § 5301. *See generally* *McMillen v. McMillen*, 529 Pa. 198, 602 A.2d 845 (1992). In order to determine what is in a child’s best interest, the court should consider “all factors which legitimately impact upon the child’s physical, intellectual, moral and spiritual well-being.” *Lee v. Fontine*, 406 Pa. Super. 487, 488, 594 A.2d 724, 725 (1991); *Zummo v. Zummo*, 394 Pa. Super. 30, 45, 574 A.2d 1130, 1142 (1990).

The custody statute sets forth specific considerations to be taken into account by the court when determining “best interest.” These include:

- each parent and adult household member’s present and past violent or abusive conduct which may include, but is not limited to abusive conduct as defined under the PFA Act;
- which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child;
- any other factor which legitimately impacts the child’s physical, intellectual and emotional well-being;
- the child’s preference.

This Benchbook will discuss these factors, with a particular focus on domestic violence.

B. Present and Past Violent and Abusive Behavior Must Be Considered in Awarding Custody and Visitation in Pennsylvania

1. Exposure to Violence Adversely Affects Children

A growing body of research demonstrates that:

- up to 50% of contested custody cases involve physical violence between the parents.¹⁰
- children can be adversely affected in many ways by witnessing domestic violence, including development of aggressive or fearful behaviors, impairment of cognitive functioning, and resulting long term developmental problems.

In 1990, the National Council of Juvenile and Family Court Judges issued findings and recommendations that emphasized the need for judges to view evidence of domestic violence as “a significant factor that must be considered when deciding custody and visitation.”¹¹ Forty-eight states and the District of Columbia have adopted legislation requiring courts to consider domestic violence when fashioning custody awards,¹² and eighteen of those states have created a rebuttable presumption against giving custody to a perpetrator of domestic violence.¹³

Pennsylvania became one of these jurisdictions in 1990 when the legislature amended the custody statute expressly to require that courts consider the past and present

¹⁰ STATE JUSTICE INSTITUTE, DOMESTIC VIOLENCE AND CUSTODY DISPUTES 4-8 (1997); Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 320 (1997).

¹¹ Nat’l Council of Juv. & Fam. Ct. Judges, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges*, reprinted in 41 JUV. & FAM. CT. J. 1, 6-7 (1990).

¹² Data compiled from the Domestic Violence Law Search database of the National Council of Juvenile and Family Court Judges. Nat’l Council of Juv. & Fam. Ct. Judges, *Domestic Violence Law Search*, at <http://www.ncjfcj.org/dept/fvd/statutesfvd/> (visited Feb. 19, 2004).

¹³ *Id.*

violent and abusive behavior of the parents and adults in the child's household in deciding the best interest of the child. 23 Pa.C.S.A. § 5303(a)(3).

2. Abusive Conduct Under the Custody Statute

Abusive behavior includes, but is not limited to, conduct that is defined as abusive under Pennsylvania's PFA Act. *Id.* § 5303(a); *see supra* Section II.A.1. It may also include verbal, emotional, or economic abuse, all of which may be detrimental to the child's best interest even when not accompanied by physical abuse of the child or the other parent.¹⁴ While the definition of abuse from the PFA Act guides the court's determination as to whether abuse is a factor, 23 Pa.C.S.A. § 5303(a)(3), *it is not necessary that the victim have obtained a protection from abuse order.*

3. Violence Directed at Others Is Relevant When Determining Physical and Legal Custody

In *Costello v. Costello*, 446 Pa. Super. 371, 666 A.2d 1096 (1995), the Superior Court affirmed the importance of considering violent and abusive behavior and clarified that this behavior must be carefully considered *even where it was not directed against the child*. Reversing the trial court's award of partial custody to a father, the Superior Court found that the trial court did not fully consider the father's abusive conduct that led

¹⁴ *See, e.g.*, UNIV. OF KY. COLL. OF LAW OFFICE OF CONTINUING LEGAL EDUC., CIVIL REMEDIES FOR WOMEN VICTIMIZED BY VIOLENCE 8 (2003); AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY 4 (1996) (including psychological maltreatment as category of violence within family violence).

to the child's caretaker-grandmother obtaining a protection from abuse order against the father:

The trial court pursued Father's explanation with this inquiry: "Did this incident have anything to do with Kevin[?]. . . Was he involved? Was he injured or anything like that?" Father responded, "no." There was no further testimony on the subject of the PFA. Additionally, the fact that Father had a PFA order entered against him was not mentioned in the trial court's opinion.

Id. at 374-75, 666 A.2d at 1098.

This clarification from the Superior Court is extremely important because defendants will sometimes try to convince the court that their violence towards others is not related to the custody decision unless it was directed at the children. *Costello* makes clear that this argument is contrary to the plain language of the custody statute. Consistent with these authorities, Pennsylvania courts have held that a complete inquiry into allegations and evidence of abusive behavior, including abuse directed toward others, must take place and that such behavior can potentially be the basis for restricting custodial access.

Burkholder v. Burkholder, 2002 PA Super. 6, 790 A.2d 1053 (stating that trial judge correctly noted that, pursuant to 23 Pa.C.S.A. § 5303, she was required to consider father's abusive conduct towards mother in custody decision);

Wiskoski v. Wiskoski, 427 Pa. Super. 531, 629 A.2d 996 (1993) (reversing order of primary physical custody to father when, among other things, trial judge failed to consider father's abuse of mother, which rendered him less fit as parent). To fulfill this legal obligation, complete development of the record is essential. *See Moore v. Moore*, 535 Pa. 18, 27, 634 A.2d 163, 167 (1993).

4. Domestic Violence Is Relevant in Determining the Appropriateness of Shared Custody

The Pennsylvania custody statute authorizes courts to order shared legal or shared physical custody. 23 Pa.C.S.A. §§ 5304, 5302. In practice, shared custody can refer to two different types of arrangements:

- both shared legal custody (decision-making) and shared physical custody (living arrangements, daily care, and supervision), or
- only shared legal custody, where the child is living primarily with one parent.

Before awarding shared custody, the court must consider the following factors:

Cooperation: Cooperation and communication are essential to the success of a shared custody arrangement. The Pennsylvania Superior Court has held that before ordering shared legal custody, the court must determine that the parents are able to cooperate, at least minimally. *Hill v. Hill*, 422 Pa. Super. 533, 619 A.2d 1086 (1993).

Domestic violence indicates elevated conflict between the parents. Some studies have shown parental conflict to be incompatible with shared custody and unhealthy for children.¹⁵ Courts have refused to order shared custody when domestic violence precludes cooperation. *See e.g., Nowotarski v. Matz*, 32 Pa. D. & C.4th 509 (Ct. Com. Pl. Berks County 1996) (concluding father incapable of cooperation and refusing to order joint custody where evidence showed father to be physically and verbally abusive to mother, intransigent, and controlling.)

The court should also consider whether an order of shared custody would be contraindicated because it would place the parent and/or child at risk:

Shared physical custody may create safety risks: A shared physical custodial arrangement between parents with a history of domestic violence also compromises the safety of the battered spouse by providing a batterer

¹⁵ Diane N. Lye, *Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* iii, 4-21 (1999), available at http://www.courts.wa.gov/newsinfo/newsinfo_reports/parent/parentingplanstudy.pdf.

with continuing opportunities for destructive and potentially lethal contact.¹⁶

Shared legal custody may create risk of harassment: Even an arrangement where parents share only legal custody may create problems for domestic violence victims and opportunities for the abuser to continue harassment. Interactions necessary to joint decision making give the batterer the opportunity to continue to exert control over and manipulate the victim and make separation from the abuser impossible.¹⁷

While no reported Pennsylvania decision addresses whether shared custody standards can be met in a case involving domestic violence, other authorities and courts have considered this question and concluded that they cannot:

American Bar Association (ABA): The American Bar Association recognizes that shared custody is “inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.”¹⁸ In addition, in a report to the ABA President, several ABA committees stated that “[a]nyone who has committed severe or repetitive abuse to an intimate partner is presumptively not a fit sole or joint custodian for children” and urged that “[w]here there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children.”¹⁹

National Council of Juvenile and Family Court Judges (NCJFCJ): The Model Code includes a provision creating a rebuttable presumption that joint physical and legal custody should not be awarded when there is a determination by a court that domestic or family violence has occurred.²⁰

Other Jurisdictions: Courts in other states have found an award of shared custody inconsistent with evidence of a history of violence. Following are several examples:

¹⁶ MODEL CODE, *supra* note 8, § 402, cmt. (noting importance of considering the safety of both abused parent and child when making custody determinations).

¹⁷ D. Lee Kahachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1771 (1990).

¹⁸ Am. Bar Ass’n, Model Joint Custody Statute, 15 FAM. L. REP. (BNA) 1494, 1494 (1989).

¹⁹ HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 13 (1994) [hereinafter ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN].

²⁰ MODEL CODE, *supra* note 8, § 401.

Farrell v. Farrell, 819 P.2d 896, 900 (Alaska 1991) (upholding lower court's determination that "the history of domestic violence between the parties" rendered cooperation unlikely, and thus joint legal custody was inappropriate);

D.S. v. D.W., Nos. CN93-11783, 96-37561, 1997 WL 905950, at *3 (Del. Fam. Ct. Nov. 10, 1997) ("In light of the fact that Father has committed at least four acts of domestic violence against Mother and has not completed a program of evaluation and counseling for perpetrators of domestic violence, no evidence exists to support an award of joint custody to him.");

In re Marriage of Brainard, 523 N.W.2d 611, 614-15 (Iowa Ct. App. 1994) (finding that joint custody was inappropriate because of domestic abuse and concomitant hostility);

Heilman v. Novak, 771 P.2d 948 (Kan. App. 1989) (joint custody impracticable given history of violence by father and "acrimonious and contentious relationship" of mother and father);

R.H. v. B.F., 653 N.E.2d 195, 203 (Mass. App. Ct. 1995) (finding, in a domestic violence case, that the lower court's "award of joint legal custody [was] inconsistent with the overwhelming undisputed evidence of hostility between the parents");

In re Houtchens, 760 P.2d 71 (Mont. 1988) ("[J]oint custody of the minor child is not in his best interest due to the violent behavior manifested by [the father] towards [the mother] during the marriage and the risk posed to the child as a result of such behavior.");

Russo v. Gardner, 956 P.2d 98, 102-03 (Nev. 1998) (noting statutory presumption that joint custody by domestic violence perpetrator not in child's best interest);

Zuger v. Zuger, 563 N.W.2d 804, 810 (N.D. 1997) (finding that shared custody inappropriate in domestic violence case, since parents had not "demonstrated an ability and willingness to cooperate").

5. Domestic Violence Is Relevant to the Appropriateness of Visitation and Crafting of Visitation Orders

Even after parents have separated, children are often exposed to a range of harmful behaviors during custody exchanges—from witnessing heated arguments between their parents to being physically hurt during an abusive incident. Experts now emphasize “that a parent’s right to visitation cannot take precedence over a child’s exposure to danger or the threat of harm.”²¹ Addressing this concern, Marjorie D. Fields, former Supervising Judge of Family Court in Bronx County, New York, commented:

By focusing on parental rights rather than on the best interest of the child, courts frequently fail to limit child visitation by a parent who has abused the other parent. The substantial body of research showing the impact of domestic violence on children, however, suggests that judges *should* take spouse abuse into account in making custody and visitation decisions.²²

Both before and after the 1990 amendment requiring the consideration of abusive behavior in awarding custody, Pennsylvania courts have recognized the ongoing effect of a parent’s past violent conduct and have limited visitation in the face of evidence of such conduct:

Costello v. Costello, 446 Pa. Super. 371, 376, 666 A.2d 1096, 1099 (1995) (vacating award of partial custody to father and remanding with suggestion that trial court consider more limited award of visitation where trial court did not fully consider abusive behavior by father).

²¹ See generally The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q., 197, 205 (1995) [hereinafter Family Violence Project].

²² Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL’Y 221, 225 (1994) (emphasis in the original). See App. D-3 for a reprint of this article in its entirety.

Green v. Sneeringer, 431 Pa. Super. 66, 70, 635 A.2d 1074, 1076 (1993) (upholding denial of visitation where father was convicted of first degree murder of mother of their two-year-old child).

Schwarcz v. Schwarcz, 378 Pa. Super. 170, 186, 548 A. 2d 556, 564 (1988) (limiting father's visitation rights due to, among other things, threats against mother, brandishing gun, and assault of mother-in-law).

Hughes v. Hughes, 316 Pa. Super. 505, 508, 463 A.2d 478, 479 (1983) (denying father visitation where he had a long history of abusing child's mother and had once shot her while she was holding child).

Gwyszcz Appeal, 206 Pa. Super. 397, 404-5, 213 A.2d 155, 158-9 (1965) (ordering father's visitation with son to take place outside mother's home and presence because abuse of mother during previous meetings was inappropriate for child to witness).

More and more, judges are seeking to craft visitation orders that address safety for both the child and the parents. The National Council of Juvenile and Family Court Judges recommends that visitation be awarded to a parent who has committed domestic or family violence *only* if the court finds that adequate provision for the safety of the child and parent-victim can be made.²³ According to the ABA, “[w]here there is proof of domestic violence, the court should issue very specific, highly structured custody and visitation orders. The court should leave no room for ambiguity or negotiation.”²⁴

Specific provisions that will address these concerns include:

Ordering visitation supervised by another person or agency:²⁵ Unsupervised visitation presents serious risks for battered women and their children. The potential for violence during visitation or the exchange of children for visitation is high where there is a history of domestic

²³ MODEL CODE, *supra* note 8, § 405.

²⁴ ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 19, at 14 (emphasis added). See App. B for a sample custody and visitation order.

²⁵ MODEL CODE, *supra* note 8, § 405.

violence. Visitation is one of the few times the perpetrator comes into contact with the adult victim, so the perpetrator may use the situation as an opportunity to gain control. Women have reported continued threats against their lives and their children during visitation and exchange.²⁶ Some women and children have been killed in connection with custody disputes and visitation.²⁷

Staggering drop-off and pick-up times: An order explicitly requiring that the child be dropped off and picked up at a pre-determined location for exchange or visitation with staggered arrival and departure times may eliminate entirely the need for parties to be in physical contact with one another. When requiring separate drop-off and pick-up times, authorize personnel at the supervised visitation site to hold the batterer for half an hour after the mother leaves with the child to insure mother and child's safety (i.e., allowing him to leave before she leaves with the child may allow him to wait for her).²⁸

Exchange of a child in a protected setting:²⁹ Courts have taken a leading role in establishing visitation centers that have trained professional supervisors and security.³⁰ Visitation centers can enhance safety by arranging pick-up and drop-off to preclude contact between the custodial and non-custodial parent, providing on-site security, screening

²⁶ Studies have found that during visitation 5% of abusive fathers threaten to kill the mother, 34% threaten to kidnap their children, and 25% threaten to hurt their children. Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1117 (1996) (citing Marsha B. Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 179, 181-83 (Marsoli Hansen & Michele Harway eds., 1993)); PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 109 (1990).

²⁷ More than three women are murdered by their husbands or boyfriends in the United States every day. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003) (noting that in 2001, women accounted for 85 percent of victims of intimate partner violence). For annual reports on domestic violence homicides in Pennsylvania, see Pa. Coalition Against Domestic Violence, *Homicide Reports*, available at <http://www.pcadv.org/publications>. In 2002, domestic violence claimed 157 lives in Pennsylvania. Pa. Coalition Against Domestic Violence, *Homicide Report 2002*, available at <http://www.pcadv.org/publications/homici%c92002.pdf>.

²⁸ Maureen Sheeran & Scott Hampton, *Supervised Visitation in Cases of Domestic Violence*, JUV. & FAM. CT. J., Spring 1999, at 13, 17.

²⁹ MODEL CODE, *supra* note 8, § 405.

³⁰ See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 2 (1995) (providing an overview of supervised visitation and recommendations); see also *infra* App. A (discussion of supervised visitation centers).

all cases for domestic violence, and developing confidentiality policies.³¹

Prohibit overnight visitation:³² To the extent that child safety cannot be secured or is uncertain, overnight visitation should be denied until a determination is obtained that the child will be safe with the parent.³³

Ban alcohol and drug use: The perpetrator of domestic or family violence may be ordered to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four hours preceding the visitation.³⁴

Require counseling: The perpetrator of domestic or family violence may be required to attend and complete to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of visitation.³⁵ *The victims should not be ordered into counseling individually or with the perpetrator.*³⁶

³¹ Sheeran & Hampton, *supra* note 28, at 17-18.

³² MODEL CODE, *supra* note 8, § 405.

³³ Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, CT. REV., Fall 1998, at 23, 25.

³⁴ *Id.*

³⁵ *Id.* Courts are cautioned to carefully assess the effect of counseling on batterers and not rely on counseling itself to eliminate concerns about domestic violence. Studies indicate that treatment programs for domestic violence offenders may not effectively stop the abuse or improve victim safety. *See generally* SHELLY JACKSON ET AL., U.S. DEP'T OF JUSTICE, BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE? 1 (2003) ("The stakes for women's safety are simply too high to rely on batterer intervention programs without stronger empirical evidence that they work."). One-third of the men courts refer to batterer programs never show up, and another third drop out. Edward W. Gondolf, *Limitations of Experimental Evaluation of Batterer Programs*, 2 TRAUMA, VIOLENCE, & ABUSE 79 (2001). Also, in the absence of free or low cost programs, batterer counseling may not be affordable.

³⁶ Couples counseling implies that both parties are responsible for the perpetrator's violent behavior, a message that blames victims and fails to hold offenders accountable for their crimes. Betsy Mcalister Groves et al., *Identifying and Responding to Domestic Violence: Consensus Recommendations for Child and Adolescent Health*, Family Violence Prevention Fund 28 n.5 (2002), at http://www.stopvaw.org/OFPs_and_Family_Law_Issues.html. Couples therapy may expose a battered partner to retaliation as well as increase the batterer's power and control in a relationship that already involves an unequal distribution of power. Am. Psychological Ass'n, The Ad Hoc Committee on Legal and Ethical Issues in the Treatment of Interpersonal Violence, *Potential Problems for Psychologists Working With the Area of Interpersonal Violence* 4, at <http://www.apa.org/pii/potential.html> (last visited Mar. 3, 2005).

Confidentiality of victim addresses. The address (home, work, school, and medical providers) of the abused party and the child should be kept confidential.^{37, 38}

6. Domestic Violence Is Relevant to Evaluating Relocation Requests

The ability of a domestic violence victim to relocate with her or his children is important. A domestic violence victim may request permission to relocate in order to establish a safer, more supportive home environment and/or to improve her economic opportunities. A perpetrator may object to relocation in an attempt to maintain power and control over the adult victim and children.³⁹ Courts must be aware of this dynamic and make an effort to stop abusers from using the legal system to continue dominating the abused party, particularly when, as is often the case, the victim has little support outside of the court system.⁴⁰

Gruber v. Gruber, 400 Pa. Super. 174, 583 A.2d 434 (1990), one of Pennsylvania's seminal relocation cases, illustrates the sensitivity Pennsylvania courts have shown to victims of abuse. In *Gruber*, the Superior Court provided "specific and instructive content" to the application of the best interest standard to provide "adequate guidance" to courts in relocation cases. *Id.* at 181, 583 A.2d at 437. Under *Gruber*, as part of the best interest analysis, the trial court must make a three-part inquiry:

³⁷ See also *infra* App. B (sample custody and visitation order).

³⁸ MODEL CODE, *supra* note 8, § 405 (maintaining the confidentiality of the victim's location prevents stalking and further violence); 23 PA.C.S.A. §§ 5309, 6112.

³⁹ See, e.g., Sheila M. Murphy, *Essay: Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 287 (1999) (warning judges to "be mindful of the potential for misuse of custody litigation by abusers").

⁴⁰ *Id.*

First, the court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent;

Next, the court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; [and]

Finally, the court must consider the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.

Id. at 184-85, 583 A.2d at 439 (1990).

Applying this test, Pennsylvania courts have approved requests by domestic violence victims to relocate:

Gruber, 400 Pa. Super. at 187-90, 583 A.2d at 439-41 (granting battered woman's request to relocate with children, because relocation would allow her "to escape the turmoil and troubled confrontations with her estranged husband," receive support of family and friends, and significantly improve the quality of her and children's lives, while maintaining father's relationship with children);

Burkholder v. Burkholder, 2002 PA Super. 6, ¶¶ 17, 25, 790 A.2d 1053, 1059, 1061 (affirming rescission of order requiring mother to return children to father's home state after receiving evidence of constant physical abuse and threats by father that led her to relocate to Florida without his consent).

C. Criminal Conduct Must Be Considered in Awarding Custody and Visitation in Pennsylvania

Before making an award of custody, partial custody, or visitation to a parent with a history of criminal conduct, the court must consider the conduct and assess the risk to the child.

1. Conviction, Guilty Plea, Plea of No Contest

The custody statute requires the court to specifically determine that the parent does not pose a threat of harm to the child if a parent has been convicted of or pled no contest to any of the following enumerated crimes:

- criminal homicide,
- kidnapping,
- unlawful restraint,
- rape,
- statutory sexual assault,
- involuntary deviate sexual intercourse,
- sexual assault,
- aggravated indecent assault,
- indecent assault,
- indecent exposure,
- incest,
- endangering the welfare of children,
- prostitution and related offenses, and
- sexual abuse of children.

23 Pa.C.S.A. § 5303(b).

In cases involving a parent who has been convicted of or pled guilty or no contest to any of the above offenses, the court must appoint a qualified professional to counsel that parent and must, before deciding custody, take testimony from the professional

regarding the provision of such counseling and whether the parent poses a risk of harm to the child. *Id.* § 5303(c).⁴¹

2. Criminal Charges

The court may award temporary custody to the other parent or modify a custody order if it finds that a parent charged with a crime poses a risk of harm to the child. *Id.* § 5303(b.1).

- The criminal information upon which the court acts may be obtained and must be used pursuant to 42 Pa.C.S.A. § 1904, which permits a parent or party to a custody proceeding to file an application for the information with the prothonotary of the court where the proceeding is pending or order filed.
- The only offenses which may be considered include those identified above for which a conviction is relevant (except prostitution) as well as aggravated assault, terroristic threats, stalking, false imprisonment, arson and related offenses, and contempt for violation of order or agreement.

3. Murder

The custody statute prohibits an award of custody, partial custody or visitation to a parent convicted of murder in the first degree of the other parent of a child who is the subject of the custody dispute, unless the child is of suitable age and consents to the disposition. *Id.* § 5303(b.2).

⁴¹ The counseling must be designed to rehabilitate the parent and to address issues that include but are not limited to sexual abuse, domestic violence, and the effect of the abuse on the victim. 23 PA.C.S.A. § 5303(c). If the court awards custody, partial custody, or visitation to the offending parent, the court may also order periodic counseling and reports on both the parent's progress and the well-being of the child. *Id.* Based on these reports, the court may modify custody to protect the well-being of the child. *Id.*

D. Other Factors To Consider in Awarding Custody and Visitation in Pennsylvania

The Court is authorized to consider any other factor which legitimately impacts on the child's physical, intellectual, and emotional well-being. *Id.* Examples of these factors include:

- parental ability to care for the child;
- where child currently lives and how the child is doing in that situation;
- who has been the primary caretaker;
- home environment;
- religious practices;
- misconduct.

Those factors which present unique concerns for victims of domestic violence are discussed in more detail.

1. Fleeing Domestic Violence Does Not Demonstrate Parental Inability or Neglect

It is not uncommon for a batterer to claim in custody court that a battered ex-partner is psychologically or financially incapable of caring for children.⁴² As proof of alleged instability, the batterer may point to the victim's leaving the home or moving frequently.⁴³ In reality, victims of domestic violence may flee home, with or without the children, in order to escape the violence and protect the children. National organizations have recognized that such conduct should not be presumed to be a basis for denying custody to a victim of domestic violence:

⁴² See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 48-49 (1990).

⁴³ *Id.*

National Council of Juvenile and Family Court Judges: The NCJFCJ Model Code provides that the absence or relocation of a parent due to domestic or family violence by the other parent should not be a factor that weighs against the parent in determining custody or visitation.⁴⁴ This provision is based upon the recognition that:

[S]ometimes abused adults flee the family home in order to preserve or protect their lives and sometimes do not take dependent children with them because of the emergency circumstances of flight, because they lack resources to provide for the children outside the family home, or because they conclude that the abuser will hurt the children, the abused parent, or third parties if the children are removed prior to court intervention. This provision prevents the abuser from benefiting from the violent or coercive conduct precipitating the relocation of the battered parent and affords the abused parent an affirmative defense to the allegation of child abandonment.⁴⁵

American Bar Association Center on Children and the Law: The ABA Center on Children and the Law has concluded that:

Frequent attempts to flee an abuser, time spent at a shelter or the temporary transfer of custody by domestic violence victims to other family members for the purpose of protecting their children should not create any presumption of parental negligence. These actions may constitute the only ways in which victim parents can assure the safety of their children. ***Courts should certainly not consider such actions to be evidence of parental instability or otherwise use them against a suitable parent in a custody action.***⁴⁶

Pennsylvania courts have acted consistent with these recommendations:

⁴⁴ MODEL CODE, *supra* note 8, § 402.2.

⁴⁵ *Id.* § 402.2 cmt.

⁴⁶ ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 19, at 14 (emphasis added).

- The temporary instability resulting from a battered parent’s action in taking her children with her to a domestic violence shelter is not a basis for the loss of custody under Pennsylvania law. *See, e.g., Boylan v. Boylan*, 395 Pa. Super. 280, 577 A.2d 218 (1990) (stating that while stability is factor in custody decision, the trial court correctly did not look upon mother’s two moves with disfavor as they were motivated out of necessity to escape domestic violence).
- The fact that a battered parent left home to escape violence should not be relied upon as a reason not to give the mother custody of her children in Pennsylvania. *See Gorto v. Gorto*, 298 Pa. Super. 509, 444 A.2d 1299 (1982) (rejecting claim that mother who left her abusive husband had abandoned children, finding that she had acted in children’s best interest, had maintained contact with them, and sought legal help to regain custody).

2. Domestic Violence Victims Should Not Be Penalized For Refusing Frequent and Continuing Contact Due to Justifiable Fear

While the Court is authorized to consider which parent is more likely to encourage, permit, and allow frequent and continuing contact and physical access between the noncustodial parent and the child, 23 Pa.C.S.A. § 5303(a)(2), it is important to understand how such “friendly parent” provisions may work to endanger victims of domestic violence⁴⁷ and put them at an unfair disadvantage in the custody proceeding.⁴⁸

- A victim of abuse who discourages contact between the noncustodial parent and children may be acting from a justifiable fear of the other party.
- Requiring frequent and continuing contact in domestic violence situations can, in fact, create opportunities for more verbal and physical aggression.⁴⁹

⁴⁷ *Id.* at 15; Joan Zorza, “Friendly Parent” Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 924 (1992).

⁴⁸ NAT’L CTR. FOR STATE COURTS, DOMESTIC VIOLENCE AND CUSTODY DISPUTES: A RESOURCE HANDBOOK FOR JUDGES AND COURT MANAGERS 45 (1997) [hereinafter A RESOURCE HANDBOOK].

⁴⁹ D. Lee Kahachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1769-72 (1990).

- As one commentator noted, friendly parent provisions have a counterproductive effect in domestic violence cases:

Ironically, within the friendly parent framework, a mother's proper concern about her abusive partner's fitness to parent will negatively affect her chance to win custody, not his. At the same time, the abuser's willingness to share the children, which assures his ongoing access to his partner and allows him to continue to manipulate and intimidate her, will, within the same framework, make him appear the more attractive candidate for custody.⁵⁰

- The risk that appearing unfriendly will result in losing custody of her children may silence a mother and leave her and her children in jeopardy of future violence.⁵¹
- Requiring a victim of abuse to be "friendly" reinforces the batterers' abusive conduct, further victimizes the mother and children, and makes friendly parent provisions dangerous to battered women.⁵²

There are almost no appellate cases discussing this provision of the Pennsylvania custody statute and none in which it is applied to override the consideration that abuse must be given in custody cases.

⁵⁰ Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999).

⁵¹ Margaret K. Dore & J. Mark Weiss, *Lawrence and Nunn Reject the "Friendly Parent" Concept*, 6 DOMESTIC VIOLENCE REP. 81, 82 (2001).

⁵² Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113 1123 (1996).

- If a party claims to be the friendly parent in a case involving domestic violence, consideration of the impact of violence on the best interest of the child should be given precedence.⁵³
- A parent accused of discouraging access to her children should be asked why and, if she responds that she is concerned about domestic violence, her concerns should be seriously considered. Friendly parent provisions should not be used to punish parents acting to protect their children.⁵⁴

E. Consideration of Child's Preference⁵⁵

The express wishes of a child, while not controlling as to the ultimate decision regarding custody, are an important factor which must be carefully considered in determining the child's best interest. 23 Pa.C.S.A. § 5303(a)(1) ("In making an order for custody or partial custody, the court shall consider the preference of the child.");

McMillen v. McMillen, 529 Pa. 198, 203, 602 A.2d 845, 847 (1992); *Commw. ex rel.*

Pierce v. Pierce, 493 Pa. 292, 299, 426 A.2d 555, 559 (1981); *Bovard v. Baker*, 2001 PA Super. 126, ¶ 12, 775 A.2d 835, 840.

The weight to be given a child's testimony as to his preference can best be determined by the judge before whom the child appears. *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *Kirkendall v. Kirkendall*, 2004 PA Super. 55, ¶ 17, 844 A.2d 1261, 1264-5; *Swope v. Swope*, 455 Pa. Super. 587, 592, 689 A.2d 264, 266 (1997). However, guiding the court's consideration of the child's preference are the following factors:

⁵³ See NANCY K.D. LEMON, DOMESTIC VIOLENCE AND CHILDREN, RESOLVING CUSTODY AND VISITATION DISPUTES: A NATIONAL JUDICIAL CURRICULUM 45 (1995).

⁵⁴ Zorza, *supra* note 47, at 924-25; see also Martha Matthews, *Addressing the Effects of Domestic Violence on Children* 3 (1999), available at <http://www.casanet.org/library/domestic-abuse/effects.htm> (noting that friendly parent provisions may create risks for both children and parents where there is history of domestic violence).

Good reasons. A child's preference will be considered where based on good reasons. *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *Kirkendall*, 2004 PA Super. 55, ¶ 17, 844 A.2d at 1264; *Watters v. Watters*, 757 A.2d 966, 969 (Pa. Super. 2000); *Swope*, 455 Pa. Super. at 592, 689 A.2d at 266; *E.A.L. v. L.J.W.*, 443 Pa. Super 573, 590, 662 A.2d 1109, 1117-18 (1995); *see also Pierce*, 493 Pa. at 299, 426 A.2d at 559 ("The weight to be accorded to a child's preference varies with . . . the reasons given for the preference.").

Reasons accorded significant weight by the court have included:

- failure to get along with a parent or stepparent, *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *Cardamone v. Elshoff*, 442 Pa. Super. 263, 278, 659 A.2d 575, 582 (1995);
- mistreatment by a stepparent, *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *E.A.L.*, 443 Pa. Super. at 590, 662 A.2d at 1118;
- being left alone after school, *McMillen*, 529 Pa. at 203, 602 A.2d at 847; interference with extracurricular activities, *id.*; dirty movies, foul language, smoking, drinking, yelling, and overt sexual activity, *E.A.L.*, 443 Pa. Super. at 590, 662 A.2d at 1118;
- failure to provide regular meals, *id.*;
- help with homework, *Watters*, 757 A.2d at 969; and
- a desire to have the opportunity to live with the non-custodial parent, *Myers v. DiDomenico*, 441 Pa. Super. 341, 346, 657 A.2d 956, 958 (1995).

Reasons not accorded weight by the courts have included:

- a desire not to leave a parent alone, *Kirkendall*, 2004 PA Super. 55, ¶¶ 14-16, 844 A.2d at 1264;
- having more fun, *Swope*, 455 Pa. Super. at 592-93, 689 A.2d at 266;
- a lack of parental strictness, *id.*;

⁵⁵ *See infra* Section V.H.1. (regarding child's competence to testify); *see also infra* Section V.I.1. (regarding appointment of representative for child).

- proximity to friends, a pony, a large yard, *Ellingsen v. Magsamen*, 337 Pa. Super. 14, 19 n.2, 486 A.2d 456, 458 n.2 (1984); and
- less noise, *id.*

Intelligence and maturity. The child’s maturity and intelligence must be considered. *McMillen*, 529 Pa. at 203, 602 A.2d at 847; *Kirkendall*, 2004 PA Super. 55, ¶ 17, 844 A.2d at 1264; *Swope*, 455 Pa. Super. at 592, 689 A.2d at 266; *see also Pierce*, 493 Pa. at 299, 426 A.2d at 559 (“The weight to be accorded to a child’s preference varies with the age, maturity and intelligence of the child”); *E.A.L.*, 443 Pa. Super. at 590, 662 A.2d at 1118 (“As children grow older, more weight must be given to the preference of the child.”); *Wheeler v. Mazer*, 2002 PA Super. 46, ¶ 22, 793 A.2d 929, 937 (same); *e.g.*, *Kirkendall*, 2004 PA Super. 55, ¶ 17, 844 A.2d at 1264 (concluding that a five-year-old child’s reasons for his preference were “not sufficiently mature to warrant deference”).

Where the court finds both parents equally suitable caretakers, the child’s preference may be the deciding factor. *McMillen*, 529 Pa. at 203, 602 A.2d at 847 (holding that because both parents were found to be suitable, the child’s preference “tip[ped] the evidentiary scale”); *Wheeler*, 793 A.2d at 938; *Bovard*, 2001 PA Super. 126, ¶ 14, 775 A.2d at 840 (finding an abuse of discretion where the trial court failed to consider the children’s preference between equally suitable parents); *Myers*, 441 Pa. Super. at 346-47, 657 A.2d at 958-59 (concluding that this rule applies even where the trial court does not accord significant weight to the child’s preference).

When considering a child’s preference, however, caution should be observed if one of the parties claims that the other parent has alienated the child from him or her, particularly in cases involving domestic violence. Batterers often accuse the other parent

of alienating the child against them and deny the impact of domestic violence.⁵⁶ If a mother's claims of abuse are rejected as false based upon such claims, the mother will be inappropriately labeled pathological and the court will be distracted from addressing important safety issues. This will place both the mother and children in danger of future violence.⁵⁷ A child's preference for living with a parent who has bought his or her affections should merit less deference than the preference of a child who expresses fear for his or her safety if placed with a battering parent.

Claims of alienation have become more common as a result of the promotion of "parental alienation syndrome" (PAS), a theory coined by Richard Gardner which promotes severance of contact between the "alienating" mother and child.⁵⁸ Rejected by most professionals as unsupported by any data, unscientific and harmful to children,⁵⁹

⁵⁶ Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (2001); Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, in GEORGE W. HOLDEN ET AL., *CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES* 371, 379-80 (1998); *see also* Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, JUDGES' J., Fall 1997, at 38, 41.

⁵⁷ Smith & Coukos, *supra* note 56, at 42.

⁵⁸ *See* RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS* (1992).

⁵⁹ AM. PSYCHOLOGICAL ASS'N, *REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* 40 (1996) (citing recommendation of experts that evidence of PAS be inadmissible because it is unscientific and nondiagnostic); Jaffe & Geffner, *supra* note 56, at 380-81 (2001) (discussing lack of data to support the existence of such a syndrome and real likelihood, in light of the overlap between battering and child abuse, that child maltreatment may explain a child's parental alignment); PHILIP M. STAHL, *COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS* 4-5 (1999) (noting lack of research on children's preferences); Bruch, *supra* note 56, at 530-36 (discussing flaws in Gardner's theory and commenting on emotional disruption and suffering caused to child by Gardner's recommended remedies).

courts have likewise rejected it, questioning its existence and usefulness.⁶⁰ In the rare case in which evidence is presented to the court which substantiates that one parent has purposefully alienated the children against the other parent, the court has tools to address this problem on a case-by-case basis without attaching labels or transferring custody and eliminating contact between the other parent and child. *See infra* Section III.B.5.

⁶⁰ *New York v. Loomis*, 658 N.Y.S.2d 787 (County Ct. 1997) (refusing to allow psychological examination of defendant's children and their mother for symptoms of "parental alienation syndrome"); *Wiederholt v. Fischer*, 485 N.W.2d 442 (1992) (Wis. Ct. App.) (rejecting PAS as based on limited research data and creating uncertain risks); *In re TMW*, 552 So. 2d 260, 262 n.3 (Fla. Dist. Ct. App. 1989) (pointing to the confusion engendered by referencing syndromes in expert testimony and asserting a causation problem with respect to claims of alienation of affection).

IV. Evidentiary Considerations When Domestic Violence Is Present

As with any other type of evidence presented in any hearing, evidence of domestic violence, whether presented in a custody or a PFA hearing, must meet threshold evidentiary requirements. Relevance is a preliminary consideration. *See* Pa. R. Evid. 401. Evidence of domestic violence will always be relevant in both PFA and custody cases, regardless of when it occurred, since domestic violence is the subject of PFA cases and the custody statute mandates consideration of domestic violence in custody cases. 23 Pa.C.S.A. § 5303(a)(3). This section discusses how domestic violence should be considered within the parameters of the Pennsylvania Rules of Evidence and also highlights issues unique to the consideration of domestic violence in custody cases.

A. Victim Testimony

Frequently, the only available evidence of domestic violence is the victim's testimony. Abuse is often committed in private and victims may conceal the abuse out of shame or fear of retaliation.⁶¹ Thus, there may be no documentation of the abuse or other witnesses. Due to lack of knowledge of judicial procedures and lack of financial resources, victims may not subpoena existing documentation or obtain expert witnesses.⁶² While additional evidence is often helpful to the court, neither the PFA Act nor the Custody Act requires corroboration of victim testimony. 23 Pa.C.S.A. §§ 5301-5314, 6101-6117.

⁶¹ *See* Lemon, *supra* note 53, at 75.

⁶² *Id.*

In the absence of additional evidence, there may be an allegation or perception that the victim-parent is fabricating allegations of domestic violence, child abuse, or child sexual abuse by the other parent to gain a strategic advantage in the litigation.⁶³ This widespread myth is at odds with available data. In actuality, out of fear, embarrassment, and denial, women are more likely to minimize and deny domestic violence than make false allegations.⁶⁴ Batterers, on the other hand, may try to use the legal system to continue exerting power and control over victims by denying that they have perpetrated violence and insisting that the victim is fabricating allegations.⁶⁵

Domestic violence claims made during a custody dispute should not be discounted, because:

- domestic violence tends to increase or intensify during separation, the time when a couple is also likely to be determining custody of children.⁶⁶
- victims of domestic violence may not previously have felt safe enough to reveal the abuse.

⁶³ See, e.g., William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 462 (2000) (noting that while there may be strategic advantages to raising issues of violence during contested custody cases, there is no research that suggests false allegations are common occurrence); Marilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse*, CT. REV., Spring 1998, at 12, 12 (highlighting common misperception that false allegations of sexual abuse during divorce are highly prevalent and noting that such beliefs are not supported by scientific evidence).

⁶⁴PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 17 (2003); Dalton, *supra* note 50, at 191-92.

⁶⁵ Barbara J. Hart & Meredith Hofford, *Child Custody*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 5-1 (Deborah. M. Goelman et al. eds., 1996).

⁶⁶ See Carolyn Rebecca Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, NIJ JOURNAL, Nov. 2003, at 4, 6, available at <http://www.ojp.usdoj.gov/nij> (finding that a woman's attempt to leave was the precipitating factor in 45 percent of murders of women by men); Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300, 311 (1999); see also Zorza, *supra* note 52, at 1115; Barbara J. Hart, *Children of Domestic Violence: Risks and Remedies*, available at <http://www.mincava.umn.edu/hart/risks&r.htm> (last visited Mar. 3, 2005); Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 118 (1992).

The judicial process provides sufficient means to permit the court to evaluate the credibility of witnesses and validity of allegations, including direct and cross examination of litigants and witnesses, child representation, and custody evaluations.

B. Protection From Abuse Orders

PFA orders entered after a hearing provide evidence of abusive conduct. *See, e.g., Burkholder v. Burkholder*, 2002 PA Super. 6, 790 A.2d 1053; *Costello v. Costello*, 446 Pa. Super. 371, 666 A.2d 1096 (1995). Courts should also consider evidence that a PFA order has been violated, whether or not the order was entered by agreement or after a hearing. *See Larrison v. Larrison*, 2000 PA Super. 111, ¶¶ 3-4, 750 A.2d 895, 897 (affirming trial court's decision to place children in father's custody based in part on finding that mother's repeated violations of PFA order entered by agreement were indicative of angry and violent disposition). The court may take judicial notice of the order for purposes of authentication. Pa. R. Evid. 201.

C. Evidence of Criminal Conduct

Victims of domestic violence may seek to introduce testimony and/or records demonstrating that they contacted the police for assistance and that the defendant was arrested or convicted of prior offenses related to the abuse.

- **Police Reports:** In the absence of local practice easing the application of evidentiary rules, police reports are inadmissible as hearsay under *Id.* 802.
- **Officer Testimony:** The officer who prepared the report may testify to his or her observations and actions. The officer may also testify to statements of the parties, which may be admissible if they meet a hearsay exception, such as excited utterances. *Id.* 803(2).

- **Conviction and Arrest Records:** Records of convictions and arrests are admissible under 42 Pa.C.S.A. § 6104 as public records tending to prove that the action disclosed in the record was in fact taken.

D. Photographs

Victims of abuse may introduce photographs of their injuries or other damage inflicted by the perpetrator. Photographs are admissible as long as they are an accurate representation of the person, place, or thing that they purport to be and are authenticated by a witness. *Taylor v. Borough of Modena*, 370 Pa. 100, 87 A.2d 195 (1952). The authentication does not necessarily need to be made by the photographer, but can be done by any witness with adequate knowledge of the subject of the photograph to be able to state that it is an accurate reproduction. *Thompson v. DeLong*, 267 Pa. 212, 110 A. 251 (1920).

E. Business Records

Some records introduced by litigants will be admissible as business records.

The Uniform Business Records as Evidence Act states:

A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

42 Pa.C.S.A. § 6108.

These records may include:

1. Medical Records

Medical records, including emergency room, hospital, and mental health records, may be introduced to support a victim’s testimony of abuse.

In PFA proceedings, local rules may provide special procedures for introduction of such records. For example, the Philadelphia Local Rules provide for admission into evidence “without further proof, copies of bills, hospital and physician reports, and all other records of licensed health care providers that are offered to support claims of personal injury resulting from domestic violence.” Phila. Local R. 1904.5. If the other party wishes to cross examine the person whose testimony is excused by this rule, the court may continue the hearing to allow the other party to subpoena the person for such purpose. *Id.*

In the absence of local rules to the contrary, medical records are admissible under the Uniform Business Records as Evidence Act, 42 Pa.C.S.A. § 6108, if the proponent can demonstrate that:

- the records were made contemporaneously with the act recorded;
- there was no motive for making a false entry at the time they were made; and
- the person who made up the contents of the record had sufficient knowledge and qualifications to guarantee the truthfulness of the recorded statements.

Paxos v. Jakra Corp., 314 Pa. 148, 153, 171 A. 468, 470-71 (1934).

Medical records “must be properly authenticated by the custodian or other qualified witness.” 42 Pa.C.S.A. § 6108.

- A custodian of records is a person who controls and supervises the records. A qualified witness is a person who is familiar with the hospital's or department's procedures regarding the production and maintenance of records, providing information on the identity, mode of preparation, and preparation time of the record. *Poltorak v. Sandy*, 236 Pa. Super. 355, 363, 345 A.2d 201, 205 (1975); *Commw. v. Arnold*, 29 Pa. D. & C.2d 112, 117 (Ct. Quarter Sessions York County 1962).
- This person need not be the preparer of the medical record or the custodian of records when the entry was made or have personal knowledge of the facts of the record in question. *Commw. v. Kelly*, 245 Pa. Super. 351, 363, 369 A.2d 438, 444 (1976).

The purpose for which the medical records may be admitted will depend on the content of the document and the witness whose testimony accompanies the records:

Medical Facts: Medical records may be admitted to evidence the fact of hospitalization, symptoms found, and treatment prescribed. *Morris v. Moss*, 290 Pa. Super. 587, 592, 435 A.2d 184, 187 (1981).

Medical Opinions: Medical records are inadmissible for the purpose of showing medical opinion, conclusions, or diagnosis. *Commw. v. DiGiacomo*, 463 Pa. 449, 455-56, 345 A.2d 605, 607-08 (1975); *Pothier v. Commw., Dept. of Transp. Bureau of Traffic Safety*, 98 Pa. Commw. 571, 574, 511 A.2d 939, 940 (1986). In order to admit records containing medical opinions, conclusions, and diagnosis, the physician responsible for the record must be available for cross-examination. *Commw. v. DiGiacomo*, 463 Pa. at 455, 511 A.2d at 455.

Non-Medical Statements: Statements that are not medical in nature in medical records may be admissible under exceptions to the hearsay rule:

Excited Utterance: Pa. R. Evid. 803(2). A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *Commw. v. Gore*, 262 Pa. Super. 540, 547-48, 396 A.2d 1302, 1305 (1978).

Statements for Medical Diagnosis or Treatment: Pa. R. Evid. 803(4) A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source

thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment. *Ferri v. Ferri*, 2004 PA Super. 268, ¶ 7, n.4, 854 A.2d 600, 602 n.4. This exception is not limited to statements made to physicians; those made to nurses have been found to be admissible as have statements as to causation but not fault. *Commw. v. Smith*, 545 Pa. 487, 681 A.2d 1288 (1996).

2. Records of Other Losses

Victims may experience and, in PFA cases, recover for other losses, such as lost earnings or damages to property. As with medical records, local rules may make provision for the admission of evidence of such losses without further proof of documentation. *See, e.g.*, Phila. Local R. 1904.5 (providing for receipt into evidence of copies of bills, records, reports, affidavits of repair, estimates of value, statements of lost earnings and other documentation of losses in PFA proceedings).

3. Phone Records

Records showing calls from defendant's telephone numbers to the plaintiffs may be introduced to support allegations of abuse by phone. Such records are admissible as business records.

4. Computer Records

A perpetrator may abuse through harassing emails or instant messages. Internet service providers or other providers of electronic communication service may disclose customer records, not including the contents of the communication. 18 Pa.C.S.A. § 5743(c)(1).

F. Expert Testimony

An expert may be appointed when "scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand

the evidence or to determine a fact in issue.” Pa. R. Evid. 702. Testimony from a domestic violence expert can illuminate important issues that trained custody evaluators and mental health professionals may overlook.⁶⁷ For an expert report to be admissible in a custody case:

- the expert must be available to testify and be subject to cross-examination, *Cyran v. Cyran*, 389 Pa. Super. 128, 131, 566 A.2d 878, 879 (1989) (holding that report of expert witness report cannot be used unless author of report testifies and is made available for cross-examination, unless parties agree otherwise, court reversed custody order and remanded case where parties first learned of report of court evaluator when judge ended hearing, noting that such report would be appended to the record); *Hall v. Luick*, 314 Pa. Super. 460, 461 A.3d 248 (1983) (reversing custody order and remanding case where reports of home investigation and psychological evaluation were admitted without taking testimony and giving parties opportunity to cross-examine individual who made up report and to present rebuttal testimony), and
- the report must be submitted to the parties so that they can call witnesses for the purpose of contradicting or explaining it, *Rummel v. Rummel*, 263 Pa. Super. 97, 99, 397 A.2d 13, 15 (1979).

Topics on which expert testimony may inform a best interest analysis include:

Impact of violence on children: The National Conference of Juvenile and Family Court Judges urges that expert testimony regarding the effects of violence on a child and the continuing threat of violence to the child and abused parent be admissible whenever credible evidence of domestic violence emerges in a custody proceeding.⁶⁸

⁶⁷ See Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 288-95 (discussing biases in favor of joint custody that may result from family systems ideology in which many mental health professionals are trained). A preference for joint custody or resistance to relocation with a primary caretaker may emerge as a result of this training, even where there has been violence, and such preferences can undermine legal standards in place to protect abused parties and children in custody disputes. *Id.*

⁶⁸ BARBARA J. HART, STATE CODES ON DOMESTIC VIOLENCE: ANALYSIS, COMMENTARY AND RECOMMENDATIONS 35 (1992).

Battering and its effects: Victims of domestic violence may offer expert testimony on battering and its effects, sometimes referred to as “battered woman’s syndrome.” Expert testimony on the effects of battering can help the court to contextualize the abuse and may dispel misconceptions about the victim’s behavior.⁶⁹ Such testimony may prove particularly helpful to rebut allegations by a perpetrator that the victim lacks parenting capability.

Knock v. Knock, 621 A.2d 267, 274 (Conn. 1993) (stating that expert testimony on battered woman’s syndrome provided necessary information for trial court to “conclude that the defendant fit within its parameters” and that such conclusion was relevant to court’s ability to determine what was in child’s best interest);

Custody of Vaughn, 664 N.E.2d 434, 439 (Mass. 1996) (reversing and remanding lower court’s custody decision based in part on court’s failure to adequately consider evidence of domestic violence, including expert testimony on battered woman’s syndrome).

G. Privileged Interactions

Sometimes, defendants seek to obtain and introduce evidence of victim interactions with certain professionals. Such information is confidential under Pennsylvania law and may not be obtained without the informed consent of the subject. These privileges are based upon the goal of protecting access to help from particular professionals by insuring that confidential communications will not be disclosed without the subject’s knowing permission.

Doctor/Patient Privilege: Doctor/patient confidentiality is governed by 42 Pa.C.S.A. § 5929, which prohibits a physician from disclosing in any civil matter any information acquired in attending a patient in a professional capacity which was necessary to enable the physician to act in that capacity, and which shall tend to blacken the character of the patient, without consent of the patient except in civil matters brought by such patient, for damages on account of personal injuries. *Id.* The holder

⁶⁹ See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 45 (2000).

of the privilege may introduce relevant medical information. The fact that the patient submitted to diagnosis and treatment and dates of treatment is not privileged. *Miller Oral Surgery, Inc. v. Dinello*, 416 Pa. Super. 310, 611 A.2d 332 (1992).

Psychiatrist and Psychologist/Patient Privilege: Communications to psychiatrists or licensed psychologists are protected under 42 Pa.C.S.A. § 5944, which states:

No psychiatrist or person who has been licensed . . . to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services on behalf of such client. *Id.*

Domestic Violence Counselor/Victim Privilege: Communications with domestic violence counselors are entitled to strict protection from disclosure, subpoena, or court review. Pursuant to 23 Pa.C.S.A. § 6116, a domestic violence counselor or a coparticipant present during any counseling or advocacy is barred from testifying or otherwise disclosing “confidential communications made to or by a domestic violence counselor/advocate by or to a victim” without a written waiver by the victim.

- Confidential communications include all information transmitted between a victim and a counselor or advocate during the relationship. *Id.* § 6102.
- A victim for purposes of confidential communications is “a person against whom abuse is committed who consults a domestic violence counselor or advocate for the purpose of securing advice, counseling or assistance.” *Id.* The term also includes “persons who have a significant relationship with the victim and who seek advice, counseling or assistance from a domestic violence counselor or advocate regarding abuse of the victim.” *Id.*
- A domestic violence counselor or advocate to whom the privilege applies is an individual engaged in a domestic violence program, the primary purpose of which is to provide counseling or assistance to victims of domestic violence, and has undergone at least forty hours of training. *Id.*

Rape Counselor/Victim Privilege: Domestic violence may include sexual assault; therefore, a victim of domestic violence may have contacted a rape crisis center for assistance. Like communications with domestic violence counselors, absolute privilege also applies to communications between victims and sexual assault counselors. Pennsylvania law prohibits sexual assault counselors, interpreters translating communications between sexual assault counselors and victims, and coparticipants to disclose confidential communications between a victim and the counselor without the victim's written consent. 42 Pa.C.S.A. § 5945.1(b).

- The statute broadly defines “victim” to include persons who consult sexual assault counselors for advice concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by a sexual assault and also to include persons with a significant relationship with the victim who obtain counseling due to the assault of the victim. *Id.* § 5945.1(a).
- A sexual assault counselor is a person who is engaged in a rape crisis center to offer assistance to victims of sexual assault, who has undergone at least forty hours of training and is under supervision. *Id.*
- Confidential communication is defined as oral or written information “transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including but not limited to advice, reports, statistical data, memoranda, working papers, records or the like, given or made during that relationship.” *Id.*

V. Procedural Considerations When Domestic Violence Is Present

A. Jurisdiction

The rules relating to custody jurisdiction are contained in the Uniform Child Custody and Jurisdiction and Enforcement Act (UCCJEA), 23 Pa.C.S.A. §§ 5401-5482. *See infra* App. F-5 (UCCJEA in its entirety). As a general rule, jurisdiction is proper in the state and county where the child has lived for the six-month period prior to commencement of the custody action. *Id.* § 5421(a).

Emergency exceptions to this general rule exist that may apply in cases of domestic violence. Under the UCCJEA, a Pennsylvania court may assume temporary emergency jurisdiction if the child is present in this Commonwealth and:

- the child has been abandoned, or
- it is necessary in an emergency to protect the child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse. *Id.* § 5424.

This allows a court to take jurisdiction when a parent has been abused by the other parent even though the child has not been abused

The UCCJEA became effective on August 15, 2004, and, at the time of publication of this Benchbook, no opinions had been published interpreting its provisions. Under the preexisting law, which governs actions filed prior to the effective date of the UCCJEA, courts were vested with power to assume jurisdiction to decide custody in emergency circumstances in order to prevent mistreatment, neglect or abuse. 23 Pa.C.S.A. § 5344(a)(3), *repealed by UCCJEA*; *see, e.g., Baines v. Williams*, 431 Pa. Super. 72, 635 A.2d 1077 (1993) (father's violence towards mother, taking children away

from mother, and subsequent abandonment of children for several weeks established jurisdiction).

Emergency jurisdiction under the UCCJEA is temporary and remains in effect only until an order is obtained from a state with jurisdiction. A temporary custody order may become permanent if no order is subsequently obtained from such a state. 23 Pa.C.S.A. § 5424(b), (c). The UCCJEA provides specific procedural requirements, including requirements regarding communication between courts to “resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order.” *Id.* § 5424(d).

The UCCJEA also addresses the situation in which an abuser threatens to or actually wrongfully removes a child from his or her home state.⁷⁰

- If the abuser seeks to establish custody in the new state, the court must decline jurisdiction if it determines that the party seeking jurisdiction has engaged in unjustifiable conduct, unless the parties have acquiesced in the exercise of jurisdiction, no other court would have jurisdiction under the circumstances, or the court in the state otherwise having jurisdiction has determined that Pennsylvania is the appropriate forum. *Id.* § 5428(a). If jurisdiction is declined, the court is empowered to take steps to ensure the safety of the child. *Id.* § 5428(b).
- If the child is in danger of immediate serious physical harm or removal from Pennsylvania, the court may issue a warrant to take physical custody of the child. *Id.* § 5451.

⁷⁰ Studies report a significant number of batterers threaten to and actually kidnap their children. See Marsha B. Liss & Geraldine Butts Stahley, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY 175, 183 (1993) (reporting that at least 34% of the abusers studied threatened to kidnap their children, and 11% actually kidnapped their children); GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES LEFT BEHIND THE HEADLINES 59 (1993) (finding that approximately half of the abductors had been violence toward the other parent during the marriage).

B. Standing

In order to obtain custody, a person must either be:

- a parent of the child, or
- have acted *in loco parentis*, by having put oneself in the situation of a lawful parent as a result of assuming parental status and parental duties. *T.B. v. L.R.M.*, 567 Pa. 222, 228, 786 A.2d 913, 916-17 (2001).

C. Custody Evaluations

1. Custody Evaluations Should Consider Domestic Violence

In some cases, the evidence to determine the child's best interest may include custody evaluations prepared by psychologists or other mental health professionals. These evaluations may be prepared at the initiation of the parties and their counsel or by the court. *See* Pa. R. Civ. P. 1915.8.

Guidelines for custody evaluations developed by the American Psychological Association,⁷¹ the Association of Family and Conciliation Courts,⁷² and the American Academy of Child and Adolescent Psychiatry⁷³ include professional standards relevant to any custody case, and specific recommendations for cases involving domestic violence. According to the standards developed by the Association of Family and Conciliation

⁷¹ Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994).

⁷² Ass'n of Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluation*, available at http://www.afccnet.org/pdfs/Child_Model_Standards.pdf (last visited Mar. 3, 2005) [hereinafter *Model Standards*].

⁷³ Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluations*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 57S (1997).

Courts, a child custody evaluator must investigate all allegations of domestic violence.⁷⁴ Other experts recommend that custody evaluators explore whether domestic violence is present in all families, as many individuals seek to hide it.⁷⁵ Depending on the resources available to the litigant or the parameters established by the judge, the scope of the evaluation may vary, which in turn may affect whether and the extent to which the evaluator addresses domestic violence. To make certain that custody evaluations appropriately consider and address domestic violence, the court may:

Insure evaluator has domestic violence expertise: All guidelines and standards for evaluations recommend continuing education relating to custody and divorce and a working knowledge of all applicable laws.⁷⁶ Further, some guidelines require that an evaluator not possessing expertise about domestic violence seek outside consultation with appropriately trained professionals.⁷⁷ In addition, to the extent that an evaluation includes psychological testing, only licensed psychologists should conduct such testing.⁷⁸

Direct parties' evaluators to consider domestic violence. Since it is the obligation of the court to develop a comprehensive record, when domestic violence has been alleged and the court has an opportunity to provide guidance to the evaluator, the court should direct the evaluator to make a thorough inquiry into the domestic violence. The focus of this evaluation should be both the known danger and the potential risk of future danger to both the caretaker and the children.⁷⁹ In addition, the evaluator must consider the impact of the violence on the children, both those who have been abused and those who have witnessed such violence.⁸⁰

⁷⁴ *Model Standards*, *supra* note 72, at IV.D.F.

⁷⁵ *See, e.g., STAHL*, *supra* note 59, at 31.

⁷⁶ *Model Standards*, *supra* note 72, at II.A.; *Practice Parameters*, *supra* note 73, at 59S, 62S; *Guidelines*, *supra* note 71, at 678 (Guideline II.5.A.).

⁷⁷ *Model Standards*, *supra* note 72, at IV.F.; *Guidelines*, *supra* note 71, at 678 (Guideline II.5.C.).

⁷⁸ *Model Standards*, *supra* note 72, at II.D.F.

⁷⁹ *Model Standards*, *supra* note 72, at IV.F.

⁸⁰ *STAHL*, *supra* note 59, at 34-35.

Direct evaluators performing evaluations pursuant to court order to consider domestic violence: Private custody evaluations are very costly and therefore are not available to many litigants. In Philadelphia, as an alternative, the court may order a mental health evaluation of one or more family members that is performed by the Family Court's psychologist. Pa. R. Civ. P. 1915.8. While these evaluations may be more narrowly focused and less comprehensive than custody evaluations, the evaluator should also assess the impact of domestic violence.

The National Council of Juvenile and Family Court Judges has published a guide for judges on how to use custody evaluations in cases involving domestic violence. *See infra* App. E (*Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*).

2. Admissibility and Procedure

- Custody evaluations are admissible under the same terms as are expert reports. *See supra* Section IV.F.
- Psychologists must obtain informed consent to perform a custody evaluation on children. When the evaluation is requested by one party, the psychologist may not evaluate the child without knowledge or consent of the other party. 49 Pa. Code § 41.61(3)(e) (Principle 3(e) of the Pennsylvania Board of Psychology Code of Ethics, adopting American Psychological Association standards and guidelines related to practice and to conduct of research with human beings and animals); *Grossman v. State Bd. of Psychology*, 825 A.2d 748, 752 (Pa. Commw. 2003) (upholding reprimand of psychologist for violation of ethical regulations when, after being hired by one parent to conduct custody evaluation, he met with child without other parent's consent or knowledge); Am. Psychological Ass'n, *Ethical Principles of Psychologists and Code of Conduct*, §§ 3.10, 8.02, 9.03, at <http://www.apa.org/ethics/code2002.html> (2002) (provisions relating to informed consent).
- Upon completion of the evaluation, the custody evaluator must deliver to the court and attorneys of record or, if unrepresented, the parties, a written report of findings, test results, diagnoses, and conclusions. Phila. Local R. 1915.8(b); *see also Rummel v. Rummel*, 263 Pa. Super. 97, 397 A.2d 13 (1979).

3. A Custody Evaluation Is Not Conclusive

Although a court must consider uncontradicted expert evidence, it is not obligated to accept the conclusions of experts. *Nomland v. Nomland*, 2002 PA Super. 386, ¶ 6, 813 A.2d 850, 854 (2002).

D. Testimony by Electronic Means

It is sometimes difficult for witnesses to testify in court. Medical professionals may not be able to leave their practices to devote an entire morning in court. Illness or disability may prevent appearance in court. Under the Pennsylvania Rules of Civil Procedure, the court may approve the giving of testimony by telephone, audiovisual or other electronic means. Pa. R. Civ. P. 1930.3.

E. Domestic Violence Is Relevant to the Appropriateness of Mediation

Mediation has become more common in custody cases in recent years. In some cases, mediation is an appropriate alternative for the parties and serves to promote the best interest of the child. For mediation to result in an effective and fair agreement, experts agree that participation must be voluntary and that parents must have relatively equal bargaining power and equal ability to protect their interests. Where there is domestic violence, however, the probability is high that mediated agreements may be coercive and not truly voluntary on the part of an individual.⁸¹

⁸¹ See ABA REPORT ON THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, *supra* note 19, at 15 (“Mediation, to work successfully, should occur only when both parties have equivalent bargaining power. The domestic violence relationship is inherently unbalanced as to power, therefore making mediation inappropriate.”); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 320-21 (1990); *see also* A RESOURCE HANDBOOK, *supra* note 48, at 19-30.

Pennsylvania law authorizes only *voluntary* mediation in custody cases. 23 Pa.C.S.A. § 3901(b); Pa. R. Civ. P. 1940.3(b). Pennsylvania does not permit courts to order parties to a custody action to mediation (or to an orientation session to explain mediation) where either party or child of either party is or has been a victim of domestic violence or child abuse at any time during the pendency of the action or during the twenty-four months preceding the filing of the action. 23 Pa.C.S.A. § 3901(c)(2); Pa. R. Civ. P. 1940.3(b).

To implement this requirement, courts should:

- Screen cases for domestic violence before they can be referred to an orientation session. Pa. R. Civ. P. 1940.3, cmt.
- If screening reveals domestic violence, advise the victim that mediation is voluntary and provide clear information about the pros and cons of mediation.
- If the victim decides to go forward with mediation, monitor the safety of the victim throughout the process, including developing a safety plan with the victim and a strategy for safely terminating the mediation if necessary.⁸²
- If domestic violence is discovered for the first time during the mediation, the mediator may determine that the proceedings are inappropriate for mediation and terminate mediation. *Id.* 1940.6(a)(4).

The National Center for State Courts, consistent with the National Council of Juvenile and Family Court Judges' Model Code on Domestic and Family Violence, endorses screening for domestic violence prior to referral to and continuing through the mediation process. Specific suggestions to aid in screening include:

⁸² A RESOURCE HANDBOOK, *supra* note 48, at 24-28.

- Check court records for past or existing protection orders and past criminal charges prior to referring cases to mediation.
- Have parties complete written questions, separately and with assurances of confidentiality.
- Interview each party separately about physical violence and controlling behaviors.
- Observe parties for signs of abuse.⁸³

See infra App. C (sample mediation screening tool).

F. Protecting Confidential Information

Pennsylvania law provides special protection for certain confidential information of victims of domestic violence.

- Courts are not permitted to force anyone to disclose the address of a domestic violence shelter or “confidential information of a domestic violence counselor.” 23 Pa.C.S.A. § 5309(c).
- Pennsylvania’s child support statute provides special protection for the privacy rights of abuse victims. Pursuant to 23 Pa.C.S.A. § 4305(a)(10), the Domestic Relations Division of the Court of Common Pleas must implement the following safeguards applicable to all confidential information received:
 - Safeguard against unauthorized use or disclosure of information relating to paternity, support or child custody proceedings;
 - Prohibit release of information on the whereabouts of one party or the child to another party against whom a protective order with respect to the former party or child has been entered;

⁸³ *Id.* at 23-24.

- Prohibit release of information on the whereabouts of one party or the child to another person if there is reason to believe that the release of the information may result in physical or emotional harm to the party or child.

These important provisions provide for the suppression of the address of a victim of abuse and/or her child where the release of that information would jeopardize her or their safety. This protection is critical if the victim has fled from her batterer for her own and/or her children's safety.

G. Contempt

1. Violations of a Custody Order

A party may be held in contempt for willfully failing to comply with a visitation or partial custody order. 23 Pa.C.S.A. § 4346; *Langendorfer v. Spearman*, 2002 PA Super. 93, ¶ 16, 797 A.2d 303, 308. The elements which must be proven in order to establish contempt are the same as those for civil contempt of a PFA order. *See supra* Section II.A.5.a.

Upon a finding of contempt, the court is authorized to issue an order providing for:

- Imprisonment for up to six months, specifying the conditions to be met to obtain release;
- A fine up to \$500;
- Probation for up to 6 months;
- Nonrenewal, suspension or denial of driver's license.

23 Pa.C.S.A. § 4346; Pa. R. Civ. P. 1915.12.

While custody may be temporarily modified in a contempt petition, it cannot be permanently modified without a petition for modification or other notice served upon the opposing party that custody was at issue. *Langendorfer*, 2002 PA Super. 93, ¶¶ 16, 19, 797 A.2d at 308.

2. Violations To Protect the Child

When a custodial parent has reason to believe that the non-custodial parent is abusing the child and cannot persuade the court that this abuse is happening, the parent is faced with “the Hobson’s choice” of defying a court order to protect the child and risking contempt charges or complying with the court order and thereby placing the child in danger of further abuse by the non-custodial parent.⁸⁴

Although no Pennsylvania decisions have ruled on this issue, it is recommended that protection should be considered a defense to contempt charges when parents violate custody orders for the purpose of protecting the safety of their children and a mitigating factor to any punishment.

Such a defense is recognized in other custody-related matters. For example,

- Pennsylvania’s interference with the custody of a child statute permits a parent who has taken or retained the child outside the parameters of the custody to assert as a defense that the parent believed the action was necessary to protect the child from danger to his or her welfare. 18 Pa.C.S.A. § 2904(b)(1).
- The federal Parental Kidnapping Prevention Act of 1980 allows a party who has wrongfully fled the jurisdiction with the child to claim as a defense that he or she was acting to protect the child from abuse. *See* 28 U.S.C.A. § 1738A.

⁸⁴ Susan Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 493 (1989).

H. Child Testimony

Children often testify in child custody proceedings and, if the subject of a PFA petition, or a witness, in PFA proceedings. The child's testimony may relate to domestic violence or the child's parental preference and best interest.

1. Determining Child's Competence to Testify

Whether or not a child testifies in a custody case requires careful assessment, particularly in cases in which domestic violence is a factor. While children often have first hand information to offer, the value of their testimony may be limited by their developmental age and maturity, as well as by the conflicting parental loyalties they may experience.

General Rule: Pennsylvania Rule of Evidence 601 provides that, as a general rule, every person is competent to be a witness except as provided by statute or rule. Pa. R. Evid. 601(a).

Factors of Incompetency: Under Rule 601(a), a person is incompetent to testify if the Court finds that, because of a mental condition or immaturity, the person:

- is, or was . . . incapable of perceiving accurately;
- is unable to express himself or herself . . . ;
- has an impaired memory; or
- does not sufficiently understand the duty to tell the truth.

Id. 601(b).

Age of Competency: Pennsylvania law presumes competency at a certain age:

14 and Over: Pennsylvania law presumes competency when the child is more than fourteen years of age. *Rosche v. McCoy*, 397 Pa. 615, 621, 156 A.2d 307, 310 (1959).

Under 14: When a child is under fourteen, the court, in determining the child’s competency, must balance the need for the testimony against the child’s susceptibility “to the world of make-believe and of suggestions.” *Id.*; see also *Commw. v. Short*, 278 Pa. Super. 581, 586, 420 A.2d 694, 696 (1980) (there must be searching judicial inquiry as to mental capacity, but judge retains discretion to make ultimate decision as to competency). In *De Lio v. Hamilton*, the court suggests that courts should more carefully scrutinize the competency question in a criminal proceeding than in a civil action. 227 Pa. Super. 581, 587, 308 A.2d 607, 610 (1973).

2. Hearing To Take Child’s Testimony

In taking a child’s testimony, courts should be sensitive not only to the child’s age but also to the emotional impact that testifying in a high-conflict custody case may have on a child. In these cases, “[c]hildren become ‘informational pawns, caught between two beloved parents and facing catastrophic loss no matter how they choose’ to testify.”⁸⁵ The fear of retribution from a parent may exacerbate the trauma of testifying. When a child has witnessed a parent act violently towards the other parent, the child’s fear of physical reprisal for testifying is legitimate.⁸⁶ Providing testimony about domestic violence “requires the child to divide his loyalties and potentially to make derogatory statements about a parent with whom the child wants a long-term relationship.”⁸⁷

If the court decides in favor of a child testifying, the court should consider different ways of alleviating the pressure the child may feel.

In camera: The court has the discretion to question a child in *camera*. See Pa. R. Civ. P. 1915.11(b). Studies have found that children

⁸⁵ Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 295-96 (1999) (quoting LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 18-19 (1994)).

⁸⁶ See generally *id.*

⁸⁷ *Id.* at 296.

interviewed in a less threatening environment recalled more information correctly through free recall than those questioned in a courtroom.⁸⁸

When a judge interviews a child *in camera*, the lawyers for the parties must be present and have an opportunity to question the child and the testimony must be transcribed and made part of the record. *See Cyran v. Cyran*, 389 Pa. Super 128, 132, 566 A.2d 878, 879-80 (1989); *Gerald G., Jr. v. Theresa G.*, 284 Pa. Super. 498, 505, 426 A.2d 157, 161 (1981).

Put child at ease: The court can further assuage discomfort by making clear to the child (as well as to counsel and the parties) what the subject matter and goal of the interview will be and by explaining to the child whether the information obtained in the interview will be kept confidential.⁸⁹

I. Representation of Children in Custody Proceedings

Most contested custody cases feature some measure of competition between parents regarding who can better serve the best interest of the child. Independent representation for the child increases the likelihood that the court will get an unbiased account of the child's needs and interests and is recommended in high-conflict cases.⁹⁰ The lawyer representing the child, also known as the "child advocate" or "guardian *ad litem*," can assist the court in ensuring that it has all the information it needs to make the best interest determination. In addition, a lawyer representing a child is in a position to take steps to protect the child from any insecurity or instability that may result from the litigation itself.

⁸⁸ *Id.* at 309 (citing Karen Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perception of Stress In and Out of the Courtroom*, 17 Child Abuse & Neglect 613 (1993)).

⁸⁹ *Id.* at 310.

⁹⁰ See Am. Bar Ass'n, *High Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589, 596 (2001).

1. When To Appoint Lawyers To Represent Children in Custody Cases

In its *Standards of Practice for Lawyers Representing Children in Custody Cases*, adopted in August 2003, the American Bar Association recommends that court systems make the appointment of an attorney for a child discretionary in a custody case.⁹¹

Pennsylvania law is consistent with this recommendation.

- Pennsylvania law allows, but does not require, the appointment of a lawyer representative for a child in a custody case.⁹² *See, e.g., In re Davis*, 288 Pa. Super. 453, 468, 432 A.2d 600, 607 (1981); *Palmer v. Tokarek*, 279 Pa. Super. 458, 476, 421 A.2d 289, 299 (1980); *Lewis v. Lewis*, 271 Pa. Super. 519, 527, 414 A.2d 375, 379 (1979) (all noting that such appointments are in court's discretion and may be appropriate when parental conflict subordinates best interest of child).

The *ABA Custody Standards* offer guidance by identifying circumstances in which the appointment of counsel for the child in a custody case may be “most appropriate.” These circumstances include cases involving allegations of past or present domestic violence as well as other factors that may arise in cases of domestic violence, such as harm to the child from drug or alcohol abuse, disputed paternity, child abduction, or a high level of acrimony.⁹³

- A Pennsylvania custody court should consider appointing representation for children in cases involving domestic violence. One Pennsylvania court has stated that “in some cases the bitterness which exists between their parents may result in the children’s interest being thrown aside” and that “in some custody disputes the children do need someone to advance and protect their interests.” *Lewis*, 271 Pa. Super. at 527, 414 A.2d at 379.

⁹¹ Am. Bar Ass’n Section of Family Law, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 152 (2003) [hereinafter *ABA Custody Standards*].

⁹² By contrast, the Juvenile Act, 42 PA.C.S.A. §§ 6301-65, mandates the appointment of a lawyer representative for the child in termination and dependency cases.

⁹³ *ABA Custody Standards*, *supra* note 91 at 152.

2. Clarifying the Role of the Child Representative

Defining the role of the child's lawyer is a controversial topic in the ethics of lawyering for children. Two poles typify the potential roles:

- One is the lawyer as the child's *attorney and counsel*, bound to follow the directions of the client and loyal to his or her confidences.⁹⁴
- The other is the lawyer as a *guardian ad litem*, empowered to act in the client's best interest without necessarily being bound by his or her preferences.⁹⁵

It is customary in Pennsylvania for the term "guardian *ad litem*" or "child advocate" to be used to designate the legal representative for the child. By statute, only lawyers may serve as guardians *ad litem* in dependency proceedings. 42 Pa.C.S.A. § 6311. It is less clear whether the lawyer serving as "guardian *ad litem*" or "child advocate" is bound by client preferences or to what extent the traditional lawyer functions and duties apply.

Most authorities agree that the court making the appointment should clarify the role it expects the appointed lawyer to serve.⁹⁶

- Whether acting as counsel or guardian *ad litem*, the lawyer for the child will perform many of the traditional roles of lawyering: ascertain the client's position, marshal evidence and analysis to support the

⁹⁴ The term "child's attorney" means "[a] lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client." *Id.* at 133.

⁹⁵ The guardian *ad litem* is an officer of the court appointed "for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives." *Id.* The ABA does not use the term "guardian *ad litem*" in its Custody Standards, but rather refers to the "Best Interests Attorney," whose role is to "provide independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives." *Id.* This Benchbook uses the term "guardian *ad litem*" in the traditional "best interests role," but recognizes that the ABA reserves this term for practitioners representing children's interests in abuse and neglect cases.

⁹⁶ *Id.* at 154.

position, and advocate zealously to the parties and in court for the client's position.⁹⁷

- The lawyer for the child should acquire evidence, including school records or the recommendations of the child's therapist, and also advocate as needed for services and protection. Like all lawyers representing clients, children's representatives should neither testify nor be cross-examined.⁹⁸

3. Child's Competence to Direct His or Her Representative

Another issue courts should evaluate is at what age or cognitive ability the child should be deemed competent to control the direction of the case and the conduct of his or her lawyer. While Pennsylvania law is silent on the question, there are several models or approaches to guide the lawyer and jurist.

- The *ABA Custody Standards* view competency as situational and not absolute: a child may be competent about some issues and not others, or competent on an issue at some time but not another time.⁹⁹ Under this model, the lawyer for the child should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer and does so.
- The American Academy of Matrimonial Lawyers sets the bright line of age 12 as the demarcation of competency: below age 12, the child's representative performs the traditional guardian *ad litem* function but may not substitute his or her judgment in setting the direction of the case; for children 12 years and older, who are deemed presumptively

⁹⁷ See, e.g., *id.* at 136-38 (outlining a number of duties to be performed by the representative both when acting as a child's attorney and when acting as best interest attorney).

⁹⁸ *Id.* at 134.

⁹⁹ The commentary to the *ABA Custody Standards* notes: "These Standards do not presume that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another." *Id.* at 144.

competent, the attorney should follow the client's direction in the traditional approach to lawyering.¹⁰⁰

¹⁰⁰ AM. ACAD. OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 2-3 (1995).

VI. The Effects of Domestic Violence on Children

A developing body of research reveals the staggering frequency of domestic violence and its multifaceted impact on children. Statistics from a 1998 study by the National Institute of Justice and the Centers for Disease Control and Prevention show the alarming incidence of domestic violence: 25% of surveyed women said they were physically assaulted and/or raped by a current or former spouse, cohabiting partner, or date at some time in their lives.¹⁰¹ In 1996, child protective services agencies nationwide received reports of over 3 million abused children, 80% by a parent.¹⁰² In addition, conservative estimates of the number of children who each year witness adults committing domestic violence in their homes, ranging from insults to hitting to murder, range from between 3.3¹⁰³ to 10 million.¹⁰⁴

The relationship between partner violence and child abuse has been documented. Research has found that the presence of marital violence is a significant predictor of

¹⁰¹ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 12 (1998).

¹⁰² OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 1999 NATIONAL REPORT SERIES: CHILDREN AS VICTIMS 1 (2000).

¹⁰³ Jacquelyn C. Campbell & Linda A. Lewandowski, *Mental and Physical Health Effects of Intimate Partner Violence on Women and Children*, 20 *Psychiatric Clinics of N. Am.* 353, 359 (1997); Bonnie Carlson, *Children's Observations of Interparental Violence*, in *BATTERED WOMEN AND THEIR FAMILIES* 147-67 (Albert R. Roberts ed., 1984).

¹⁰⁴ Murray Straus, *Children as Witness to Marital Violence: A Risk Factor for Life-Long Problems Among a Nationally Representative Sample of American Men and Women* 10 (1991) (paper presented at the Ross Round Table, "Children and Violence," in Washington, D.C.).

physical child abuse.¹⁰⁵ Additional research reports an overlap of child exposure to partner violence and physical abuse that ranges from 20% to 100%, depending on the research sample and methodology, with 40% the median.¹⁰⁶ Even where they are not the immediate targets of violence, children may get physically hurt while attempting to protect their mothers or because they are in the line of attack directed at their mothers.¹⁰⁷ One study that looked at intimate partner homicides over a four-year period in Massachusetts found that batterers also murdered children in approximately one out of eight of such homicides.¹⁰⁸

Victimization in childhood perpetuates the cycle of violence. Women who are physically and/or sexually abused in childhood are at risk of being victims of abuse as adults.¹⁰⁹ Research has also shown that sons of wife-battering fathers often become aggressive and violent.¹¹⁰ As the Family Violence Project of the National Council of Juvenile and Family Court Judges (NCJFCJ) has emphasized, “[s]ocial scientists and

¹⁰⁵ Murray A. Straus & Christine Smith, *Family Patterns and Child Abuse*, in MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE*, 8145 FAMILIES 254 (1990).

¹⁰⁶ Anne E. Appel & George W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psychology 578, 578 (1998) (noting that statistics derived using conservative definition of child abuse). The Philadelphia Department of Human Services estimates the co-occurrence of domestic violence and child abuse at 50-75%. *Hearing on Bill 020613 Before the Committees on Public Safety and Public Health & Human Services* 19 (Phila. 2002) (testimony of Alba Martinez, Commissioner, Department of Human Services).

¹⁰⁷ MARIA ROY, *CHILDREN IN THE CROSSFIRE* 89-92 (1988). While males are also victims of domestic violence, most victims are female and therefore victims are frequently referred to as female. BUREAU OF JUSTICE STATISTICS, *supra* note 27.

¹⁰⁸ See LINDA LANGFORD ET AL., *HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995*, at 10 (1999), available at <http://www.peaceathome.org/pdfs/homrepo.pdf> (finding that 22 out of a total of 194 victims were children killed by their mothers' partners).

¹⁰⁹ See Jeremy Coid et al., *Relation Between Childhood Sexual and Physical Abuse and Risk of Revictimisation in Women: A Cross-Sectional Survey*, 358 LANCET 450, 450 (2001).

¹¹⁰ JAFFE, *supra* note 64, at 32-75.

legal researchers have documented the detrimental impact of domestic violence not only on the children who are victims of physical abuse in violent homes but also on children who witness violence that occurs between their parents.”¹¹¹

Indeed, the impact on children of witnessing the abuse of other family members can be profound.¹¹² Multidisciplinary findings have shown that the effects of witnessing violence alone are serious, varied, and manifested both behaviorally and emotionally.¹¹³ Children who grow up in abusive homes imitate what they see, hear, and experience; they act like the adults they know. Children believe their parents’ actions are sanctioned; if the adults in their lives abuse one another, the children mimic that violence and may be more likely to become abusers themselves.¹¹⁴

While the growing body of research does not conclusively establish that every child who witnesses abuse suffers harm because of it, it does show that children can be affected in numerous ways.¹¹⁵ The problems can be grouped into three main categories:

¹¹¹ Family Violence Project, *supra* note 21, at 198.

¹¹² See Jeffrey L. Edleson, *Problems Associated with Children’s Witnessing of Domestic Violence* 5 (1999), available at <http://www.vaw.umn.edu/Vawnet/witness.htm>. (reviewing 31 studies reporting on children’s witnessing of domestic violence and concluding that they “provide strong evidence that children who witness domestic violence at home also exhibit a variety of behavioral, emotional, cognitive, and longer-term developmental problems”). See Appendix D-1 for a reprint of this article in its entirety.

¹¹³ *Id.* See generally J. Attala et al., *Integrative Review of Effects on Children of Witnessing Domestic Violence*, 18 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 163, 163-72 (1995).

¹¹⁴ Zorza, *supra* note 52, at 1116 (citing Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, VIOLENCE AND VICTIMS, No. 2, 1988, at 1, 11).

¹¹⁵ Edleson, *supra* note 112 (“Each child will experience adult domestic violence in unique ways depending on a variety of factors Significant percentages of children in the studies reviewed showed no negative developmental problems despite witnessing repeated violence. We must be careful to not assume that witnessing violence automatically leads to negative outcomes for children.”).

(1) behavioral and emotional; (2) cognitive functioning and attitudes about the use of violence; and (3) longer term developmental problems.¹¹⁶

Behaviorally and emotionally, many children who witness their fathers abuse their mothers exhibit more aggressive and antisocial (or “externalized”) behaviors as well as fearful and inhibited (or “internalized”) behaviors.¹¹⁷ They also show more anxiety, depression, anger, reduced self-esteem, and other temperament problems than other children.¹¹⁸

Some studies have shown impairment of cognitive functioning in children who witness domestic abuse. One direct consequence may be the attitudes a child develops concerning the use of violence and conflict resolution. Many children who witness domestic violence have difficulty understanding appropriate ways of interacting with other people. They have particular difficulty when it comes to resolving conflicts or coping with their own aggressive feelings and often develop destructive patterns of conflict resolution.¹¹⁹

In addition to experiencing the childhood behavioral, emotional, and cognitive consequences of witnessing domestic violence, many children develop longer-term problems. As adults, they continue to experience low self-esteem, depression, and

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See David A. Wolfe & Barbara Korsch, *Witnessing Domestic Violence During Childhood and Adolescence: Implications for Pediatric Practice*, 94 PEDIATRICS 594, 595 (1994).

trauma-related symptoms.¹²⁰ These symptoms can lead to drug and alcohol abuse and other problems stemming from social mal-adjustment.¹²¹

Normal, healthy development requires support, protection, and encouragement, but children who live with violence more often than not live in fear. They know that the people who are supposed to take care of them may, at any time, hurt them or be hurt themselves. This profoundly changes their view of the world, and the effects are long-lasting.¹²²

Separation may escalate the nature and severity of the violence to which a woman and her children are subjected.¹²³ The perpetrator may become more desperate and more likely to use extreme measures, including harm or threatened harm to children. For example, the likelihood of child abuse may increase when the parents' marriage falls apart, when the father is most determined to retain his control and dominance over the children and their mother.¹²⁴ Indeed, "[a]fter separation, many abusers discover that using children is the best way to hurt their former partners."¹²⁵ Batterers may devalue their wives and convince police, judges, and others that the women are not caring for the

¹²⁰ See Edelson, *supra* note 112, at 2.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *supra* note 66.

¹²⁴ Barbara J. Hart, *Family Violence and Custody Codes*, JUV. & FAM. CT. J., 29, 33-34 (1992); see also Paula D. Salinger, *Review of Selected 2000 California Legislation: Family Law True or False Accusations?: Protecting Victims of Child Sexual Abuse During Custody Disputes*, 32 MCGEORGE L. REV. 693, 699 (2001) (noting that first time child sexual abuse incidents may be more likely to occur upon the dissolution of a marriage).

¹²⁵ Zorza, *supra* note 47, at 1115.

children.¹²⁶ Thus, leaving a batterer places a battered woman and her children at grave risk of serious danger.

¹²⁶ *Id.* at 1120 (citing David Schuldberg & Shan Guisinger, *Divorced Fathers Describe Their Former Wives: Devaluation and Contrast*, in *WOMEN AND DIVORCE/MEN AND DIVORCE: GENDER DIFFERENCES IN SEPARATION, DIVORCE, AND REMARRIAGE* 61-87 (Sandra S. Volgy ed., 1991)).

VII. Conclusion

In summary, it is hoped that courts will carefully consider all evidence of domestic violence that parties present in child custody matters, regardless of whether the custody sought is primary, partial, shared, or a request for visitation. If a history of domestic violence already exists within a family, there can be little doubt that the children involved have already felt its detrimental effects. Certainly, if the violence is not addressed or given serious consideration in a custody determination, the short and long-term consequences could be exacerbated by continued contact with the primary offending parent. Although consideration of domestic violence in custody cases requires deeper inquiries by the court, primarily in the form of additional witnesses and evidence by the parties, these efforts supply the court with important information that is essential to crafting an order that will prevent further violence and truly promote the best interests of the children.

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